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CASES

DECIDED IN

THE COURT OF SESSION,
COURT OF JUSTICIARY,

AND

HOUSE OF LORDS,

FROM JULY 20, 1880, TO AUGUST 27, 1881,

REPORTED BY

MIDDLETON RETTIE, G. F. MELVILLE, A. E. HENDERSON,
H. JOHNSTON, J. PATTEN, AND C. C. MACONOCHIE,
ESQUIRES, ADVOCATES.

FOURTH SERIES.—VOL. VIII.

EDINBURGH:

T. & T. CLARK, LAW BOOKSELLERS.

LONDON: STEVENS & SONS.

M.DCCC.LXXXI.

PRINTED BY GEORGE ROBB (SUCCESSOR TO JOHN HUGHES),
THISTLE STREET, EDINBURGH.

279717

1844.191.1

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OF THE
COURT OF SESSION
DURING THE PERIOD OF THESE REPORTS.

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Lord MURE.

Lord SHAND.

SECOND DIVISION.

Lord Justice-Clerk, The Right Hon. Lord MONCREIFF.

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Lord GIFFORD.†

Lord YOUNG.

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† Lord Gifford resigned on 30th January 1881.

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WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE
PERIOD OF THESE REPORTS.

Lord Chancellor, Lord SELBORNE.

EARL CAIRNS, Lords PENZANCE, O'HAGAN, BLACKBURN,
and WATSON.

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CASES

DECIDED IN

THE HOUSE OF LORDS,

1881.

ROBERT CASSELS (Pursuer), Appellant.—*Sol.-Gen. Sir F. Herschell—
Sol.-Gen. Balfour—Rigby.*

JAMES REID STEWART (Defender), Respondent.—*E. E. Kay, Q.C.—
Mackintosh.*

No. 1.

Jan. 18, 1881.
Cassels v.
Stewart

Partnership—Latent assignation by one partner of his beneficial interest to a copartner.—A contract of copartnery provided that it should not be in the power of any of the partners "to assign all or any part of his share or interests in the capital, stock, or profits of the concern, to any person or persons, or to give them a right to inspect the company's books, or to interfere in any way with the business of the company," and that should any such assignation be granted contrary to this stipulation, the same should be null and void "so far as regards the company or other individual partners, who shall not be obliged to pay any attention thereto." It was also provided that on the death, insolvency, or retirement of any partner, the remaining partners should have the option of buying his interest at the amount standing at his credit at the last balance. The company having come to consist of three partners, R, S, and C, with equal shares, R and S entered into an agreement, which was not disclosed to C, by which R sold to S, his nephew, his whole interest in the concern as it stood at a certain date. R continued ostensibly a partner till his death, which occurred about seven years after the date of this agreement, during which period the business and prosperity of the company greatly increased. On the death of R, when the agreement between him and S came to light, C raised an action against S to compel him to communicate the benefit which he had obtained by his latent arrangement with R.

Held (in *aff.* judgment of Second Division) (1) that the contract of copartnery did not prohibit a sale of the beneficial interest of one of the partners either to a stranger or a copartner, provided the effect of the sale did not oblige the company or other partners to take cognisance of it; (2) that the rule which requires a partner, dealing with an asset or liability of the company, or transacting in the line of the company's business, to communicate any benefit derived by him to the company, did not apply to a partner purchasing another partner's interest in the company.

(In the Court of Session, May 22, 1879, *ante*, vol. vi. p. 936.)
Robert Cassels, the pursuer, appealed.

Ld. Chancellor
(Selborne).
Ld. Penzance.
Lord Black-
burn.
Lord Watson.

LORD CHANCELLOR.—This case has been argued with much ability, and your Lordships have been put in possession of the views which are relied upon in support of the appeal. Those views were not adopted by any of the four learned Judges who decided the case in the Court below; and under these

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circumstances, as I believe there is no difference of opinion among your Lordships with regard to the correctness of the decision appealed from, it does not appear to be necessary to call upon the learned counsel for the respondent to address your Lordships' House.

Now, the first point, which was very confidently urged, was that in point of fact there was a mandate constituting the respondent, Mr Stewart, the agent of his copartner, the appellant, in this transaction, so as, upon the principles of mandate or agency, to entitle the appellant to the benefit of the contract made between Mr Stewart and his uncle, Mr Reid. It would be very difficult to imagine an allegation of that kind resting upon more slender grounds, because the way in which it is put by the appellant himself is this: that in the year 1860, three years before the agreement between Mr Reid and Mr Stewart, upon the occasion of Mr Robertson parting with his interest on certain terms which were thought to be beneficial to him, something was said about Mr Reid being probably willing to part with his interest on similar terms, and Mr Cassels, the appellant, said that he would be perfectly agreeable to such an arrangement. Upon the question of fact, whether any conversation which could reasonably be so interpreted ever took place or not, there is a difference of recollection between the appellant and the respondent. Your Lordships have one witness against the other, and nothing that I can see to strike the balance between them. Therefore there would have been great difficulty, to say the least, in acting upon that evidence, more especially when the language to which alone Mr Cassels speaks is itself the most vague and uncertain which could well be conceived on such a subject. That Mr Stewart did not consider that he had accepted any mandate for that purpose is clear.

But it seems to me that we may lay the whole of that branch of the argument aside upon this ground,—that whatever controversy might have arisen in consequence of that conversation between these parties, assuming the conversation to have taken place as Mr Cassels states, if then or shortly afterwards such an agreement had been made, in point of fact no such agreement was made then or within anything which by possibility could be called a reasonable time afterwards. There is no connection in point of fact between the actual agreement and that conversation. I pass, therefore, from the subject of mandate.

The next argument was this, that a wrong has been done here by the purchase of Mr Reid's share from him by his nephew, Mr Stewart, on all or some of these three grounds,—first, that there is in the partnership contract a prohibition against the assignment of a partner's share, and that the breach of that prohibition, which it is said has taken place by this transaction, is a wrong for which there must be some remedy; secondly, that even if that were no wrong, or a wrong not drawing after it the remedy now claimed in the case of a sale of Mr Reid's interest to a stranger, yet the position of Mr Stewart, as a partner, disqualified him at all events from purchasing otherwise than for the benefit of his copartner as well as himself, and that on that ground the appellant may claim the benefit of the purchase; and thirdly, that if these consequences would not follow from these causes alone, they do follow when you have added the concealment of the transaction for a considerable period of time.

Now, the first observation that I have to make is this, that I cannot interpret the partnership contract as prohibiting, or attempting to prohibit, a sale of the beneficial interest of one of the partners to a stranger, or to a copartner, if the effect of such sale is not to give any "right to inspect the company's books," or

"to interfere in any way with the business of the company," to a person who had it not before, or to oblige the company or other individual partners to take notice of it or "pay any attention" to it. I cannot separate, as it has been suggested that your Lordships ought to separate, that part of the clause which speaks of the effect of such assignation or conveyance, if granted, and the part which says that it shall not be in the power of any of the parties to assign. Your Lordships will observe that this is not a covenant not to do a thing, but a declaration as between the partners that it shall not be in the power of any of them to do it. Then it goes on to contemplate an act of that nature being done, and says that if it should be done it shall be "null and void and of no force, strength, or effect so far as regards the company," and so on. The argument on the other side really is that you are to turn the declaration as to what is not to be in the power of the partners into a covenant not to do a thing which is in their power; and when it is expressly said that the effect of a particular act is to be qualified so far as relates to certain persons and matters, that you are to qualify it still further, and not only so far. I cannot accept that construction of the agreement. It appears to me that its intention and effect is simply this: If anything of that kind is done it shall not have the effect of giving any person claiming under it any right whatever against the company or against the other partners, or of obliging them to take any notice of it; it shall not have any effect which will alter any of their rights. The actual transaction was one which, as it was carried into effect, was, as I think, in exact conformity with that agreement. It gave no new person any right to inspect the company's books, or to interfere with the business; it did not enlarge the power of interference, within the meaning which I ascribe to those words in the contract, of any person, beyond what existed before; it did not change the constitution of the partnership; it did not make Mr Reid cease to be liable; it did not oblige the appellant to take notice of any greater interest in Mr Stewart than Mr Stewart had before.

I pass on to the next argument, arising out of the special position of Mr Stewart as a partner. Upon that I say, whatever may be the force of that argument, it cannot depend upon this clause; for this clause most certainly makes no distinction between an assignment to a person who is, and an assignment to a person who is not, a partner. On the contrary, it would rather seem to me that it has in view an assignment to one who is not a partner, prohibiting things which in the other case could not happen. Well, then, is there any authority which says that the beneficial interest of one partner in a partnership, apart from a special contract or stipulation, may not be given or sold by him to another of the copartners? The authorities which were cited have no tendency to establish such a principle. They relate to dealings by a partner, during the continuance of the partnership, with either present or future partnership assets or liabilities. A man obtaining his *locus standi*, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligation to his copartners in such dealings not to separate his interest from theirs, but, if he acquires any benefit, to communicate it to them. I should be sorry to see the day when the principle of such cases as *Featherstonehaugh v. Fenwick*¹ could be disturbed or called in question. But this subject-matter here is in no sense a property or interest of the partnership. The share of an individual part-

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5.
declared
of nullity
from
agreement
to, &c.

¹ 17 Ves. 298.

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ner is his own property, not the property of the firm ; and if bought it would not be bought by the partnership as a partnership, but by one or more individuals purchasing for his or their own benefit. If the man dies, it passes to his heirs and executors, unless there is a stipulation to the contrary. If there is a stipulation to the contrary, still the principle is the same in all respects—it is his property—it is something distinct from the partnership assets, although it is, or represents, his interest in those assets. That principle, therefore, does not touch this case at all.

It is suggested that by possibility the motives of particular partners for interesting themselves in the welfare of the concern may be affected by a diminution of their beneficial interests. All I can say is, if that be the opinion of those who enter into a partnership contract, they must put something into the partnership contract to restrict the powers which otherwise each partner would have over what is his own. I am not at all sure that it would increase the inducement to enter into partnership contracts if such restrictions were made part of them ; because the principle of the argument does not stop at the point where the entire beneficial interest is parted with, and a partner becomes a mere trustee for some one else to whom he has made either a gift or a sale ; it would apply to every case in which he diminished his beneficial interest below the point recognised in the constitution of the partnership, either by communicating to somebody else a particular share of it, or by allowing some participation in the profits, for a certain consideration, to another person, or by making a charge upon it, or by granting or agreeing to pay an annuity or annuities out of it.

Not only is there no authority for such a proposition, but we have in the books well-known cases in which such transactions have been recognised by Courts of Equity, at least in England, as regular and legitimate, where not expressly excluded. There is the well-known case of *Brown v. De Tastet*.¹ De Tastet and Paiva and Grellet entered into a partnership deed, and a Mr Mangin, who had been at an earlier period in partnership with De Tastet, not communicating at all with Paiva or Grellet, made an agreement for a subpartnership with De Tastet in De Tastet's share. Afterwards the accounts, as to that share, had to be taken in a suit in Chancery, and the Court, with the approval of Lord Eldon, as appears by this book, dismissed the bill as against the other two partners Paiva and Grellet, because they had nothing to do with the contract ; but directed an account of the profits as between De Tastet and Mangin, holding De Tastet responsible to Mangin for his share of all the profits which had been made either by himself or the other partners. There is another case upon the same principle, *Bray v. Fromont*.² The agreement there was between three persons to work a coach from London to Bath, each undertaking to find horses for certain stages. One of them (Smith) employed Bray to provide horses for him, and agreed, in consideration of his doing so, to give him a certain share of his profits. The bill which was maintained was for an account and payment of a proportionate share of those profits, but subject to the account as between the partners in the principal partnership ; the other partners having nothing to do with that share in which the interest was given to Bray.

I apprehend, my Lords, that you will, under these circumstances, hold that in this case there is no principle which justifies any claim on the part of the

¹ Jac. Rep. 283.

² 6 Madd. Rep. 5.

appellant to participate in the profits of this transaction. I can find no ground for saying that there is any breach of the duty of a partner in a transaction like this between an uncle and a nephew, by way of bounty to a very great extent on the part of the uncle to the nephew,—a transaction involving no object or purpose against the good faith of the partnership agreement, and neither alleged nor proved to have had such an effect. If that or any other bargain, made by a partner with another partner, being concealed, were used for unfair or illegitimate purposes in the subsequent management of the partnership concern, and if, when the facts became known, it should appear that wrong had been done and damage sustained by means of any such secret arrangement between two partners, redress suitable to the nature of the injury and the circumstances of the case might probably be found. But that would depend, not upon the agreement by one partner to give a beneficial interest in his share to another, but upon the use assumed to have been made of that agreement in an illegitimate way to the prejudice of a third partner, and upon proof of actual damage having occurred.

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It appears to me to be unnecessary to add anything more, except to move your Lordships that this appeal should be dismissed, with costs.

LORD PENZANCE.—My Lords, agreeing as I do with all that has fallen from my noble and learned friend the Lord Chancellor, I shall occupy your Lordships for a very few minutes with what I have to say.

With regard to the first point, as to the mandate, I think it is a point which, when the facts of the case are understood, is really hardly arguable. The most that has happened, supposing that you take the pursuer's account and throw aside the account of the defender altogether, is that at a certain time it was intimated to the pursuer that Mr Reid wished to retire upon the same terms as Mr Robertson, and thereupon the pursuer said that he would have no objection to that arrangement. Now, my Lords, that is construed into a mandate, and then the matter is followed up by an attempt to shew that the bargain which was ultimately made between Mr Stewart and Mr Reid was a bargain actually made in furtherance and under the authority of that mandate.

It seems to me that the fact that the one partner intimated to the other partner that he was ready to enter into a certain arrangement with regard to the retirement of Mr Reid, is not sufficient to constitute an authority in the sense in which that word is used in this argument without shewing that Mr Stewart, to whom that proposition was made, accepted it as an authority, and afterwards acted upon it as an authority. Now, it seems to me that there is no particle of evidence upon the face of the pursuer's statement to shew that Mr Stewart ever accepted that, or ever professed that he would act upon it, and it took place three years, if not more, before he actually entered into a contract with Mr Reid for his retirement, or rather for the sale of his interest in the concern. It appears to me, therefore, that that point entirely fails, and that it is one upon which your Lordships could have, I think, very little or no doubt.

With regard to the deed, and particularly the effect of the sixth clause of the deed, I will not add one word to the excellent exposition of it which my noble and learned friend the Lord Chancellor has given, and with which I entirely agree.

But with regard to the last point, which is a more substantial one, and one upon which greater stress was laid, namely, that the principle that a partner

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(and it is the same with regard to an agent) cannot in acting in partnership concerns secure to himself an individual benefit where he is acting in those concerns, and that if he attempts to do so, the partnership may claim a benefit in any such contract, is a principle well understood and thoroughly and soundly established. But the answer to the proposed application of that principle to the present case is, that this arrangement with Mr Reid was not an arrangement in the partnership business, it was not an arrangement in which the partnership had an interest. I do not know that I could better express what I feel upon that subject than by reading a sentence of the judgment of the Lord Ordinary (Curriehill). He says,—“The present case appears to me to be entirely different. The subject-matter of the agreement is entirely outside the scope of the company's business. It relates exclusively to the stock and profit belonging to one of the individual partners, who is communicating these on extremely liberal terms to his own nephew, who no doubt happens to be also a partner in the concern, but who does not thereby acquire any advantage over the company, or the remaining partner, or make any profit which the company or the remaining partner would have made if there had been no such agreement.” It seems to me, my Lords, that that correctly describes the circumstances of the present case, and by that description throws them outside the principle upon which your Lordships are now asked to act.

But then it was said that although that may be so, a distinct wrong was done in the present case to Mr Cassels, the pursuer, because by an assignment of Mr Reid's interest behind his back, Mr Reid had stripped himself of part, at any rate, if not of the whole, of those motives which would tend to make him exercise the vigilance and judgment in the partnership affairs to which Mr Cassels, the pursuer, had a right to look. My Lords, I confess that when that proposition was stated, I asked myself how far such a proposition would go. A share in a partnership and the profits made, or to be made, in the partnership, are, I believe, the property of the individual partner, and if the principle were once to be established that an individual partner cannot charge and cannot sell a portion of his interest, that he cannot hand over to a third person for valuable consideration a year's profit, or half a year's profit, or in any way diminish or withdraw a portion of the active interest he has in the concern,—I say if that principle were to be established it would be one of very wide application, and one which would largely diminish the individual interest and freedom that properly belong to a partner in any partnership. I looked anxiously to see whether, for such a principle as was put forward, any case was cited at the bar in establishment of it. No such case, or authority of any kind, was cited, and the principle of the cases I have referred to certainly did not embrace it. My Lords, in the absence of all authority, and having regard to the effect which would be produced by accepting such a principle, I should strongly advise your Lordships that you ought not to do so.

Under these circumstances I agree that the judgment should stand, and that the appeal should be dismissed, with costs.

LORD BLACKBURN.—I am entirely of the same opinion.

On the first question, whether there was in point of fact a mandate or authority given by Mr Cassels to Mr Stewart under which Mr Stewart made a contract with Mr Reid, it is only a question of fact, and upon that I intend to say nothing more than that having read Lord Curriehill's (the Lord Ordinary)

note to his interlocutor, which is the first judgment given, I can add nothing No. 1.
 whatever to his reasons stated there, which seem to me to place that part of the
 matter in as clear a light as possible. I do not think there is the slightest Jan. 13, 1881.
 ground for saying that in point of fact that was made out. Cassels v.
 Stewart.

Then, as to the next ground upon which the appellant's case was put, namely, the supposition of an analogy to the case of *Featherstonehaugh v. Fenwick*¹ and other cases of that sort, I do not think that that class of cases has any analogy with the present. Those cases proceed upon the ground that if a partner being an agent (for I think it is because he is an agent that the fiduciary character arises) makes a profit out of the concerns of his principal, and as acting for him, he must communicate it to his principal; he cannot make a profit out of his principal's business for himself. As I have said, a partner is an agent, and the principle applying to him is a branch of that general rule which applies to agents. I agree with what has been said by both the noble and learned Lords who have spoken before me, that that is of necessity confined to those cases where it is part of the business of the company or firm that is carried on, and I think it is quite impossible to say that the purchase of a partner's beneficial interest in the partner's share in the partnership was one of those things in which the business of the company was carried on, and in which, therefore, Mr Stewart may be considered as in the nature of an agent for that class of dealings for Mr Cassels. It is upon that ground that I say that the class of cases I have referred to has nothing whatever to do with the present case.

There is a further ground upon which the appellant's case is put, namely, that by the special terms of the contract made between the partners, it is agreed that Mr Reid shall continue a partner, that he shall not have the power in fact to sell his partnership interest, or at least, that if he do sell his partnership interest, that shall not have any effect as against the other partners in the concern. Upon that I perfectly agree with what has been already said by the noble and learned Lord on the woolsack, and I do not think it necessary to repeat it.

The last ground, and the only one remaining to be spoken of, is this. It was said, as I understood the argument of the counsel for the appellant, that, although this transaction might have been all right if it had been disclosed, yet that inasmuch as Mr Reid, by having made this agreement with his nephew by which he in substance and effect gave him a present of some £25,000 (for that is what it really amounted to) in this particular shape, had deprived himself of the beneficial interest in his partnership whilst he still retained the liability and still retained the power, he had by so doing deceived his partner, Mr Cassels, and induced him to go on in the belief that he had the benefit not only of Mr Reid's services and Mr Reid's judgment, but also of Mr Reid's services and judgment as having a strong pecuniary interest in making them as available as he could. I think that is about the strongest way in which the argument can be put. It was said that that was a positive wrong to his partner.

Now, I pause to say that I do not think it was in the slightest degree morally wrong in the present case or in circumstances like those before us. I do not see that it could be supposed for a moment by the most conscientious moralist

¹ 17 Ves. 298.

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that there was anything wrong here. But I can see this: it may have led Mr Cassels to suppose that he had Mr Reid's personal interest to induce Mr Reid to exercise his judgment judiciously, and to be more careful in giving his judgment and advice upon a thing than he would otherwise have been. It was said that that was a wrong, and then the argument that was based upon it was this: "We cannot prove that this has done the slightest harm" (in point of fact I think it is clearly proved that it never did the slightest harm), "but it might possibly have done some harm, and therefore" (and here it is that, I confess, I listened to both the learned counsel with some curiosity to see how they took this great stride in their logic) "therefore, although we cannot prove that it has done any harm, yet, as it might possibly have done harm, we say that there was a breach of contract with Mr Cassels in the transaction, and it must be considered as having been a mere case of a mandate to one partner on the part of the other." I cannot see, my Lords, how that conclusion would follow from the premises; and not a single authority, or anything like an authority, has been cited for it.

I can only come to the conclusion, therefore, that the contract remains a good contract between Mr Reid and Mr Stewart, as it was before Mr Reid's death. It would have been better, I think, if Mr Cassels had been informed of it whilst it was so going on. I generally think it is advisable, as a matter of prudence, as well as on other grounds, to let everything be above board; and therefore I say it would have been better that he should have been told that Mr Reid had made that arrangement; but his not having been told about it did no harm whatever, and inasmuch as even supposing harm had resulted from it, Mr Reid would have been liable for that harm, that cannot entitle Mr Cassels to say that as against Mr Stewart the benefit arising from the purchase of Mr Reid's share is to be given partly to Mr Cassels. I think, therefore, my Lords, that upon all these grounds the case of the appellant totally fails, and consequently I quite agree in the proposed judgment.

LORD WATSON concurred.

INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs.

YOUNG, JONES, ROBERTS, & HALE—J. & J. ROSS, W.S.—GRAHAMES, WARDLAW, & CURREY—HAMILTON, KINNEAR, & BEATSON, W.S.

No. 2.
Feb. 11, 1881.
M'Kenzie v.
British Linen
Co.

Poor DUNCAN M'KENZIE (Complainer), Appellant.—*Brand—Rhind.*
BRITISH LINEN COMPANY (Respondents), Respondents.—*Sol.-Gen. Balfour—Chitty, Q.C.*

Bill of Exchange—Forgery—Adoption—Silence as a personal bar to disclaiming liability.—When a person comes to know that his signature has been forged to a bill mere delay on his part in giving notice of the forgery to the billholder will not necessarily imply adoption nor bar him from repudiating liability unless the billholder or others have been prejudiced by his silence.

A bill for £76 drawn by A, and bearing to be accepted by B and C, was discounted by a bank. It fell due on 10th April, and on Saturday 12th April the bank gave notice of dishonour to B, who lived at some distance from the office of the bank. On receiving the notice B did not inform the bank that his signature to the bill was a forgery, or communicate with them in any way. On Monday 14th April, without waiting for a reply from B, the bank allowed the bill to be retired by A, who paid £6 in cash and discounted another bill for £70, drawn by him and bearing to be accepted by the same B and C. This second bill fell due on 17th July, and the bank, on 14th, 18th, and 21st July, gave notices

that it was coming due, and that it was overdue, to B. B made no reply to these notices until 29th July, when he informed the bank that his signature had been forged. Notwithstanding various suspicious circumstances, tending to shew knowledge and authorisation or adoption on the part of B, *held* (rev. judgment of First Division) (1) that it was not proved that B had authorised his name to be put to the bill, or had subsequently adopted the signature; and (2) that he was not barred by his silence from repudiating liability on 29th July, as the bank had been in no way injured by it.

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(In Court of Session, June 4, 1880, *ante*, vol. vii., p. 836.)

Duncan Mackenzie appealed.

At delivering judgment,—

Ld. Chancellor
(Selborne).
Lord Blackburn.
Lord Watson.

LORD CHANCELLOR.—In this case there are two questions, the first, whether the appellant authorised or assented to the signature of his name as drawer and indorser of the bill of exchange of the 14th April 1879; the second, whether, if he did not, he has nevertheless so acted as to be estopped from denying his liability on that bill in a question between himself and the respondents, the British Linen Company.

If the first of these questions ought to be answered in the appellant's favour, I am clearly of opinion that the circumstances of this case can raise no estoppel against him. He has done nothing from first to last by which the respondents can have been led to act in any way in which they would not otherwise have acted, or to omit to take any step for their own security, or in any sense for their benefit, which they would otherwise have taken—nothing from which the respondents or a Court of justice could reasonably infer that he “adopted,” or admitted his liability upon, this bill.

The merits of the respondents appear to me to be extremely small. They took from John Fraser the first bill for £76 on the 7th February 1879, bearing the signatures of the appellant and John Macdonald, without any knowledge of these parties or of their handwriting, and without any inquiry whatever. The bill was not one which had been previously in circulation; it was offered by John Fraser to the bank to obtain a loan of money for his own benefit for the purpose of paying for a grocery business which he was then taking up in Inverness. John Fraser had not been their customer before; they knew nothing of him except that he had been in the employment of a respectable merchant who was one of their customers. On Saturday, 12th April 1879, two days after the bill became due, they caused notice to be given to the appellant, and also to Macdonald, both of whom resided and were in employments at some little distance from Inverness. But on the following Monday, before any reply had been or could reasonably have been expected to be received to these notices, they gave up this bill to John Fraser in exchange for £6 cash, and for another bill which, when produced to Mr Williamson (the bank's agent), was signed in blank with the same names, and was filled up by John Fraser in Mr Williamson's presence for £70, being the bill now in question. It is impossible for the respondents to contend that any conduct or silence on the appellant's part caused them to take either the first or the second bill, or to abstain on the 14th April from doing anything for their own security which they would otherwise have done.

The respondents on the 14th July 1879 (before the second bill became due), and again on the 18th and 21st July (when it was overdue), gave notices to the appellant; and on the 29th July they were informed that he denied his signature to, and his liability upon, that bill. There is no principle upon which the

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appellant's mere silence for a fortnight, during which the position of the respondents was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or to estop him from now denying it. What took place during the interval was unknown to the respondents, and it has, in my opinion, no tendency to shew that in point of fact the appellant then was, or admitted himself to be, or intended to become, liable. He communicated as early as the 18th or 19th July with Mr M'Gillivray, a law-agent, expressly on the footing that his name had been forged, and that he was not liable. It is plain that Mr M'Gillivray was desirous, if possible, to get some settlement made by which criminal proceedings might be avoided. The appellant was also quite willing that such a settlement should be arrived at, if it could be done without making him liable. No such settlement, however, was arrived at, and I am unable to discover in the communings which then took place any ground in fact or in law on which the appellant ought to be held to have become liable on the bill by reason of those communings if he was not so before.

Chas
The question, therefore, in my judgment, is only one of fact, viz., whether the appellant did or did not authorise or assent to the use made of his name on the 14th April by John Fraser? and it appears to me that the *onus probandi* on this point rests entirely upon the respondents, it being admitted that the signature to the bill of the 14th of April is not in the appellant's handwriting. The question, I think, turns altogether upon what took place when the appellant met John Fraser on that day. If it is shewn that he then knew, or had reasonable grounds to believe, that a new bill with his name upon it had been given by John Fraser to the respondents, the conclusion (under all the circumstances) would be inevitable that he assented to and became bound by the use so made of his name. On the contrary supposition it is of course impossible to hold that he assented to that of which he was ignorant, and which he had no reason to believe.

This is in great measure a question depending upon the credit to be given to the witnesses on each side. If John Fraser and his father are believed, the case against the appellant is established. But John Fraser and his father (besides the discredit attaching *prima facie* to a witness acknowledged to have been guilty of forgery, and to one closely related to him and identified with him in feeling and interest) prove more than, in view of the undoubted facts of the case, I find it possible to believe. According to the father, John Fraser told him that the appellant had actually signed both the bills. Macdonald said he had signed the second bill, and the appellant said he had "put the second bill all right." According to John Fraser himself, the appellant came to him to get the first bill renewed before he (John Fraser) went to the bank about it, and expressly authorised the renewal in his name. If these statements were true, the appellant's signature was subscribed to both bills by his authority, and there was no forgery; nor was there any reason why he should not have signed the second bill himself. I am unable to place any reliance whatever upon the evidence of either of these persons.

The Lord Ordinary, who heard and saw the witnesses, gave credit to the appellant and refused it to the Frasers. Taking the case as it stands upon the evidence of the appellant and of Macdonald, both of them distinctly deny knowledge that a second bill had been given, and *a fortiori* that it had been given in their names. The appellant says he was solemnly and positively assured by John Fraser that the first bill had been taken up not by way of

renewal but by payment, and the assurances given to Macdonald were that he "had squared it." I cannot but say that some of the circumstances as they appear upon the evidence of these two persons are to my mind suspicious and unsatisfactory. If the burden of proof lay upon the appellant I might perhaps doubt whether he had satisfied it. But the burden of proof is on the respondents, and it is impossible, merely because there are some suspicious circumstances not satisfactorily explained, to hold a man liable upon a bill which he did not sign or authorise, and of the existence of which he swears he was ignorant.

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The suspicious circumstances are—(1) That the appellant, after learning on the 14th April that his name had been forged to the first bill, did not communicate with the bank ; (2) that he required the acknowledgment, No. 18 of process, to be given him under John Fraser's hand, which is dated the 15th April, and which merely says, "Before the above date Mr Duncan Mackenzie did not sign a bill in my favour;" (3) that when he took away the first bill of the 7th of February he did not destroy it, but gave it to a young man named James Fraser to keep, assigning as his reason "that it might be a warning to him not to do the like" ; (4) that the interview of the 14th April ended in an adjournment to a public-house, and in a loan of £4 by the forger to the appellant, which the appellant says he afterwards repaid by the hand of James Fraser ; and (5) that there was the delay already mentioned, in July, before the appellant gave notice to the bank—that is to say, to Mr Williamson—that the second bill was a forgery ; and that when he did so he blamed Mr Williamson for not insisting "on a further reduction when the first bill became due."

This latter circumstance appears to me to amount to very little or nothing, and after much consideration I think that all the other circumstances admit of explanation upon the hypothesis that the appellant was thinking of the first bill only, and had no idea that a second bill, also bearing his signature, had been given on the 14th of April, as easily as, or more easily, than they do upon the contrary supposition. Evidently he had no sensitive feeling on the subject of forgery so long as he did not himself suffer by it ; he condoned it with great facility to John Fraser ; he did not wish to inform against him ; he was willing to remain on friendly and familiar terms with him, and perhaps also to squeeze out of him some temporary accommodation as the price of his silence, without regard to the difficulties he might be under, if he had really himself found the money to take up the first bill. But how that money was found (being himself unwilling to help) the appellant might also not choose to inquire ; it might have been borrowed from the uncle William Fraser, or from somebody else, without making it necessary to suspect any second forgery. The document dated the 15th of April (whatever else may be said or thought of it) is inconsistent with the story now told by the Frasers, and confirms (as far as it goes) the appellant's statement that John Fraser did then assure him that there had been no renewal of the first bill, at all events in his (the appellant's) name. The fact of the acknowledged forgery might suggest precautions against future forgeries, though there might be no knowledge or belief or suspicion that any such had already taken place. The appellant might not unreasonably consider it a proper precaution against any such possible repetition of the offence to retain the first bill, to admit some persons whom he thought discreet to his confidence about it, and to have under John Fraser's own hand what, in truth, amounted

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to an admission of the forgery of that document, and to an acknowledgment that he had down to the 15th signed nothing for John Fraser's accommodation. The possession of these papers gave the appellant a strong hold over John Fraser. With the first bill in his own hands he had no longer anything to fear from the notice which he had received from the bank; and he might think it the most prudent course to abstain from making any communication to Mr Williamson which might place him in the dilemma of either having to discover John Fraser's guilt or seeming to admit that he had himself been liable on the bill. I do not say or think that the appellant's conduct, if it was to be thus explained, was commendable or satisfactory; it was not such as might have been expected from a scrupulous man with a strong sense of moral propriety; but it was, on the other hand, by no means such as to require for its explanation that he should have had in his mind any belief or even suspicion that another forgery of his name had taken place on that 14th of April, contrary to the positive assurances which he states that he had received from John Fraser.

The burden of proof is (as I before said) upon the respondents. In my opinion they have failed to satisfy it. I think, therefore, that this appeal ought to be allowed, and I move your Lordships accordingly.

LORD BLACKBURN.—My Lords, this case comes before your Lordships by way of appeal from the First Division of the Court of Session against an interlocutor by which the majority, consisting of the Lord President, Lord Deas, and Lord Mure reversed the interlocutor of the Lord Ordinary, Lord Shand dissenting. As the Lord Ordinary (Adam) who tried the cause saw the witnesses and heard them give their testimony, he had an advantage in so far as regards any question depending on their credibility which neither the Judges of the First Division nor your Lordships possess, and therefore so far as anything turns on the credibility of the testimony his judgment is not lightly to be overruled. As to the inferences to be drawn from admitted facts, the Lord Ordinary had no advantage over either the Lords of Session or your Lordships. I think, therefore, that though the numbers are three to two, the case comes before the House without any great superiority of authority.

It is not disputed that John Fraser took to the agent of the British Linen Company a bill for £76, dated the 7th February 1879, and payable two months after date, purporting to be drawn by the appellant Mackenzie and a man of the name of John Macdonald on and accepted by John Fraser, and that the agent discounted that bill—it does not precisely appear when, but about the date of the bill. It was understood between Fraser and the agent that when the bill became due the amount should be reduced and a renewal bill given and discounted for the balance. It is not now disputed that the names of neither of the drawers were in their own handwriting. The agent, who knew neither of them, acted entirely on the faith of John Fraser's representations. The bill became due and was dishonoured on the 10th April 1879. On the 12th April 1879, which was a Saturday, and not before, a notice of dishonour was sent by post to Mackenzie, and it is not disputed that he did receive it on the evening of that day. On Monday the 14th April Fraser came to the agent, bringing with him a paper stamped for a bill, and with the names of Mackenzie and Macdonald (apparently in the same handwriting as those on the bill of 7th February) written on it, in the places where the names of the drawers and indorsers should be. Fraser wished the bill to be renewed for the whole

amount. The agent declined to do that, but after talking it over it was agreed to be renewed to the extent of £70, and that a larger reduction would be made when the bill was renewed again. It was then filled up as it now is so as to purport to be a bill dated the 14th April 1879, for £70, drawn by Mackenzie and Macdonald on John Fraser, payable three months after date to their order, accepted by Fraser and indorsed by the two drawers to the British Linen Company. Fraser paid £6 and the charges. The bill of 7th February was then given up to Fraser, who took it away. The question in the cause is, whether, on the facts proved, Mackenzie is liable to the British Linen Company on this bill of the 14th April?

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Pausing for a moment here in my narrative of the facts not now in dispute, it seems to me clear, though I do not think it is quite admitted, that the agent acted in discounting this bill, as he had acted in discounting the bill of the 7th February, entirely on his faith in Fraser's representations. Having sent off the notice of dishonour so late as the Saturday, by post, he had no right to suppose the drawer would be with him so early as the morning of the Monday, and therefore the undisputed fact that Mackenzie had not done anything to deny the genuineness of his signature could not as yet afford any new ground for believing it was genuine. To proceed with the undisputed facts, Mackenzie did not inform the British Linen Company that his signature to the bill of the 7th February was a forgery. On the 14th July 1879 an intimation was sent by post to Mackenzie that "your bill on John Fraser, Greig Street, Inverness, for £70, is due on the 17th July, and lies at this office for payment." This was received by Mackenzie, who did not come to the bank. On the 17th July the bill was dishonoured, and on the 18th July notice of dishonour was sent, which, it is admitted, was received by Mackenzie. On the 21st July, which was a Monday, a notice was sent that if not paid on Friday it would be put into the hands of the bank's law-agent. On the 25th July the law-agent, Ross, wrote, and on the 29th July a writer of the name of M'Gillivray, who had been employed by Mackenzie, informed Ross that Mackenzie's defence was that his signatures as drawer and indorser were forgeries. This was the first intimation that was given to the bank that the genuineness of the signatures was denied.

The disputed facts depend on the effect given to the testimony, as to the credibility of which there has been a great difference of opinion between the Judges below. Mackenzie had not only denied his liability to the bank, but he had charged John Fraser with having forged his signature. If this was a falsehood it was a very wicked one, and once having pledged himself to it he had every motive to persevere in his falsehood. John Fraser was brought to give evidence from the prison to which he had been committed on Mackenzie's charge, and had a very strong motive to try to fix Mackenzie with responsibility even by a falsehood. It does not, however, by any means follow that he was not fixing him by telling the truth.

The testimonies of these two witnesses, as might be anticipated, are in direct conflict. The Lord Ordinary and Lord Shand believe Mackenzie to swear truly when he says that he never knew or suspected that his name was on the second bill till he got the intimation of the 14th July. The Lord President and Lord Mure believe, directly in contradiction of his testimony, that he was aware of it. The Lord President says,—“I am disposed to come to the conclusion that the complainer was perfectly aware, or, to say the least of it, had very good reason to believe, that the first forged bill was replaced by the second forged bill, and that

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Lord Deas, I think, proceeds upon another ground. But, before examining the testimony, I wish to consider what it was relevant to prove, for I think some confusion has arisen below from not keeping the different points separate. As it is not now disputed that none of the signatures were written by Mackenzie, being, in fact, all written by Fraser, the acceptor, the burden of proving that he was liable on them rests on the bank. If Mackenzie authorised Fraser to write his name for him he gave him a mandate to sign, and is, of course, liable, and there was no forgery on the part of Fraser. This is a question of fact depending on the evidence. If I thought it was satisfactorily proved that Mackenzie, before Fraser uttered the bills with his name upon them, knew that Fraser was going to do so, and took no steps to hinder him, I should not have much hesitation in drawing the inference that he did authorise him. But, even though it was not made out that the signatures were authorised originally, it still would be enough to make Mackenzie liable if, knowing that his name had been signed without his authority, he ratified the unauthorised act. Then the maxim *omnis rati habitio retrotrahitur et mandato priori equiparatur* would apply. I wish to guard against being supposed to say that, if a document with an unauthorised signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act even though known to be a crime he makes himself civilly responsible just as if he had originally authorised it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another. The Lord President says,—“There is another averment which brings out elements of particular importance in this case. This bill was a renewal of a previous bill with the same names upon it for the sum of £76. Upon the face of that bill the complainer and Macdonald were drawers, and John Fraser was the acceptor, and that bill had been also discounted with the British Linen Company, and this £70 bill, as I have said, was a renewal to the extent of £70 of that previous bill. The averment made is further—‘He never intimated to the bank that the signature of his name to the first bill was a forgery, nor did he so intimate to the bank in regard to the second bill until a fortnight after he had received notice from the bank of the bill being due. If he did not draw and indorse the bills himself he misled the bank into the belief that the signature thereon was his genuine signature, and he adopted them as his, and assumed the responsibility attaching to drawing and indorsing them.’ There are two averments here which require to be distinguished. The one is that the complainer was aware that this first bill with his forged name on it as drawer was presented to the bank, and discounted by the bank in reliance upon his name being genuine. That means, of course, that at the time at which it was presented to be discounted the complainer was aware that his signature thereon was a forgery, and, if that is established, I think the case is clear indeed, because in that case the complainer would be distinctly *particeps fraudis*, and probably answerable criminally. But the other averment is this, that by his conduct, not silence merely, but silence combined with his conduct, he allowed the bank to rely upon his signature being genuine, and so adopted it as his genuine signature.”

Now, I cannot but think that he here confuses two separate propositions of law, one, to which I fully assent, with another, which is that on which Lord Deas, as I understand him, bases his judgment, to which I do not assent without qualifications which prevent it being applicable to this case. As I have already said, I think if he ratified to anybody or for any purpose the act done by Fraser as professing to be his agent, that for all civil purposes enured to make him liable just as if he had originally authorised that act, and his conduct and silence, combined with his conduct, may prove such a ratification, and if the phrase "adopted it as his genuine signature" is to be understood as meaning that he ratified, I quite agree with what is said.

And I agree that though he did not ratify the act of Fraser, yet he may preclude himself—bar himself by a personal exception—from averring against the bank that the signature was not genuine. Lord Deas says "that a duty lies upon a party whose name is forged not to do or say anything that may mislead a bank. It is his duty not to say anything that may so far deceive a bank as to enable a forger to escape from justice, and thereby, for anything that he can tell, prevent the bank from recovering from him full indemnity. He is not entitled to speculate upon the consequences that may ensue if the bank is prevented from going immediately against the forger. He is bound to take for granted that the result will be to prevent them from recovering on the bill, which otherwise they would." I agree that if he thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill, which if the bank had known of the forgery they might have used, it would be a sufficient alteration in the bank's position to preclude him as against the bank. But when Lord Deas says,—“In cases of this kind, where he has peculiar means of knowledge whether his signature is forged or not, he is not entitled by saying or doing something, or not saying or doing something, to lead his neighbour to think that his signature is genuine to his neighbour's loss,” he goes further than I am inclined to follow in the words “by not saying or doing something.” And when he says “there was here not only a moral but a legal duty on the part of the suspender to have informed the bank that his signature to the first bill was a forgery, and if he had done so there would not have been a second bill,” I not only doubt his position that there was a legal duty then to have informed the bank, but I deny his conclusion of fact. As I have already pointed out, the second bill was uttered to the bank before Mackenzie, with the utmost diligence, could have informed the bank that the first was forged. It would be quite a different thing if it was proved that Mackenzie knew that the bank had put the second bill with his name on it to Fraser's credit, and knew that at a time when he had reason to believe that he would be permitted to draw against it. His silence then would certainly prejudice the bank, and would afford very strong evidence indeed that Mackenzie, for Fraser's sake, thus ratified Fraser's act for a time, and a ratification for a time would, I think, in point of law, operate as a ratification altogether. But if Mackenzie (as his case is) first knew that the bank had taken the second bill on the faith of his forged signature on receiving the intimation of the 14th July, he knew that the bank were not going to give further credit to Fraser on the faith of that signature, and that all the mischief was already done. I cannot think that even if Mackenzie had gone so far in his endeavours to shield Fraser from the consequences of his criminal act as to make himself liable to criminal proceedings for an endeavour to obstruct justice, that would bar him from aver-

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ring against the bank that the signature was not his. Certainly I think that his not telling the bank on the 15th July, nor till the 29th July, that it was a forgery, and so letting them continue in the belief that it was genuine, if he had not indorsed it, could not so preclude him if, as I think was clearly the fact here, the bank neither gave fresh credit in the interval nor lost any remedy which, if the information had been given earlier, they might have made available.

The principles which I have above assumed to be law have been recognised in England ever since the clear judgment of Mr Baron Parke in *Freeman v. Cooke* (2 Wel. Hurl. and Gordon, Exch. Rep. 654). The Scottish cases cited at your Lordships' bar shew that those principles have not been so clearly recognised in Scotland. I leave to my noble and learned friend who is to follow me the task of commenting on the Scottish decisions, which he is much more competent to perform, merely saying that I have read them all, and that every one, I think, is perfectly consistent with the principles I have stated, and I think their justice must be acknowledged by all.

As to the question whether the evidence of Mackenzie is substantially true or not I shall be more brief. The Lord President reads his statement as to the conversation which took place at Abriachan Wood, and draws the conclusion that Mackenzie knew Fraser "could not have a penny to spare." I cannot go so far, but I think that it does shew that Mackenzie doubted his solvency; the last inference which I should draw from that is that he would readily become surety for him. Soon after that conversation he received the letter of the 11th February, written, be it observed, after the bill of 17th February had been discounted. He says that he did not go in to see Fraser, because he knew that there was no business between them he (Mackenzie) would lose by not calling on him, but that when he received the notice of 12th April he recollected this letter, and suspected that Fraser had put his name to a bill, and accordingly went into Inverness on the Monday to see Fraser. I can see nothing incredible in this. Then he says that "we went into a back room, where, shewing him the notice, I asked him if he had anything to do with this. He said he had, 'but' he added, 'it is not going to trouble you any more.' I asked him what he meant by doing such a thing? (Q.) Doing what? (A.) By forging that bill in my name. He said, 'I did not know the danger of it at the time.' I told him I would not pass him, but would give him up to the fiscal at once. He said, 'You need not do that; I have the bill here, and it will not meddle with you after this.' He shewed me the bill. (Q.) Was anything said between you about the renewal of the bill? (A.) Not a word. I told him at the same time, 'See that you don't put in another to relieve this one.' And he said upon his soul and body he would not. He told me that he paid it in clear cash. This conversation between us was in Gaelic. I believed him when he said the bill was paid. With the bill he gave me I went up to the shop of Mr James Fraser, No. 1 Ness Walk, who belongs to the same place as I belong to, and I gave him the bill, and he kept it. I never saw Fraser of Greig Street again until I heard about the second bill." Why he gave the bill to James Fraser to keep is never explained. If his story is true I see no motive for it; but if John Fraser's story is true I see as little motive for it.

Then there is what I think the strangest piece of evidence in favour of the bank. It is not brought in as a prominent part of their case, but in re-cross-examination:—"Re-cross-examined.—(Shewn No. 18, letter dated 15th April)—

This letter was written by Fraser when the first bill was got up. He told me he would give me that letter to shew that I had nothing to do with it, and that he had cleared the bill with cash. I asked him for a letter to that effect. (Q.) Did you say you wanted to shew the letter to your sister? (A.) No. (Q.) Did you say your sister had been angry at you for going into the bill? (A.) I could not say that, for I did not go into the bill. I had had no quarrel with my sister about the bill. I told her from the first day that I got any notice of it that it was forged. On the day when I got No. 18 I daresay Fraser and I had a dram together, I think in the 'Lorne.' I was not very long with him. I think he lent me £3 or £4 for two or three days. I was parting with him on the other side of the bridge, and said I had to look for £2 or £3 for a day or two, and he said I will give you that, and he gave me £4. That was repaid three or four days after I got it. I sent it to him by James Fraser. (Q.) Do you remember meeting John Fraser in Greig Street, near his shop, about the month of February 1879, and asking him how he was getting on with his shop, and whether he would be able to clear the bill? (Objected to. Objection repelled.) (A.) I don't mind of that occasion, for it never happened. *By the Court.*—(Q.) How did Fraser come to give you the first bill that was forged? (A.) When I went to him with the notice I had received from the bank he had the bill settled in the bank before I got to his shop. (Q.) Did you ask him for it? (A.) No; he shewed it to me to satisfy me that it was fully settled, and gave it to me. I don't know if he told me to take it away. He did not ask it back. (Q.) Did you put it in your pocket and go away with it? (A.) Yea. (Q.) You told us the first time you spoke to Fraser's father was after the forgery became known in the district, but you said afterwards you spoke to him after you had got the first notice about the bill? (A.) Yes. The forgery was quite current in the district after the first bill. It was known that it had been forged."

John Fraser, who is brought from prison to give evidence, gives, as might be expected, a very different account of the whole transaction. He says that Mackenzie came in to him, as he expected he would, to talk about renewing the bill. He is not asked when anything had occurred to make him expect Mackenzie to come for that purpose, but clearly implies that Mackenzie had before that had knowledge that the first bill was discounted, and that it was, when it became due, to be reduced in amount, and renewed as to part, and he distinctly swears, both in chief and in answer to the Lord Ordinary, that Mackenzie, before he went to the bank to get the bill renewed, authorised him to get Mackenzie's name put on the renewal bill. Why Mackenzie did not write his own name on the blank stamp is never explained.

Then as to the transaction in the public-house he says:—"It was £5 or something that he wanted. I did not sign it until he came in, and he went to the Royal Bank to cash it there. I don't remember when I saw Mackenzie after I got the first bill from the bank, but he came to my shop, and I shewed him the bill. We had gone to a public-house. I had left a boy in the shop. He said his sister and mother were kicking up a row at home against him for giving me the bill. I gave him the bill, or he took it, and kept it. (Shewn No. 16)—This is the bill I gave him; I think he borrowed £5 from me on that date. We had some drink. I drank lemonade, and he drank whisky. We were alone together for a good long while. (Q.) Did you give him that bill, or did he take it? (A.) He took it. As far as I remember he did not say why

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he wanted it. He wanted to get a note from me that he would shew his sister, because they were kicking up a row. (Shewn No. 18)—(Q.) Did he ask you at that time to write a letter, and did you write this letter?—(The Lord Ordinary again cautioned the witness)—(A.) I did, in order that he should shew it to his mother. (Q.) Did he say he wanted it because his sister was making a row about it? (A.) Yes, so that they would not know about it. I think I wrote it in the public-house. I don't remember how much drink I had that day with him. He did not, as far as I remember, say why he wanted the old bill."

' Now, if I could see my way to thinking it proved, as the Lord President does, that Mackenzie knew that Fraser was in such want of money that he could not possibly have met the bill in cash, and had £3 or £4 over to lend, I should think that his borrowing £3 or £4 from him then would go very far to shew that he knew that Fraser had renewed the bill with Mackenzie's name on it, and either had, as John Fraser swears, expressly authorised his doing so, or at all events then ratified it. And though it is imputing to Mackenzie that he not only committed perjury for the purpose of defeating the just claim of the bank, but had committed the far more wicked crime of giving information to the fiscal, leading to the making of a charge of forgery against Fraser, when he, Mackenzie, well knew that Fraser had not committed forgery at all, yet no doubt that may be true. But I cannot think there is enough evidence to justify me in finding such a very serious charge proved. I think the evidence that Mackenzie must have known that Fraser could not have had such command of money by the aid of his friends or otherwise to be able to pay £76 in cash is insufficient, and the evidence as to the loan itself is brought in so much by the way (not striking the Lord Ordinary who tried the cause as of importance, so that no opportunity was given to explain it) that I cannot rely upon it.

John Fraser's evidence is, I think, on the face of it, so improbable that I cannot trust it. And it is distinctly in conflict with that of Macdonald. John Fraser, the father, no doubt says—"I went to the bridge and my son came past me, and I followed him and asked him how he had got on. He said to me—'The bill is all right.' I did not speak to Duncan Mackenzie that day, but when I was repairing the road 150 yards from his house I saw him one day, and he stood speaking to me, and said—'I am sure John would tell you about the bill.' I said—'Yes.' He said—'Well I have put it all right now.' This was after the bill was due in April. Mackenzie said—'The bill is in my possession now.' He tapped his breast as he said so. (Q.) Did he speak to you about the second bill? (A.) He said the second bill was in before he got the first one out. I cannot say that he said that, but he meant that the second was in the bank before he got the first out. (Q.) Did he say how much the second bill was for? (A.) He said there was too much in the first bill—that there was £76 in it, but that £6 had been taken off. I am quite certain he said that about that time." This, if accurately remembered and truly reported, would shew an admission by Mackenzie. But I cannot trust the accuracy of this evidence.

As to what happened afterwards I have no doubt that Mackenzie would have been quite content to say nothing about the forgery if John Fraser or John Fraser's friends took up the bill and freed him from responsibility. And I have no doubt that he delayed making the charge of forgery from the time when he received the intimation till the 29th July in hopes that they would do so, but, as I have already said, I do not think that he thereby made himself liable to

the bank unless the bank was in some way prejudiced by that delay, which, in this case, it was not. I therefore agree in the motion which the noble and learned Lord has made, that the interlocutor should be reversed.

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LORD WATSON.—My Lords, the process of suspension in which the present appeal is taken was raised by Duncan Mackenzie, the appellant, in order to obtain a stay of summary diligence which the respondents were proceeding to use against him on a bill of exchange at three months for the sum of £70 sterling, and bearing date the 14th April 1879, upon which his name appears as that of a drawer and indorser along with another person of the name of John Macdonald.

The sole ground of suspension stated for the appellant is that the signatures upon the bill charged on, bearing to be his, are forgeries. The respondents on record denied that allegation, but the Lord Ordinary, who gave judgment in the appellant's favour, held that its truth was established by the evidence. In the Inner-House the respondents do not seem to have impeached the soundness of that conclusion; and the Lord President accordingly states that "although originally the chargers denied that allegation it must now be taken that the complainer's signature certainly is a forgery."

The majority of the First Division of the Court of Session, consisting of the Lord President, Lord Deas, and Lord Mure, gave judgment against the appellant, upon these two grounds—(1) That the appellant was, to use the language of the Lord President, "perfectly aware," or at least "had very good reason to believe, that the first forged bill was replaced by the second forged bill," and that the appellant "permitted that to be done, and acquiesced in the proceeding;" and (2) that assuming such knowledge and acquiescence on the part of the appellant not to be established he must nevertheless be held to have adopted the bill charged on by reason of his failure to give information to the respondents that his signatures were forged after receipt of the notice sent by them in July 1879.

The first ground of judgment assigned by the learned Lords constituting the majority appears to me to negative the idea of forgery. I cannot concur that John Fraser, the drawer of the bill, by whom the signatures of the appellant were admittedly written, can be held thereby to have committed the crime of forgery, according to the law of Scotland, if these signatures were written and used by him, as their Lordships hold it to be proved that they were, with the permission and acquiescence of the appellant. And it does seem a strange thing that in the interlocutor under appeal the respondents are found entitled to costs, but "subject to deduction of any expense that may have been caused to the complainer (appellant) by the respondents' denial of the averment of forgery."

But it is unnecessary to dwell upon these matters, because I agree with your Lordship that neither of the views taken by the learned Judges is well founded, and consequently that the judgment of the First Division must be reversed.

Since the conclusion of the argument at your Lordships' bar I have carefully perused the whole proof led by the parties, and the opinion which I have formed upon the facts of the case is precisely the same with that which has been already expressed in the Court below by Lord Adam (the Lord Ordinary), and by Lord Shand. The real question arising upon the proof appears to be, whether the account given by the appellant, on the one hand, or that given by

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John Fraser, the forger, and his father, on the other, is to be accepted as true. In estimating the relative weight of their conflicting statements it is of course necessary to take into account the whole facts and circumstances of the case established by evidence independent of the testimony of these three witnesses, and also to consider the degree of probability attaching to their respective statements. Giving due effect to these considerations, I have come to the conclusion that the account given by Duncan Mackenzie, the appellant, is to be believed, and that the contradictions of his statement, which are to be found in the evidence of the forger, and his father John Fraser senior, are unworthy of credit. When testimony is directly conflicting, and the question at issue depends upon the credibility of certain witnesses, it is undoubtedly advantageous to have an opportunity of noting the demeanour of these witnesses whilst they are under examination, and the Lord Ordinary had that advantage in the present case. At the same time I should not be inclined to accept the opinion of the Lord Ordinary on that account, unless the opposing testimony came to a very even balance. In the present case, the weight of testimony appears to me, irrespective of the Lord Ordinary's opinion on that point, to be on the side of the appellant; but it is nevertheless satisfactory to my mind, that the Judge before whom the witnesses were examined expresses his unhesitating belief that the appellant gave a "substantially true account of the various transactions which took place with reference to the bills."

Having arrived at that conclusion, I do not think it necessary to criticise the evidence in detail. For reasons, some of which appear in the opinion of Lord Shand, and others of which have been assigned by your Lordships to-day, I am quite unable to concur in the view of the facts which was taken by the Lord President, as I understand, with the approval of his brethren Lord Deas and Lord Mure.

I therefore pass at once to the second ground of judgment, the alleged adoption of the forged bill by the appellant. The facts material to this part of the case which I hold to be instructed by the evidence, and which the majority of the First Division assumed as the alternative of their own view being negatived, appeared to be these :—

(1) That on the 14th of April 1879 the appellant came to know that his signature as drawer and indorser of a bill for £76, discounted with the respondents' bank, had been forged by John Fraser, grocer, Inverness, the drawer; that the forged bill was then delivered to him by the forger; and that the appellant was informed and believed that the bill had been paid in cash.

(2) That the bill had not been so paid, but was retired by the forger paying £6 in cash and handing the bill charged on to the bank.

(3) That on 14th July 1879 written notice was sent to the appellant that the £70 bill drawn by him on John Fraser would mature on the 17th, and lay at the bank office for collection; and that on the 18th July a further notice was sent giving the particulars of the bill, and intimating that it had been protested for non-payment.

(4) That on 21st July 1879 the local agent of the respondents wrote the appellant intimating that unless the bill was forthwith paid by him it would be placed in the hands of their law-agent, and that on 25th July the law-agent intimated by letter to the appellant that proceedings would be taken against him if he did not pay the bill before the 28th July.

(5) That on receipt of the first notice of 14th July the appellant had good

reason to know, and was in point of fact aware, that his signature had been again forged by John Fraser, and that on receipt of the second notice he went to Inverness, informed Mr M'Gillivray, a solicitor there, of the fact, and instructed Mr M'Gillivray to take steps to protect him against the consequences of the forgery.

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(6) That on the 29th July 1879 Mr M'Gillivray informed Mr Ross, the law-agent of the bank, that the appellant's signature was forged, and that two days thereafter the appellant, and John Macdonald, whose name was also on the bill as a drawer and indorser, called together upon Mr Williamson, the respondents' branch agent, and told him that their signatures were forged.

It is not suggested that there was any change in the position of the bank betwixt the date of the first notice given to the appellant on the 14th July and the 29th July, when the respondents were informed of the forgery, and it cannot therefore be alleged that the respondents have sustained any loss or prejudice by his silence during that period. But the three learned Judges composing the majority of the First Division have nevertheless held that such silence is, in the circumstances above narrated, sufficient according to the law of Scotland to infer adoption of the forged bill by the appellant. I am unable to concur in that judgment, it being my clear opinion that the right view of the case was taken in the Court below by Lord Shand and the Lord Ordinary.

The question whether a forged bill has or has not been adopted by the person whose signature is forged is in reality an issue of fact and not of law. Still adoption of a bill may be matter of legal inference from certain ascertained facts, and in the present case the inference which has been drawn by the Court below adversely to the appellant appears to depend upon the fact that after he came to know in July that the second bill had been discounted with the bank he (the appellant) kept silence, or at least did not inform the bank of the forgery of his own name until a fortnight or thereby had elapsed. The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in carefully chosen language by Lord Wensleydale in the case of *Freeman v. Cooke* (2 Wel. Hurl. and Gordon, Ex. 654). It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if, when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information.

I do not think the Scotch cases which have been cited at the bar bear out the proposition that silence in circumstances such as occur in the present case is *per se* sufficient to imply adoption of a forged bill. I shall now, before concluding, shortly refer to those cases in the order of their dates.

Meiklem v. Walker, 12 S. 53, was a case in which two brothers, who lived together, were in the year 1828 charged jointly to make payment of a bill upon which both their names appeared. A considerable time after the charge was given the goods of A, one of the brothers, were arrested, whereupon A immediately brought a suspension of the charge and diligence, alleging then, for the first time, that his signature to the bill had been forged by his brother B, who in the meantime had absconded. The Court held that A had made himself liable to pay the forged bill, and refused the suspension, Lord Gillies

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observing—"Is he to be allowed to acquiesce until the proper debtor makes his escape out the country, and then to come forward and allege he has incurred no liability to the holder of the bill?"

In *Findlay v. Currie* (13 D. 278) the question was one of relevancy; and all that the Court decided was that the charger had made averments sufficient to entitle him to a counter issue of adoption in order to meet the issue of forgery taken by the suspender. The substance of the charger's averments was that after notice to him of the bill said to be forged and a demand for payment the suspender had an interview with the charger's agents, when he was shewn the bill, and did not deny his signature; that at a subsequent interview the suspender did not deny his signature, but "begged for time to see the bill," which was granted. In the meantime, his brother, the alleged forger, absconded, and he then for the first time denied the authenticity of his subscription to the bill.

Boyd v. The Union Bank (17 D. 159) was a decision upon the record holding the charger's allegations of adoption to be irrelevant. The only allegation of the charger was to the effect that although the bill was during its currency intimated to the suspender, he kept silence, and did not inform the bank that his signature was a forgery. In that case the Lord President (Lord Colonsay) said—"When a party is shewn a bill and makes no objection, and allows the creditor to remain in the belief that it is his signature, he has incurred a ground of liability through the loss incurred by that adoption. That principle might apply even though he was not shewn the bill which is the subject of discussion. If he had allowed the matter to lie over, and through his silence the whole was lost, an obligation might be incurred through that silence."

The case of *Warden v. The British Linen Company* (1 Macph. 402) is a decision to precisely the same effect as the preceding. The Court there refused to grant a counter issue of adoption by two co-acceptors, both of whom alleged that their signatures to the bill were forged, upon the bare averment that they had taken no notice of a letter addressed to them by the bank informing them of the existence of the bill before it was due.

In the next case, that of *Brown v. The British Linen Company* (1 Macph. 793), the Court sustained the relevancy of the charger's averments, and allowed a counter issue of adoption. These averments were that the bill was intimated during its currency to the person alleging forgery, that thereafter his agent, acting under his instructions, called at the bank and examined the bill; that the agent did not state that his employer's signature was forged, but, on the contrary, requested that the bank should send him an intimation when the bill fell due, and, moreover, gave the bank-agent to understand that if the bill was not paid at maturity by Walker (the alleged forger) his client wished it to be renewed.

None of these decisions appear to me to give the least support to the doctrine that mere silence after intimation or even after demand for payment of a forged bill necessarily implies adoption of a bill by one whose subscription to the bill is a forgery; and accordingly the Solicitor-General for Scotland, towards the close of his argument, mainly relied upon the case of *Urquhart v. The Bank of Scotland*, 9 S. L. R., 508, which was decided by the First Division of the Court in the year 1872.

The facts established by the proof in that case, as they are detailed in the report, were somewhat peculiar. It was proved that the suspender's signature to the bill charged on was forged, but it was also proved that notice of protest

of the bill for non-payment was received by him on or about the 2d of August 1871, and that he wrote to the bank on the 23d August that his signature was a forgery, his friend and intimate, the forger, having in the meanwhile absconded. It was proved that the forger was subsequently tracked out and apprehended under a criminal warrant; and it was also proved that the suspender knew, or had good reason to know, that the forger had for some years previously been in the habit of forging his name upon bills, and that in June 1870 he had given the forger money to retire one of those bills, known by him to be forged. It is no doubt the case that the terms of the Lord Ordinary's interlocutor, and of the judgment of the Inner-House, as reported, lay great stress upon the silence of the suspender as warranting their decision, which was against him. But there were obviously many grounds for the decision other than his silence, and I think it must be assumed that the judgment proceeded upon the whole circumstances of the case, and not upon silence alone. All I can say is, that if these grounds were in the view of the Court, the case was, in my opinion, well decided. But if it was intended by the Court to rest their judgment upon the mere silence of the suspender apart from other circumstances, which I greatly doubt, then, whilst agreeing in the result at which their Lordships have arrived, I should be of opinion that the decision was not only unnecessary, but erroneous.

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ORDERED and adjudged, that the interlocutor of the Lords of Session in Scotland, of the First Division, of the 4th of June 1880, complained of in this appeal, be, and the same is hereby reversed, and that the interlocutor of the Lord Ordinary, of the 3d of February 1880, be, and the same is hereby restored: And it is further ordered that the respondents do pay, or cause to be paid, to the appellant the costs following upon the reclaiming note in the Court below, and such costs in this House as have been incurred by the appellant in appearing *in forma pauperis*, and the amount of such last mentioned costs to be certified by the Clerk of the Parliaments.

A. BEVERIDGE, London.—WM. OFFICER, S.S.C.—W. A. LOCH, Westminster—
MACKENZIE & KERMAK, W.S.

CALEDONIAN RAILWAY COMPANY (Pursuers), Appellants.—*Benjamin, Q.C.* No. 3.
—*Chitty, Q.C.*

NORTH BRITISH RAILWAY COMPANY (Defenders), Respondents.—
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Statute—Construction—38 and 39 Vict. c. clxvii. (North British Railway, Dundee and Arbroath Joint Line Act, 1879), secs. 3 and 6—Commencement of Payment.—The North British Railway, Dundee and Arbroath Joint Line Act, 1879, proceeded on the preamble that it was “expedient that all interest which the Caledonian Railway possess in the Dundee and Arbroath, &c. Railway . . . should be transferred to and vested in the Caledonian Railway Company and the North British Railway Company jointly and equally, and that those companies should have equal rights and powers, and be subject to equal liabilities over and with respect to the said railways.”

Accordingly, the Joint Line Act, section 3, enacted that on and after 1st February 1880 (called the “vesting period”), all interest which the Caledonian Railway Company possessed in the said railways should “be transferred to and vested in” the Caledonian and North British Companies, “jointly and in equal

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The Caledonian Company claimed under this section a payment on 1st March 1880 equal to one-half of the guaranteed dividends which they fell to pay in March or April 1880 for the half year ending 31st January 1880.

Held (aff. judgment of First Division) that the Joint Line Act of 1879, in requiring the half-yearly payments to be made on 1st March and 1st September in each year from 1st February 1880 might be construed as merely fixing generally the terms of payment in each year without reference to the particular term when the payments were to commence, and that as it would be inconsistent with the equality set forth in the preamble to require the North British Company to pay a share of the dividends payable in March or April 1880 for the six months prior to 1st February 1880, during which the Caledonian Company were sole owners of the line, the first payment under the Act did not fall due till 1st September 1880.

Observed (per Lord Chancellor Selborne), the more literal construction of a section of a statute ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

Ld. Chancellor
(Selborne).
Lord Black-
burn.
Lord Watson.

LORD CHANCELLOR.—My Lords, I cannot say that I think this case free from difficulty. There is always some presumption in favour of the more simple and literal interpretation of the words of a statute or other written instrument, and so much as this must, I think, be conceded to the appellants that the 6th section of the North British Railway (Dundee and Arbroath Joint Line) Act, 1879, does at first sight seem to appoint the 1st day of March 1880 as the day on which the first of a series of equal half-yearly payments is to be made by the North British to the Caledonian Company. This impression is produced not only by the *prima facie* import of the introductory words of the first clause of the section, but also by the fact that instead of saying that the North British Company shall pay and contribute one-half of the specified half-yearly liabilities of the Caledonian at the times when they respectively become due, the Legislature has said that it shall pay “a sum equal to one-half of the aggregate of these liabilities, and that it shall do so half-yearly on days which confessedly do not correspond with the times at which the liabilities in question will become payable in respect of the same half years by the Caledonian Company, and which must therefore (to some extent) involve payments in advance by the North British Company with benefit of interest to the Caledonian if those payments are not punctually made. On the other hand, it may justly be said that this arrangement would not be substantially at variance with the principle of an equal division of these liabilities between the two companies if the amount to be paid by the North British were in fact equal to one-half of

the liabilities of the Caledonian Company in respect of each of the same half years, the Caledonian Company being answerable for the whole amount to the creditors ; and that it was not unreasonable that the North British Company should be bound to contribute beforehand their share of this amount, so that the Caledonian Company might always have funds in hand to make payments at the proper time. The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.

The Court below has founded its judgment mainly upon the intention, unquestionably declared in the preamble of the statute, that the two companies "should have equal rights and powers, and be subject to equal liabilities, over and with respect to the railways" (between the points therein mentioned) "as thereafter provided." If the effect of the appellants' construction of the 6th section would be to disturb, and that of the respondents' construction to preserve the equality contemplated by that preamble, this is an argument of much weight in the respondents' favour.

The appellants have contended that the word "liabilities," as used in the preamble, ought to be understood only of such liabilities of the joint line as might for the first time come into existence after the 1st February 1880 (the "vesting period" when the union of interests between the two companies was to take effect), and not of any which though accruing due after that period might result from obligations previously contracted by the Caledonian Company.

The words "as hereinafter provided" suggest the inquiry, what subsequent provisions as to "liabilities" there are in the Act? As to "rights" and "powers" there are various detailed provisions. As to "liabilities" (if the 6th section were excluded), I find the word mentioned only in sub-section 23 of section 8, where it relates, not to any burdens which were to be borne equally, but to some which were to be thrown solely upon one company in exoneration of the other because arising out of that company's own acts or defaults. The working expenses of the joint line are provided for on the principle of equality by sub-section 24 of section 8 (and perhaps also by section 12), and all expenditure upon capital account for new works is provided for in like manner by sub-section 31 of section 8. Future liabilities having their first inception after the vesting period are, no doubt, in this way covered, but it is rather under the conception of outlay or disbursement than under that of liability or indebtedness.

On the other hand, all the payments of which one moiety is thrown upon the North British Company by section 6 are declared on the face of that section to have been, when the Act passed, "liabilities" of the Caledonian Company ("payments for which the Caledonian Company are now liable") in respect of their acquisition of the Dundee and Arbroath Railway,—being a railway in which the two companies are to have equal rights,—liabilities which, though arising out of obligations previously contracted, and others in force, would accrue and become due periodically in every half year after the vesting period. According to the natural meaning of the words used in the preamble they were "liabilities to be met and provided for after the vesting period quite as much as if they had then first originated, and they were also liabilities "with respect to the said railways between the points aforesaid" because the Caledonian Com-

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pany had incurred them in respect of their "acquisition of the Dundee and Arbroath Railway." According to the reason of the thing, as apparent from the 2d sub-section of clause 6, and from the admitted operation of the first sub-section of that clause, in every half-year but the first they come within that principle of equality on which the preamble is founded.

I conclude therefore, with the Court below, that we have in that preamble a sufficient guide to the solution of anything that may be ambiguously or imperfectly expressed in the first sub-section of section 6 if one construction would produce or substantially approximate to, and if another would defeat and substantially depart from, equality.

With this guide it seems to me that if we regard the influence of the introductory words "from and after the vesting period" as pervading the whole sentence in which they occur (so as to apply not only to the direction to pay but to the ascertainment of those "half-yearly payments" for which the Caledonian Company were liable, of which one-half was to fall on the North British Company) we shall do less violence to the intention manifested by the Legislature than if we were to confine them to the mere direction for payment, so producing an arbitrary and substantial inequality between the two companies in the first half year, and in that half year only. I read the clause as if it had been expressed thus:—"The company shall pay to the Caledonian Railway Company, half-yearly on the 1st day of March and the 1st day of September in each year, a sum equal to one-half of the aggregate of the following half-yearly payments for which the Caledonian Railway Company are now liable in respect of their acquisition of the Dundee and Arbroath Railway, such liabilities of the Caledonian Railway to be ascertained as from the 1st day of February 1880, and such payments to be made by the North British Railway Company accordingly." So understood, a liability of the Caledonian Company which (though postponed as to the declaration of the state of accounts on which the amount depended and as to the time of payment till a later date) had really and in substance accrued before the 1st February 1880, belongs to a period antecedent to the vesting, and ought to be excluded from the computation. Under the Act of 1866 those liabilities of the Caledonian Company, which are numbered 1, 2, and 3 in the first sub-section of section 6 of the present Act, had really accrued on the 31st January 1880; they were by the express terms of that Act dividends payable as of right for the half year ending on that day out of profits earned during the year then ended, exclusively of all subsequent profits. Every fact on which the right and the liability depended was then fixed and capable of being ascertained. The payment was at that time *debitum*, if on taking the account the profits earned in the preceding year should be found sufficient to meet it; and the fact that this would not be done till the usual time for the declaration of a dividend in March or April, and that the payment would not be made till afterwards, could not make the liability itself attributable to a half year subsequent to the 1st of February. There is more, I think, than guess or speculation in the argument of the respondents' counsel that the vesting period was fixed for that day (the 1st February), for this very reason, that according to the previous Acts of Parliament that was the day which divided the earnings and the liabilities of one half year from those of another.

This conclusion is fortified rather than otherwise by the nature of the fourth and fifth items in the first sub-section of section 6, one of them representing interest accruing in point of law *de die in diem*, and the other rent apportion-

able over the whole period in respect of which it accrued. . One of these two items was in the year 1880 properly apportionable between the period before and that after the vesting, so that the mention of a payment to be made on the 1st of March was not as to that particular year nugatory according to the construction which excludes all liabilities properly referable to the time before vesting. It is apparent on the face of the section that the sum payable in any one half year would not necessarily be the same as in every other half year ; it would on each half-yearly day be a moiety of such of the liabilities mentioned as were *de facto* and *de jure* payable by the Caledonian Company in respect of the current half year, considering the first half year as having its commencement on the 1st February 1880. Independently of the fact that something (though no doubt a small sum) would in fact be payable according to this construction on the 1st of March in the first year, I should think any inference drawn merely or chiefly from the mention of March before September in this contract very precarious. The phraseology of the clause may well be supposed to follow the natural order of the months in the calendar, in view not so much of one particular year as of the long tract of time during which these periodical payments would recur.

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One other argument of the appellants' counsel requires notice—that founded on the words which introduce the 6th section—"The consideration for the transfer of the joint line shall be as follows." If a bargain for payment of a premium or for some other advantage to the Caledonian Company had been recited, or ought to be inferred from this clause itself, or from any other part of the Act, no doubt this might properly be described as a "consideration." But the assumption of half the existing liabilities of the joint line and the repayment of half the cost and value of the existing permanent way, &c., might, with quite equal propriety, also be so described. There is no recital in the Act of any bargain such as the appellants' argument supposes ; there is a recital that the liabilities generally were to be borne equally, which is *prima facie* inconsistent with the supposition that an unequal apportionment of the existing liabilities so as to give some advantage (in one half year only) to the transferring company was part of the consideration. The inferences, therefore, to be drawn from the rest of the Act repel rather than support the view that there was any such bargain. With the language and scheme of this clause itself I have already dealt.

Upon the whole, I am unable to dissent from the decision of the Court of Session, and I move your Lordships to affirm the interlocutors appealed from, and to dismiss the appeal, with costs.

LORD BLACKBURN.—My Lords, I also have come to the conclusion that the interlocutors should be affirmed, and the appeal dismissed, with costs. The matter turns upon the construction of an Act of Parliament, which is an instrument in writing. I believe there is no dispute at all that in construing an instrument in writing we are to consider what the facts were in respect to which it was framed and the object as appearing from the instrument, and taking all those together we are to see what is the intention appearing from the language when used with reference to such facts and with such an object. The facts here and the object are all apparent without stepping out of the Act itself, and those other Acts, of which, being public Acts, we must take judicial notice.

As appears from the recitals here, and by these Acts, the Caledonian Railway

No. 3. Company were, at the time the Act in question received the royal assent, owners of the line originally made by the Dundee and Arbroath Company, whilst it was a separate and independent undertaking. They were also lessees of a line which originally was made by the Arbroath and Forfar Company when they were an independent company, and which was let in perpetuity at a fixed rent to the Aberdeen Company, from whom the Caledonian Company acquired the lease. The North British Company had also an interest in the Dundee East Station, and an interest in the station at Broughty-Ferry; and the recital in the preamble of the Act is that it is expedient that the whole of the Dundee and Arbroath Railway belonging to the Caledonian Company, and a portion of the Arbroath and Forfar line leased by the Caledonian Company, and the whole of the interest of the North British Railway Company in those two stations, should from a certain day become transferred to and vested in the company (that is, the North British Company), jointly and equally with the Caledonian Company, and that the North British and Caledonian Companies should have equal rights and powers, and be subject to equal liabilities in this which is called the joint line. That is the object of the Act.

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In order to understand what follows, I think it is necessary to consider for an instant how and in what manner the Caledonian Company acquired the Dundee and Arbroath Company's line. That line was originally made by the Dundee and Arbroath Company, then an independent company, by means principally of money contributed by shareholders who took shares, and those shareholders in respect of the money they had advanced, which had been thus spent, received, or were entitled to receive, dividends accruing during the half years into which the railway year is divided.

In Scotland, in general, and in the case of all the companies with which we have now to deal in particular, the railway year is divided into halves—one beginning on the 1st of February and ending on the 31st of July, and the other beginning on the 1st of August and ending on the 31st of January. The shareholders of the Dundee and Arbroath Railway Company were entitled therefore at that time to payments which accrued during each half year ending at those days. Perhaps the amounts were not at that date ascertained, but they then became ascertainable, and became *debita in presenti* to them at the conclusion of each half year—that is to say, upon the 1st of February and the 1st of August in each year. They were not payable then; they were payable at the time when the company should declare its dividends, which time is by the statutes provided to be in the months of March or April, and the months of September or October, and which in practice was almost always about the end of March and end of September. They might for all practical purposes be considered as payable *in futuro* upon the last day of March and the last day of September; they were therefore *debita in presenti solvenda in futuro*.

When the Scottish North-Eastern Railway Company acquired this line they bought it from the Dundee and Arbroath Company, and the shares of the Dundee and Arbroath line ceased to exist. There were substituted for them shares of the Scottish North-Eastern Railway Company equivalent in value, or supposed to be equivalent in value, thereto. When the Caledonian Company in their turn acquired the line there were substituted for the Scottish North-Eastern shares, shares of the Caledonian Company, which were equivalent in value, or supposed to be equivalent in value, thereto. Subsequently, by the Caledonian Act for simplifying the accounts and shares, they were enabled to convert these, so that

those who represent the original Dundee and Arbroath shareholders, where they held Caledonian preference shares before, now hold Caledonian 4 per cent stock, the dividends on which are equal within 6s. 4d. to the amount which was payable before; and for the contingent dividend, which depended upon whether the Caledonian Company should earn 7 per cent or not, there was substituted an amount of Caledonian deferred ordinary stock No. 1, the dividend on which, I presume, is calculated, but I do not exactly know how, as being equal to the dividend which they would have had in respect of their original contingent dividend. But the stocks into which the original shares were converted now all retain their original feature, that the dividends on them accrue in the half year, and become *debita in presenti* on the first day of the next half year—the 1st of February for example—but are not payable till the March or April, although practically payable on the last day of March, *debitum in presenti solvendum in futuro*. These are the three first items in section 6, sub-section 1, which I have to deal with.

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But the railway was not built by means of money advanced by the shareholders alone; it was also built in part with borrowed money, for which the Dundee and Arbroath Company, borrowing the money upon mortgage, were liable. This borrowed money was laid out partly in building the line, and partly in buying rolling-stock and other moveable properties. When the Scottish North-Eastern Company acquired the line they took upon themselves the liability to make good this mortgage debt, and they took to themselves absolutely, and I suppose have long ago used up, all the rolling-stock that was there; the balance (after deducting the value of the rolling-stock) was part of the cost of the line, and that the Caledonian Company became liable for, substituting their liability for this mortgage debt for that of the Dundee and Arbroath. The interest on that mortgage debt is the fourth of the items in section 6, sub-section 2, and there it is mentioned that the proportion payable for the rolling stock is to be ascertained by arbitration and to be deducted, and the rest is to be considered part of the liabilities.

Now, though interest, no doubt, accrues *de die in diem*, yet by convention between the mortgagees and the company it was payable upon the usual term-days in Scotland—that is to say, on Whitsunday, the 15th of May, and on Martinmas, the 11th of November; *de die in diem* that interest was accruing, but it was payable *in futuro* upon those two days. And it does so chance, and it makes a little complication, that the periods beginning upon the 15th of May and 11th of November are not conterminous with either of the periods of six months into which the railway year is divided. Two months and a-half of the interest, though accruing *de die in diem* during the railway half year, would not be yet payable on the termination of the railway half year. Those are the first four items, and they are all concerning the Dundee and Arbroath line.

There is a further item which I must notice, not that it was of so much consequence, but that it throws, in my mind, a good deal of light upon the construction of the Act. It is mentioned in the proviso contained in the second sub-section. Besides those moneys which had been furnished by the shareholders and by the mortgagees which the Caledonian Company had not advanced, but the interest upon which they had become bound to pay, the Scottish North-Eastern Railway Company and the Caledonian Railway Company had spent, or at least are assumed in this proviso to have spent, money in improving the line and maintaining the line afterwards; that is mentioned in the proviso, which is

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in the centre of the second sub-section, as part of the cost of the line—moneys which the Caledonian or the Scottish North-Eastern Company had actually disbursed out of pocket, and which had gone towards building this line.

Then comes the fifth item mentioned in the first sub-section of the 6th section, which is as to the Arbroath and Forfar line. It is by no means the whole of that Arbroath and Forfar line that is to be part of the joint line. It is only a very small portion, but still it is a portion. The perpetual lease of the Arbroath and Forfar line had been acquired upon the terms that the Caledonian Company should pay an annual rent, originally in part contingent, but since ascertained and become commuted for a fixed sum, which annual rent is for the whole railway year, beginning to accrue upon the 1st of February, but not being payable until that year expires upon the 1st of February ensuing. Accruing as it does during the whole course of the year, it becomes *debitum in presenti* and *solvendum in presenti* at the same instant of time that the latter railway half year expires. The amount of the rent which is apportionable to the portion of line which is to be taken by the joint company is to be determined by arbitration. That is provided for under the 5th head of the 1st sub-section of the 6th section.

Now, taking these facts, which all appear upon the Acts, and which I hope I have succeeded in stating in such a way as to make them intelligible, we come to see how and upon what terms the Legislature has carried out the intention which they declared in their preamble to convey the joint line to the two companies to be held jointly with equal rights and subject to equal liabilities. They have done this in three sections. First, I mention the 4th and 5th, which refer to the interest of the North British Company in the two different portions of the joint line. As to each of those they say they shall be vested jointly in the two companies as part of the joint line upon terms to be fixed by agreement between the two companies, and, failing agreement, by arbitration. So far as the North British Railway Company's interest is concerned, therefore, we have nothing to do with that—it is to be settled elsewhere; but as regards the Caledonian Company's interest the 3d section says:—"On the 1st day of February 1880, in this Act called the vesting period, all interest of whatever nature or kind soever which the Caledonian Company possess or enjoy" in the Dundee and Arbroath Railway "shall by force and virtue of this Act be transferred to and vested in the Caledonian Railway Company and North British Railway Company jointly and in equal proportions in manner provided by this Act," and "the manner provided by this Act" is that specified in section 6, upon the meaning of which the controversy arises. I think, as I said before, the facts I have mentioned are all material to the construction of that section.

Now, I believe there is not much doubt about the general principle. Lord Wensleydale used to enunciate (I have heard him many and many a time)—that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in *Gray and Pearson* (6 H. L. Cas. at p. 106), in the following terms:—"I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the

grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." No. 3.

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I agree in that completely, but unfortunately in the cases in which there is real difficulty it does not help us much, because the cases in which there is real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words used with reference to the subject-matter is. *Caledonian Railway Co. v. North British Railway Co.*

To one mind it may appear that the most that can be said is, that the sense may be what is contended by the one side, and that the inconsistency and repugnancy is very great, that you should make a great stretch to avoid such absurdity, and that what is required to avoid it is a very little stretch or none at all. To another mind it may appear that the meaning of the words is perfectly clear, that they can bear no other meaning at all, and that to substitute any other meaning would be not to interpret the words used, but to make an instrument for the parties, and that the supposed inconsistency or repugnancy is perhaps a hardship—a thing which perhaps it would have been wiser to have avoided, but which we have no power to deal with. This present case is about as good an illustration of that as can very well be. The Court below did not cite what Lord Wensleydale said; perhaps as they were Scotch lawyers, not English ones, they had never heard of it; but the Lord President said, after commenting upon the clause, and saying what he thought of it—"There is nothing in this clause, I think, that is fairly susceptible of that construction. At the very best, the argument could go no further, I think, than this, that the words which I have cited are ambiguous—that it may be intended that there should be such an anomalous thing as this" (that is, what Lord Wensleydale would call an inconsistency), "and it may not. It may be merely intended to express that these are to be the days of payment in each year, but not that it is to commence on the 1st day of March 1880; and if there be ambiguity at all—if there be room for two constructions—then I apprehend we must appeal to the whole scope and purpose of the Act." So that, in the Lord President's view of the words of this Act (which I shall comment upon myself presently), Lord Wensleydale's rule would be in favour of the North British Railway Company.

Lord Mure takes quite the opposite view of it. He says in effect and substance that the words are quite clear, and that they do mean, as the Caledonian Company says, that there shall be a payment made upon the 1st of March 1880, and that that may be a harsh bargain,—he calls it an inequitable bargain. I am inclined to agree with what the learned counsel for the appellants said, that this last is not a correct phrase: a bargain is a bargain. If a man chooses to bargain that he will pay ten times the value of a thing I do not think you have, in the absence of undue influence, any right to cut down the price to the tenth part of what was agreed upon. But although this may be a harsh bargain (Lord Mure urges) he saw no reason for interfering with it; he says that the plain sense of the words is what the Caledonian Company contend, and that there is no such repugnancy or inconsistency as to lead one to modify them. If Lord Mure's view of the words is right, Lord Wensleydale's rule would be altogether in favour of the Caledonian Company.

The 6th section begins thus: After saying "the consideration for the transfer of the joint line shall be as follows,"—it says, "from and after the vesting period." Pausing here for a moment, the vesting period is the 1st of February 1880, and the counsel for the appellants argued—put in "the 1st of February 1880" instead of "the vesting period" and it will read "from and after the 1st

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of February 1880." Now, that, I do not think, was quite right. I think if the words had been the 1st of February that the argument on behalf of the respondents would have been that they put in that date because it was the vesting period, and that therefore it should be read as if the vesting period had been mentioned, and not the particular day. That argument is not needed, for the Legislature expressly said "from and after the vesting period the company" (that is, the North British Company) "shall pay to the Caledonian Company half-yearly on the 1st day of March and on the 1st day of September in each year a sum equal to one-half of the aggregate of the following half-yearly payments for which the Caledonian Railway Company are now liable in respect of their acquisition of the Dundee and Arbroath Railway—that is to say,"—then it mentions the four first items I have already referred to.

Now, what I have to say here is, that I think the words "now liable" require to be expanded or explained, for I think a great deal of the argument of the appellants was rested upon what seemed to me a fallacy in that respect. The Legislature is speaking on the 21st of July 1879, a few days before the railway half year (which would terminate upon the last day of July of that year) expired. At that time, in the sense of being liable to make a present payment, the Caledonian Company were liable for nothing. There had accrued a certain part of the dividends during the half year which would terminate at the end of July. The greater part of those had accrued at that time, a small portion, ten days, had yet to accrue, and upon the 1st day of August then ensuing the company would become liable as *debitum in presenti* for the amount of those dividends, and upon the last day of September they would become liable to make payment *in presenti* of that money, so that both that portion which had accrued in respect of that half year and that which still had to accrue would become payable long before the vesting period. The interest upon the fourth item—the mortgage money—had been paid up to the 15th of May. At this time two months and a small portion of the next ensuing six months had expired, and during that time interest accruing *de die in diem* had accrued against the Caledonian Company, and when the 11th of November came afterwards interest would have accrued for the remaining three months and something more than a half, and then, and not until then, upon the 11th of November 1879, interest upon the mortgage money would be payable.

But at the time when the Legislature was speaking neither of these were liabilities in any sense ; and the same remark applies exactly to the fifth head, viz. that portion of the rent of the Arbroath and Forfar Railway which was in respect of that portion of the line which was to be part of the joint line. The rent was accruing from the 1st of February 1879, and it would all become due upon the 1st of February 1880, but no portion of that rent was on 21st July 1879 either due or payable. Therefore the Caledonian Company were liable only in this sense, that under statutory engagements the Caledonian Company would be liable for them as debts when they had accrued, and would be liable to pay them when the period for payment had arrived ; some of them would have accrued and would be payable before the 1st of February ; others would have accrued on or before the 1st of February 1880, and would not be payable till afterwards ; others would accrue after the 1st February 1880, and be payable afterwards. Now, it is with this view that I mention it ; the words in my view require not to be altered but to be expanded and explained. When that is done I think the rest of the 6th section is intelligible, and can be construed readily.

I may say that the whole of the 6th section must be taken together; it is divided into the first sub-section and the second sub-section; but we must not construe the first sub-section until we have mastered and understood the meaning of the second—we must not construe the second sub-section until we have mastered and understood the meaning of the first; and then the two must be taken together. In explaining your views you take first the second or the first as seems convenient. I prefer to take the second sub-section first, to explain what it means. It begins,—“On the vesting period, or as soon thereafter as the amount shall be fixed or determined, as hereinafter provided, the company, ‘that is, the North British Company,’ shall pay to the Caledonian Railway Company a capital sum equal to one-half of the value of the joint line by this Act transferred to the two companies, subject to the half-yearly payments hereinbefore stipulated.” They therefore took the value of the line as the value of the line subject to these half-yearly payments. Strictly it was not subject to them. The line had before it had been acquired by the Scottish North-Eastern Company been liable for them. As a matter of fact the Caledonian Company became liable for them, and were to keep down the interest on them, so that they no longer, strictly speaking, were burdens upon the Dundee and Arbroath Railway Company. But it is plain the Legislature are here dealing with them as if they were burdens.

Then comes the proviso—“Provided that such sum shall in no case be less than one-half of the principal sums expended on capital account on the joint line by the Aberdeen Railway Company, the Scottish North-Eastern Railway Company, and the Caledonian Railway Company respectively, or any of them previously to such payment, as the amount of such value shall be fixed by agreement between the two companies, or determined by arbitration.” I point that out because, although I suppose probably the value would be larger than that cost, and that proviso would not come into play, it is plain enough that that part of the consideration is to be the transfer of the actual fixed line, the real property of the line, on payment of the value, as it might be, never to be less than the money actually expended upon it, and subject to the payments for those various charges, which were in reality payments of interest in respect of money which had been expended upon the line, but which capital sum had not been paid by the Caledonian Company, the Caledonian Company merely becoming liable, in the sense I have already explained, to pay interest for those different sums. And that does seem to me to be pretty strong to shew that when the payment was to be the value of the line as it was upon the 1st of February, subject to those half-yearly payments, it meant the value of the line as it was upon the 1st of February, subject to these half-yearly payments which would both accrue and become payable after that date, and not, as the Caledonian Company contend, subject to all such half-yearly payments which, though they had accrued as a *debitum* before the vesting period, had not been paid before that.

I think that view is fortified by what follows, namely, that “the company shall also pay interest to the Caledonian Railway Company on the said capital sum at the rate of five per cent per annum from the vesting period till paid”—interest upon the money they had actually disbursed and spent if the proviso comes into operation and is to run from the 1st of February. Payments to keep down the interest upon money which had been previously spent surely, one would say, were payments to keep down that which had accrued as well as become payable after the 1st of February. I think that is enough to make me say that the

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No. 3. construction which the Caledonian Company contend for, that the payments shall include not only those which had accrued subsequently to the 1st of February 1880, but also those payments which had accrued previously to the 1st of February 1880, but were not, in fact, payable till afterwards, is an inconsistency with the general object.

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Now, let us see, that being so, and that being, as it strikes me, upon that view a repugnancy and inconsistency with the general scheme, are the words so strong that one must say that they must not be, as Lord Wensleydale would say, modified to that extent necessary to avoid it? The first point is, that the payments shall be made half-yearly on the 1st of March and the 1st of September in each year. Now, I agree with the conclusion come to by the Lord President, that the most natural meaning of that is, not that the first payment shall be upon the 1st of March 1880, but that the 1st of March and the 1st of September are the two days in the year upon which such payments as are to be made at all shall be made,—those shall be the termly days upon which the payments shall fall due and become payable hereafter after the bargain is completed. Lord Deas says, in Scottish leases the first term is generally expressed thus—“beginning the first payment” on a particular day. If the Legislature had said the first payment to be on the 1st of March 1880 I should have understood it.

But then the section goes on to say “for which the Caledonian Company is now liable.” I have already explained my view upon that point, and, substituting for those words the detailed explanation I have given, it does seem to me that it bears the meaning that there are these three sums which are both accruing and payable before the vesting period, such as the interest payable in November 1879 and the dividends payable in September 1879; no one could contend that the North British Railway is to pay any part of that. As regards that portion which is both accruing in the period subsequent to 1st February 1880 and payable afterwards, no one could dispute that the North British Company were to pay half of that; the question is whether the words are so clear as to shew that the Caledonian Company is to receive, and the North British Company to pay, half of that interest which the Caledonian Company had become bound to keep down, which interest had accrued in respect of the period before the vesting period, though not payable till after. I have, perhaps, worked myself into the condition of thinking it clearer than it really is, but my feeling is that the fair and ordinary grammatical meaning of the words would be in favour of the North British Company. I am quite content to say that at least, as the Lord President says, it is ambiguous, and might bear one meaning or the other. The passages I have pointed out in the second sub-section as to the value, and the recital in the earlier part that they are to be on equal terms, all strongly lead me to the conclusion that there is a repugnancy and inconsistency with the general object of the scheme of the Legislature in saying that they should include those; and consequently, taking Lord Wensleydale’s golden rule which I have already quoted, and applying it literally to that, I think that the words, if they do not actually mean what the North British Company say, at least are so near it that it is no strain upon them to say that they do mean what the North British Company say they do, and that to put the other construction upon them would produce such a manifest inconsistency with the general scheme of the Act that the North British construction should be adopted. That is, in substance, the view which the majority of the Court of Session have adopted, and I think the decree ought to be affirmed, and, of course, affirmed with costs.

LORD WATSON.—My Lords, the controversy between these two companies turns upon a very narrow point, and appears to me to be attended with considerable difficulty. But I have come to be of opinion that, taking into account the scope and object of the other clauses of the Act of 1879, the construction of sub-section 1 of section 6 which has been adopted by the majority of the Judges in the Court below is the right one.

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The leading purpose of the Act was to vest in the appellants and respondents jointly, and in equal proportions, "on and after the 1st day of February 1880, therein termed the vesting period—(1) The Dundee and Arbroath Railway, and (2) a part of the Arbroath and Forfar Railway." These were originally separate undertakings, but had been amalgamated with and vested in the Caledonian Railway Company under an Act of 1866, and the terms of the preamble shew that, except in so far as otherwise provided, the two companies were "to have equal rights and power, and be subject to equal liabilities, over and with respect" to the joint lines.

By the terms of the statutory arrangement under which the Dundee and Arbroath Railway Company was absorbed in the undertaking of the Caledonian Company, the preference and ordinary stocks of the Dundee and Arbroath Railway were severally converted into Caledonian Railway Company's four per cent consolidated guaranteed stock, and a certain amount of Caledonian Railway Company deferred ordinary stock No. 1 was allotted to the holders of Dundee and Arbroath ordinary stock. The appellants were accordingly liable to pay in perpetuity a half-yearly dividend at the rate of four per cent per annum upon these converted stocks, and a contingent dividend upon the deferred ordinary stock No. 1, besides which they were liable to pay interest at five per cent on £81,619, 6s. 6d., being the amount of mortgage and other debts affecting the Dundee and Arbroath Railway.

The Arbroath and Forfar Railway was in the year 1846 transferred to the Aberdeen Railway Company under a perpetual statutory lease by which the original shareholders of the line leased became entitled to a fixed yearly rent, together with a share of profits above a certain limit which might be earned by the lessors. This contingent share of profits was afterwards commuted for a fixed annual payment, and the appellants' company, prior to the Act of 1879, were owners of the Arbroath and Forfar line as part of their general undertaking, and were consequently liable to pay the foresaid annual rent *plus* the commuted amount of contingent profits.

The half-yearly dividends upon the stocks of the appellants' company are derived from profits earned during the six months respectively preceding the 31st day of January and the 31st day of July in each year. And the dividends upon the stocks assigned to the Dundee and Arbroath shareholders accruing during these periods are by statute made payable "on the same days in the months of March or April and September or October as the other preference and ordinary dividends of the company shall be payable." Interest upon the mortgage and other debts affecting the Dundee and Arbroath Railway is payable half-yearly at the terms of Whitsunday and Martinmas (15th May and 11th November) in each year, whilst the rent falling due in respect of the Arbroath and Forfar Railway is payable yearly on the 1st day of February.

It appears to me to be clear that it was not intended by the framers of the Act of 1879 that the Dundee and Arbroath Railway and the part in question of the Arbroath and Forfar Railway should vest in the appellants and respondents,

No. 3. freed of all encumbrances, but, on the contrary, that it was to become vested in them jointly, subject to those perpetual termly payments of dividends, interest, and rents which the Caledonian Company was under obligation to make to original shareholders and creditors of these undertakings or their successors. That obligation was in substance a statutory condition attaching to the right of the appellants' company as owners and occupants of these two railways.

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Had these termly payments been made specific charges upon the railways vested in the two companies by the Act of 1879, and the revenues thence arising (as in the case of moneys heritably secured on land), the North British Company would have become liable in respect of their joint ownership to pay one-half of the dividends, interests, and rents accruing after the vesting period without any statutory provision to that effect. But the shareholders and creditors of the Dundee and Arbroath Railway and the shareholders of the Arbroath and Forfar line—although they might still have a lien over what had once been their own undertakings—had become either shareholders or creditors of the Caledonian Company, and were entitled to payment of their dividends, interest, and rents out of the revenues of that company. It formed no part of the scheme of the Act of 1879 to alter the rights of these parties or to disturb their position as shareholders and creditors of the Caledonian Company; and it was therefore necessary to make some provision as to the manner in which the North British Company was to bear its fair and equal proportion of the termly payments made by the Caledonian Company in so far as these accrued after the vesting period. That section 6, sub-section 1, of the Act was, *inter alia*, designed to meet that necessity does not appear to me to admit of serious dispute. The respondents maintain that it was intended to accomplish that object and nothing more; but the appellants contend that it was thereby intended to make the North British Company not only liable for dividends and rents accruing after that company became a joint owner, but for a half year's dividend which accrued before the vesting period, whilst the appellants' company had the sole property and possession of the railways falling within the vesting clause of the Act.

Section 6, sub-section 1, enacts that "from and after the vesting period the company" (that is, the North British Company) "shall pay to the Caledonian Railway Company half-yearly on the 1st day of March and 1st day of September in each year a sum equal to one-half of the aggregate of the following half-yearly payments for which the Caledonian Company are now liable;" and then follows a specification of the several dividends, interest, and rent already mentioned—the sum payable in the case of the Dundee and Arbroath Railway, being a proportion of the total amount of rent and commuted profits corresponding to the portion of that railway by the Act transferred to the two companies.

The words of the statute which I have just quoted do not appear to me to fix conclusively that the respondents are to pay to the appellants on the 1st of March 1880, one month after the vesting period, half-yearly dividends which had accrued before that period, and which were payable in respect of the property and use of the Caledonian Company alone. At the time when the Act received the royal assent the dividend paid by the Caledonian Company in September or October 1879 had not yet accrued, and therefore the expression "half-yearly payments for which the Caledonian Railway Company are now liable" must refer to dividends to accrue at some future time, and not necessarily to dividends accruing before the vesting period; and the words "half-yearly on

the 1st day of March and 1st day of September in each year" do not, in my opinion, necessarily imply that full payments shall be made at both of these terms in the first year subsequent to the vesting period. They would be equally appropriate as designating the terms of payment throughout the course of years which was to follow the vesting period if it had been expressly enacted in another clause that the North British Company was not to be liable except for one-half of the dividends, rents, and interest accruing after the vesting period. In that case they would aptly express the rule that one-half of such of the yearly dividends which had accrued after the vesting period and previously to one or other of those terms should be paid at such term by the North British Company. And they must, in my opinion, receive that interpretation if it be a matter of fair implication from the other enactments of the statute that the North British Company was merely to bear its just share as joint owner of dividends accruing after vesting, and was not to pay by way of premium to the Caledonian Company half of a six months' dividend which accrued whilst that company had still the sole and exclusive possession of the joint railways.

The controversy between the parties appears to me to turn upon this—whether the words "the following half-yearly payments," &c., are to be held as referring to payments "accruing" after the vesting period, or to payments which have accrued before but are not exigible until after that period. I prefer the first of these alternatives, because section 6, sub-section 1, was necessary in order to give effect to that which the Act did certainly contemplate, viz, that after the railways became joint property the North British Company should bear an equal share of the termly payments falling to be made to the original owners and creditors of the railways held by them and the Caledonian Company as a condition of their joint occupancy and use of these railways, and because I cannot discern within the four corners of the Act any indication of an intention to give the appellants a premium in the shape of a moiety of sums which they were bound to pay for their own use of the joint railways.

I therefore agree with your Lordships in thinking that the judgment appealed against ought to be affirmed.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

GRAHAMES, WARDLAW, & CURREY, Westminster—HOPE, MANN, & KIRK, W.S.—
W. A. LOCH, Westminster—ADAM JOHNSTONE, Solicitor.

JOHN MACKAY (Defender), Appellant.—*Sol.-Gen. Sir F. Herschell—
R. Johnstone.*

DICK & STEVENSON (Pursuers), Respondents.—*E. E. Kay, Q.C.—
Webster, Q.C.*

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Sale—Condition precedent—Implement rendered impossible by vendee.—Where in a contract of sale there is a condition precedent, which the vendor has been prevented from fulfilling through the fault of the vendee, the condition is held to have been satisfied.

A contract to furnish B with a steam navvy of novel construction, which B was to accept if on trial it fulfilled the condition of excavating 350 cubic yards per day of ten hours "on a properly opened up face" at the C railway cutting. The C cutting was not opened for several months after the expected time, and the machine was in the meanwhile tried at another cutting, where it broke down. It was altered, repaired, and strengthened, and removed to the C cutting where it was again tried, but not on a face properly opened up, and

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again broke down, and B refused to give it any farther trial. *Held* (*aff. judgment of First Division*) that B having failed to give a proper opportunity for the stipulated test A was entitled to decree against him for the price of the machine.

Appeal—Competency—Cause originating in Sheriff Court—Findings of fact—Judicature Act, 1825 (6 Geo. IV., c. 120), sec. 40.—In appeals falling within the scope of the 40th section of the Judicature Act, 1825, the House of Lords has no concern with the proof led in the Sheriff Court. Where it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but the omission can only be shewn by reference to the judgment and record and not to the proof. The House of Lords will not remit on matters of fact which are not plainly set forth on record.

Ld. Chancellor
(Selborne).
Lord Black-
burn.
Lord Watson.

(In the Court of Session, May 21, 1880, *ante*, vol. vii., p. 778.)

The defender appealed.

The interlocutor appealed against was as follows:—"Recall the interlocutor of the Sheriff of date 2d December 1879: (1) Find that the pursuers undertook to supply and the defender undertook to purchase and pay £1115 for a steam-digging machine, in terms of the letters dated respectively 21st and 22d September 1876: (2) Find that it was a condition of the said contract that the defender should not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of the clay or other soft substance within a day of ten hours in a certain railway cutting which the defender was to make, called the Carfin cutting, after it was fairly tried on a properly opened up face: (3) Find that it was impossible that the machine should have the stipulated fair trial unless the defender provided a properly opened up face at the said Carfin cutting: (4) Find that the defender failed to provide such properly opened up face, notwithstanding repeated demands on the part of the pursuers, and thus prevented the machine from being tested in the manner provided by the contract: (5) Find that the defender has failed to prove that the pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine: Therefore repel the defences, and decern against the defender to pay to the pursuers the sum of £1115, with the interest prayed for, in terms of the petition: (6) Find the pursuers entitled to expenses in both Courts, but subject to deduction of the expense of the conjunct probation, which was incompetent, and ought not to have been admitted, and remit to the Auditor to tax the account or accounts of said expenses, and to report."

A petition was lodged by the respondents against the competency of the appeal, in respect that the case was one which had commenced and in which the proof had been led in the Sheriff Court, and that the findings of the First Division appealed against being findings of fact and not of law the appeal was excluded by the Judicature Act, 1825, section 40.*

* Which enacted that where in causes commencing in any of the inferior Courts "matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutors the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment in the cause then pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

This petition was, however, abandoned at the bar by the respondents on the ground that they could not maintain that the findings were of fact only and did not involve any question of law. No. 4.
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The appellant contended that even if it were taken as an incontestible fact on the findings of the Court below, that a properly opened up face had not been afforded by him at Carfin for the trial of the machine in September 1877, he was not then bound to give one. Having regard to the trial at Gariongill in the earlier part of the year under favourable circumstances, and to the total break down of the machine there, and to its again breaking down a day or two after it was set to work at Carfin, he was entitled to take the position that the machine was so manifestly defective that he was not bound to waste more time and expense in preparing a face to give it the stipulated trial. The evidence led proved without farther testing that the machine could not conform to the contract. Farther there was not and could not be, consistently with the evidence, any finding that the machine was conform to contract, which was essential to the respondents' success. On these grounds he asked that the case should be remitted to the Court below to pronounce findings on these matters of fact.

The respondents maintained that the appellant had not raised on record the issue that he was relieved from complying with the stipulation that he should afford a properly opened up face at Carfin to test the machine, in consequence of its insufficiency having been conclusively demonstrated by previous trials, and that he was therefore not entitled to have the remit which he craved. On the case, so far as it was competently before the House, the appellant had failed to shew that the legal conclusion drawn from the facts by the Court below was wrong, or that any fact material to the legal result remained undisposed of. 2

At delivering judgment,=

LORD BLACKBURN.—My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session, pronounced in reviewing the judgment of the Sheriff Court of Lanarkshire, proceeding on proof taken on a record made up in the Sheriff Court.

The Court of Session, in reviewing the judgment, had full power to find the facts on the proof, and to determine the law also. But the Legislature have, by the Judicature Act of Scotland, 6 Geo. IV. c. 120, sec. 40, provided that "When in causes commenced in any of the Courts of the Sheriffs, . . . or other Courts, matters of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutor the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

¹ Fleming v. Orr, April 3, 1855, 18 D., H. of L., 21, 2 Macq. 14, 27 Scot. Jur. 364; Duncan v. Scott, June 20, 1876, ante, vol. iii., H. of L., at p. 73; Steel & Craig v. State Line Steamship Company, July 20, 1877, ante, vol. iv., H. of L., p. 103, L. R. 3 App. Ca. 72.

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The old rules of pleading in force in England at that time were founded on the strictest logic, often carried to an extreme which, when the pleadings were not managed by very skilful hands, worked injustice, but always founded on a principle. And those which regulated special verdicts, to which the Legislature here refers, were no exception. They are very accurately and fully stated by Chief Baron Comyns in his Digest, title Pleader. The following, I think, bear on the question what the Legislature intended :—"The jury may find by their verdict all things given in evidence, if it be not contrary to the evidence or the admission of the parties"—Sec. 4. "They cannot find a matter contrary to the record, and if they do, the verdict is void as to that"—Sec. 16. "So the jury ought not to inquire of a thing which is agreed by the parties to the issue"—Sec. 17. "So the jury cannot find matter out of the issue, . . . though the matter out of the issue destroy the plaintiff's title"—Sec. 18.

The reason of this last rule, which at first glance may seem harsh, is that the defendant ought to have obtained in proper time leave to amend his pleadings, and not to rely on getting the jury to find on the evidence something never alleged by him, and which the plaintiff was not called upon to be prepared to contest.

Whether we take these rules of English pleading as our guide, or the rules of sense and logic on which they are founded, it seems to me clear that the Court of Session need not in their interlocutor notice anything on which the parties are agreed. It may be convenient to do so in order to make the other findings clear, but it cannot be necessary. And they ought not to find anything, even if destructive of the plaintiff's title, if it is not included in the issues joined; if it is necessary for the purposes of justice they may, I suppose, allow an amendment, and remit the amended issue to the Court below for further proof, or dispose of it on the proof already given, as justice may require; but they ought not to find it in their interlocutor, on the record as it stands; and no complaint can be made in this House against them for not doing what they ought not to have done. This view of the statute of Geo. 4 renders it important to see what the record or issue is.

I have had the advantage of perusing the opinion of my noble and learned friend who is to follow me (Lord Watson), and as I agree entirely in all he says on this subject, I shall not repeat it.

The interlocutor finds that the contract was in terms of the two letters, 21st and 22d September 1876. It is a question of law what the effect of those letters was. I do not feel much doubt about that. The pursuers were to supply a machine capable of digging and filling into waggons at least 350 cubic yards of clay in a day. It was to be brought to the defender's cutting at Carfin, erected, and tested before February 1877. Both agreed that the event of the testing was to be conclusive. If the machine did not answer the test the pursuers were to remove it before the end of February; if it did answer the test the defender was to keep it and pay the agreed price.

I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances. In a very early case in England, in the Year Book of 9th Edward IV., Easter Term, 4 A,

where the defendant was sued on an obligation, the condition of which was No. 4.
 that, if the great bell of Mildenhall should be brought, at the cost of the men
 of Mildenhall, to the house of the defendant in Norwich, and there weighed Mar. 7, 1881.
 and put in the fire in the presence of the men of Mildenhall, and the defendant Mackay v.
 made a tenor of it to agree with the other bells of Mildenhall, the obligation Dick & Ste-
 should be void, Choke, then Chief Justice, and Littleton and Moile, then venson.
 Judges, held that a plea by the defendant that the bell was not weighed nor
 put in the fire was bad, for the defendant, being a brazier, it was his part to
 weigh it and put it in the fire; Needham, who was the fourth Judge, thought
 that the weighing of the bell required no particular skill, and might as well
 have been done by the men of Mildenhall or those they employed as by the de-
 fendant. But he said that the putting it into the fire was the part of the
 artificer. And as I understand it, for the rest of the report is not very clear, a
 further point was mooted, and the Serjeants agreed that if the defendant had
 put the bell in the fire without seeing it weighed, he would have waived that
 which was but an incident, and been as much bound to fulfil that which was the
 substance of the contract, viz., to make a proper tenor, as if he had had it
 weighed. I mention this old case, decided in 1469, because it is on it that the
 different digests laying down the principle are all founded, and because I think
 it is obvious good sense and justice. Now, applying this principle to the pre-
 sent case, both agree that the machine shall be tested at Carfin, and therefore
 the pursuers agreed that they would bring the machine to the Carfin cutting,
 and there erect it on the defender's land, and there do their part in working it
 till there had been a fair test; and the defender agreed that he would do his
 part; and even if there had been no express mention in the letters of a properly
 prepared face, the nature of the thing shews that he agreed to let the pursuers
 have access to a part of the cutting, put by the defender in such a condition that
 the machine could be fairly tested by working at it, and to assist in working it
 there until there had been a fair test. If, then, the averments on the record had
 been that, before the end of March 1877, the machine had been brought to
 Carfin cutting and there delivered to the defender, who required the pursuers to
 remove it, and it was still in his possession there, I think there could be no
 doubt that the four first findings in the interlocutor put a proper construction
 on the contract, which, being a matter of law, your Lordships are entitled to
 inquire into, and that, if they find the facts truly, into which your Lordships
 have no right to inquire, it would follow in point of law that the defender,
 having had the machine delivered to him, was by his contract to keep it, unless
 on a fair test according to the contract it failed to do the stipulated quantity of
 work, in which case he would be entitled to call on the pursuers to remove it.
 And if by his own default he can now never be in a position to call upon the pur-
 suers to take back the machine, on the ground that the test had not been satis-
 fied, he must, as far as regards that, keep, and consequently pay for it.

But the time when the machine was brought to Carfin and the defender
 refused a further trial was long after February 1877—it was in September and
 October 1878. Unless both parties had agreed to enlarge the time, the original
 bargain would have come to an end by efflux of time in 1877.

But it is agreed on the record that the time was enlarged, and the bargain in
 all other respects still in force at least as late as July 1877, and the Court of
 Session was not called upon to repeat in the interlocutor what was agreed on
 the record by both parties. There is a controversy on the record as to the terms

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on which the time was enlarged ; and the question raised on that, which is a question of fact, is disposed of by the last finding in the interlocutor, into the accuracy of which, it being a finding of fact, your Lordships are not entitled to inquire.

It was, however, argued at your Lordships' bar that there was another ground of defence appearing on the evidence. I think I state fairly, and as favourably to the defender as I can, the argument thus :—

It was said that the repeated failures of the machine between July 1877 and October 1878, though, not being on the stipulated place and in the stipulated manner, they were not the test, nevertheless, coupled with the other evidence, shewed that the machine was not such as could possibly in substance satisfy the contract ; and that therefore the defender was justified, or at least excused, in refusing to incur further expense and trouble in putting in force a test which could not possibly turn out favourably to the pursuers, and that he was entitled to throw the machine back on the pursuers' hands, not on account of the terms of the bargain, but on the general ground that a purchaser is entitled to return a thing which has been delivered to him in fulfilment of a contract, and to demand back the price if paid, or refuse payment if not yet paid, if the thing delivered is not in substance the thing contracted for, on the principle of the civil law expressed in the Digest, lib. 18, title 4 : "*Si æs pro auro veneat non valet.*"

I do not think it desirable to express an opinion on a point which it is not necessary now to discuss. I will, therefore, only say that the view I took of the law on this point in 1867 is expressed in a judgment of the Queen's Bench, which I delivered in *Kennedy v. Panama Mail Company*.¹ The other Judges of that Court adopted that exposition of the law, and I have not yet seen any reason to change my opinion. But I agree that if such a defence had been raised on the record in this case, the Court of Session ought, in their interlocutor, to have found how much, if any, of the allegations were proved in fact. It is because, having carefully read the record, and having had the advantage of reading my noble and learned friend (Lord Watson's) observations on the record, that I am clearly of opinion that no such defence was raised on the record, and that I think the Court of Session were not bound in their interlocutor to deal with it, even if it was made on the argument before them, which I think it was not.

I am therefore of opinion that the appeal should be dismissed, with costs.

LORD WATSON.—My Lords, this appeal is brought against a judgment of the First Division of the Court of Session, by which the appellant, John Mackay, railway contractor, Wishaw, has been decerned to make payment to the respondents, who are a firm of engineers in Airdrie, of the sum of £1115 sterling, being the price of a patent steam-excavating machine, manufactured and supplied by them to the appellant, as in implement of a written contract of sale entered into between the parties in the month of September 1876.

The action was raised and a proof was allowed and taken in the Sheriff Court ; and it became the duty of the Court of Session, in reviewing the judgments of the Sheriffs proceeding on that proof, to specify in their interlocutor, as required by sec. 40 of the Scotch Judicature Act (6 Geo. IV., c. 120), the

¹ Law Rep. 2 Q. B. 580, at p. 586.

several facts material to the case which they found to be established by the proof, and to express how far their judgment proceeded on the matter of fact so found, or on matter of law, and the several points of law which they meant to decide.

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The specific findings upon which the decerniture against the appellant is rested in the judgment under appeal are as follows:—(Reads the interlocutor of the Court below.)¹

In so far as these findings consist of matters of fact, the review of this House is excluded by the clause of the Judicature Act already referred to.²

The first two findings relate exclusively to the constitution and construction of the written contract upon which the action is laid, and are, therefore, matters of law. No appeal has been taken against these findings, and the appellant must be held to admit that they are sound. But the appellant is not thereby precluded from founding upon other conditions of the contract, or upon other views of the contract, so long as these do not involve the negation of what is affirmed by the findings in question.

In my opinion the third and fourth findings involve law as well as fact, in so far as they assume or imply that the appellant was, by the conditions of the contract, bound to provide the “properly opened up face” on which the machine was to be tried. So far as it is thereby found that, of the two contracting parties, the appellant alone had it in his power to provide a properly opened up face in the Carlin cutting, and that the appellant did not provide such face, notwithstanding repeated demands on the part of the respondents, nothing appears to me to be involved except matter of fact.

The fifth finding appears to me to be one of fact only.

The appellant challenges the interlocutor under appeal upon two grounds. First of all, he maintains that, in respect there is no finding to the effect that the digging machine was conform to contract, the facts as found are insufficient to sustain a decree for the contract price. Alternatively he asserts that there were important issues of fact raised by him in the Court below, to which his proof was directed, but which the Court has not disposed of; and he contends that, assuming the facts already found to warrant the decree appealed against, he will, upon these issues being decided in his favour, be entitled to decree of absolvitor. And it was contended that the House ought, with a view to the final disposal of the case, to remit to the First Division of the Court to pronounce findings upon these matters of fact.

In order to a due understanding of the interlocutor under appeal, and of the appellant's contention, it is necessary to refer to the closed record, which is the issue to which the proof of the parties was directed, and to which the findings of the Court apply.

The respondents, in their condescendence (articles 1 and 2), set forth the two letters of the 21st and 22d of September 1876, which have been held to constitute the contract. The first in date bears to be a confirmation by the respondents of a verbal arrangement between one of their partners and the appellant. The letter of the 22d of September, which is a confirmation by the appellant of that of the preceding day, recapitulates the terms of the agreement in language somewhat different, but having, for all practical purposes, the same meaning.

¹ *Ante*, p. 38.

² *Ante*, p. 38, note.

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The parties are agreed upon the record as to the following facts :—(1) That the machine was not ready, and was not sent to Carfin cutting before or during February 1877 ; (2) that it was afterwards sent to Gariongill cutting, and remained there from July 1877 till May 1878 ; and (3) that thereafter, certain repairs and alterations having been made upon it, the machine was sent to Carfin cutting about the middle of the month of September 1878, where it still remained at the time the action was raised. They are also agreed that from July 1877 to August 1878 the appellant was unable to proceed with his work at the Carfin cutting owing to a change of the plans of the railway company.

The parties join issue, however, upon the points following :—(1) The appellant alleges, but the respondents deny, that he was in a position to give a proper working face for testing the machine at Carfin cutting in February 1877 ; (2) the respondents state that the machine was sent to and kept at Gariongill cutting merely for the purpose of experiment with a view to its being improved and strengthened before it was tested at Carfin, whereas the appellant avers (Ans. to Cond. 5) that the parties “agreed that the machine instead of being tested at the Carfin cutting should be tried at the Gariongill cutting.”

The respondents (Cond. 7) aver in substance that the machine was sent to Carfin in order to its being subjected to the contract test,—that a proper working face was not provided by the appellant whilst the machine was at work there,—that the machine could not in consequence be fairly tried, and that “the machine was fit for the contemplated work.” The appellant (Ans. Cond. 7) admits that, “on request of the respondents,” he “permitted them to make a further trial of the machine ; a suitable face then was ready for trial on 3d August 1878. In consenting to a further trial at Carfin, the defender informed the pursuers that, if the machine again broke down it would have to be removed, so as not to interfere with the progress of the cutting, which had to be proceeded with with the utmost dispatch.” The appellant meets the respondents’ allegations as to his failure to provide a suitable working face, and the fitness of the machine, with a direct negative, thereby asserting that he did provide a proper face whilst the machine was working at Carfin, and that the machine was not capable of performing the amount of work required by the conditions of the contract.

The 8th article of the condescendence for the respondents is in these terms :—“The defender (appellant) called on the pursuers (respondents) to remove the machine from Carfin, as he alleged it had not excavated and filled the stipulated quantity. The pursuers refused to do so, and the machine is still at Carfin. The machine was delivered to the defender at Carfin, and is still in his possession there.” The appellant’s answer is, “Admitted.”

The foregoing answer appears to me necessarily to imply an admission on the part of the appellant that the machine was delivered to him at Carfin cutting by the respondents as in implement of the contract, and that he rejected it because of its incapacity to perform the amount of work stipulated in the contract. And that must be read in connection with his previous assertion that the “further trial” at Carfin was made on a proper face. Taking all his averments together, they appear to me to disclose no ground of defence to the action, except one, that the machine was disconform to contract, as was evidenced by the fact that it had been subjected to the contract test by working at a suitable face, and had failed to perform the stipulated amount of work. And it is a notable circumstance that, neither in the opinion of Lord Shand, who carefully

states the respective contentions of the parties, nor in the judgment delivered by Lord Mure, is there to be found the least indication of any other controversy having been raised before the Court of Session by the appellant.

This view of the appellant's record is borne out by his pleas in law. The only pleas which indicate any substantive defence to the respondents' claim for the contract price are these:—"2. The machine having failed on trial, the defender is not bound to accept it. 3. The sale of the machine having been conditional on the trial, which has failed, the defender is not liable in the price thereof."

Such being the shape of the record or issue to which the findings of the Court of Session are applicable, I am of opinion that the findings in the interlocutor appealed against are in themselves sufficient to entitle the respondents to decree for the price of the machine. The terms of the contract seem to me to imply very plainly that it was incumbent on the appellant, and not upon the respondents, to provide "a properly opened up face" for the trial of the machine. Then the Court negatives the existence of the agreement alleged by the appellant, to substitute Gariongill for Carfin cutting as the place of trial; and find in substance that the appellant failed to provide a proper face at Carfin cutting, "notwithstanding repeated demands" on the parts of the respondents. The respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord Shand from Bell's Principles (section 50) to the effect that, "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor has done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement," expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of Scotland, and I think it ought to be applied to the present case.

It was argued for the appellant that the condition was only intended to operate in his favour, and that he might therefore dispense with it and defend himself upon the ground that the machine was, in point of fact, disconform to contract. But I cannot regard the stipulation in that light; it was so obviously for the interest of the manufacturers of this new patent machine to have the question, whether it was or was not conform to contract, determined by reference to a simple and definite test, instead of being left to the uncertainty of speculative opinion, aggravated by the risk of litigation.

I now proceed to consider whether, before disposing of this case, any remit should be made to the Court below.

As I understood the appellant's argument, he desired to have an opportunity of asking findings from the Court of Session to the effect that (1) the machine was disconform to contract; and (2) that the trials of the machine, though not to be regarded as equivalent to the test provided by the contract, made its disconformity to contract apparent to all concerned. Various other points were suggested for remit, but these appeared to me to be mere after-thoughts, and being unable to find any trace of their having been made grounds of defence in

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the record, I take no further notice of them. In the case lodged for the appellant, his pleadings upon the facts, which include a great deal of unnecessary observation upon the proof led in the cause, are thus summed up (Case, p. 36):—
 “The only fact found by the interlocutor is that the appellant failed to provide a properly opened up face-at the Carfin cutting. It is submitted that this finding does not, in point of law, warrant the finding that the appellant is liable to pay the sum of £1115 and expenses. It is consistent with the facts found that the machine was not in fact according to contract, and that such trials as there had been afforded ample evidence of this. If this be so, it is submitted that the appellant would not be liable to pay for the machine, and it is contended that the evidence establishes these facts, or at all events, that the machine did not comply with the contract.”

In the view which I have taken of the judgment under appeal, any general allegation by the appellant, to the effect that the machine was not conform to contract, is irrelevant, because, according to that view, the machine must be held to have satisfied the contract test, which was not applied owing to the default of the appellant.

As to his other allegation, that “such trials as there had been” made it clear that the machine was disconform to contract, I doubt whether it is to be found on the record, and, even if it be, I have no doubt of its irrelevancy. No such statement would, in my opinion, afford a relevant answer to the case disclosed by the interlocutor under appeal, unless it amounted to this, that the machine was so disconform to the specification, or so palpably deficient in working power, that the respondents were not in *bona fide* to tender it to the appellant as in implement of the contract. I need only add that I have not heard it suggested in argument that any such case has been made by the appellant on record or elsewhere.

In appeals falling within the scope of the 40th section of the Judicature Act, 1825, I humbly conceive that this House has no concern with the proof which has been led in the Sheriff Court. When it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but that can only be shewn by a reference to the record, and not to the proof. It would, in my opinion, be productive of great inconvenience if the House were to make remits upon matters of fact which are not very plainly set forth upon record, as substantive grounds either of pursuit or of defence.

I am accordingly of opinion that the application for a remit which has been made by the appellant’s counsel ought not to be entertained, and that the judgment under appeal must be affirmed, with costs, and the appeal dismissed.

LORD CHANCELLOR.—My Lords, having had an opportunity of reading in print the judgments which have now been delivered by my two noble and learned friends, and agreeing with them, I think it unnecessary to add anything further.

INTERLOCUTORS appealed from affirmed; and appeal dismissed with costs.

WILLIAM ROBERTSON, London—J. SMITH CLARK, S.S.C.—SIMSON & WAKEFORD, London—FINLAY & WILSON, S.S.C.

THE RIGHT HONOURABLE CHARLES LORD BLANTYRE AND THE MASTER OF
BLANTYRE (Complainers), Appellants.—*Sol.-Gen. Sir F. Herschell—*
R. T. Reid.

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THE CLYDE NAVIGATION TRUSTEES (Respondents), Respondents.—
Benjamin, Q.C.—Asher.

*Navigable River—Foreshore—Clyde Navigation Consolidation Act, 1858 (21 and 22 Vict., c. cxlix.), secs. 76 and 84—Right of Clyde Trustees to dredge the foreshore without consent of proprietor.—Held (aff. judgment of First Division) that notwithstanding the general repeal of the previous Clyde Navigation Acts by section 3 of the Consolidation Act of 1858, the terms of section 76, read in connection with those of section 84, were sufficient to re-enact the powers of the trustees under the repealed Acts, *inter alia*, to dredge the river over a certain area till a depth of seventeen feet at neap tides was obtained at every part thereof, and that a riparian proprietor was not entitled to interdict the trustees dredging a portion of the foreshore within the said area, which had by a judgment of the House of Lords¹ been held to belong to him, subject to any right which the public might have over the same, “and subject also to any rights conferred upon the trustees of the Clyde Navigation by their Acts of Parliament.”*

(In the Court of Session, March 5, 1880, *ante*, vol. vii. p. 659.)

The complainers appealed.

At delivering judgment,—

Ld. Chancellor
(Selborne).
Lord Cairns.
Ld. Penzance.
Lord Black-
burn.

LORD CHANCELLOR.—My Lords, the question in this case arises upon the construction of an Act “To consolidate and amend the Acts relating to the River Clyde and Harbour of Glasgow,” passed in 1858, by which a series of earlier statutes, as to the same river and harbour, was repealed. The original Act, passed in 1758, as explained and amended in 1770, empowered the predecessors in title of the respondents to “cleanse, scour, deepen, and enlarge, or straighten and confine the said river and channel thereof, or any part or parts of the same” (within certain defined limits), “and to dig and cut the soil, ground, or banks of the said river, and soil, sand, and gravel in the bed thereof.” These operations were to be carried on until the river and harbour should, throughout its course within the prescribed limits, have attained a minimum depth, which was from time to time increased, till in 1840 it was fixed at seventeen feet at neap tides. No consent of any proprietor, who might be entitled to any estate or interest in any part of the bed or foreshore of the river which might be affected by them, was required for the exercise of these powers. In 1825 the same authorities were enabled (in enlargement of their former powers, and still without requiring any consent), to “dredge, cleanse, and scour by machinery worked by the power of steam, or otherwise, the said river and bed or channel thereof; to remove all sand banks or shoals which might obstruct the navigation, and to erect and construct . . . such new works as should seem to them proper and expedient for directing the stream of the river, for removing obstructions to the course of the tide, for bringing up a greater quantity of tide water, and for making, continuing, maintaining, and securing the navigable channel of the said river at least of (the prescribed) depth, and of as great width as might be found expedient for enabling vessels resorting to the harbour of Glasgow to pass each other with safety and facility.”

From the beginning power was given to make locks, dams, weirs, jetties,

¹ June 19, 1879, *ante*, vol. vi. p. 72, L. R., 4 App. Cas. 770.

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again broke down, and B refused to give it any farther trial. *Held* (aff. judgment of First Division) that B having failed to give a proper opportunity for the stipulated test A was entitled to decree against him for the price of the machine.

Appeal—Competency—Cause originating in Sheriff Court—Findings of fact—Judicature Act, 1825 (6 Geo. IV., c. 120), sec. 40.—In appeals falling within the scope of the 40th section of the Judicature Act, 1825, the House of Lords has no concern with the proof led in the Sheriff Court. Where it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but the omission can only be shewn by reference to the judgment and record and not to the proof. The House of Lords will not remit on matters of fact which are not plainly set forth on record.

Ld. Chancellor
(Selborne).
Lord Black-
burn.
Lord Watson.

(In the Court of Session, May 21, 1880, *ante*, vol. vii., p. 778.)

The defender appealed.

The interlocutor appealed against was as follows:—"Recall the interlocutor of the Sheriff of date 2d December 1879: (1) Find that the pursuers undertook to supply and the defender undertook to purchase and pay £1115 for a steam-digging machine, in terms of the letters dated respectively 21st and 22d September 1876: (2) Find that it was a condition of the said contract that the defender should not be bound to accept and pay for the said machine if it should fall short of digging and filling into waggons 350 cubic yards of the clay or other soft substance within a day of ten hours in a certain railway cutting which the defender was to make, called the Carfin cutting, after it was fairly tried on a properly opened up face: (3) Find that it was impossible that the machine should have the stipulated fair trial unless the defender provided a properly opened up face at the said Carfin cutting: (4) Find that the defender failed to provide such properly opened up face, notwithstanding repeated demands on the part of the pursuers, and thus prevented the machine from being tested in the manner provided by the contract: (5) Find that the defender has failed to prove that the pursuers agreed to substitute for the Carfin cutting any other cutting as the place for the trial of the said machine: Therefore repel the defences, and decern against the defender to pay to the pursuers the sum of £1115, with the interest prayed for, in terms of the petition: (6) Find the pursuers entitled to expenses in both Courts, but subject to deduction of the expense of the conjunct probation, which was incompetent, and ought not to have been admitted, and remit to the Auditor to tax the account or accounts of said expenses, and to report."

A petition was lodged by the respondents against the competency of the appeal, in respect that the case was one which had commenced and in which the proof had been led in the Sheriff Court, and that the findings of the First Division appealed against being findings of fact and not of law the appeal was excluded by the Judicature Act, 1825, section 40.*

* Which enacted that where in causes commencing in any of the inferior Courts "matter of fact shall be disputed, and a proof shall be allowed and taken according to the present practice, the Court of Session shall, in reviewing the judgment proceeding on such proof, distinctly specify in their interlocutors the several facts material to the case which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment in the cause then pronounced shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor."

deepening, straightening, enlarging, widening, or confining, dredging, scouring, improving, and cleansing the river and harbour, until a depth of at least seven-
 teen feet at neap tides has been attained in every part thereof; the altering, directing, or making the channel of the river through any land, soil, or ground, part of the present or former course or bed of the river;” and other things, which it is not necessary to enumerate in detail, but which include the erection of jetties, banks, walls, &c., and the construction and completion of the wet docks, tidal basin, and other works, shewn and described in the plans and sections referred to in the repealed Acts of 1840 and 1857, and thereby authorised to be made and maintained.

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 missioners.

This is undoubtedly a singular and very inartificial manner of re-enacting, by way of consolidation, the powers contained in and conferred by the repealed Acts; but the preamble shews that it was the intention of the Legislature (subject to such amendments as were thought requisite) to do so, and it is not otherwise done. The words “in terms of the recited Acts” cannot, indeed, amount to a re-enactment of all that had been repealed; but they do refer to, and by reference incorporate, so much of the repealed Acts as, when examined, is found to describe and define the powers and authorities meant to be transferred to and vested in the respondents as part of the undertaking. Some of these, and particularly the powers of “deepening, straightening, enlarging, widening, confining, dredging, scouring, improving, and cleansing the river,” until the prescribed depth should have been attained in every part thereof, and the “altering, directing, or making the channel of the river through any land, soil, or ground,” being part of its “bed or course,” were, by the earlier Acts, conferred upon the predecessors of the respondents, without contemplating or providing for the purchase or taking of any land; while others (those relating, *e.g.*, to the construction of docks, &c.) were conferred by later Acts, in the manner usual when lands must be acquired, either compulsorily or by agreement. The effect of these words of reference is (in my opinion) that both these classes of powers were continued to the respondents, as if they had been given anew “in terms” of the repealed Acts. It follows that the respondents have now the former class of powers (being those of which alone the exercise is in question on this appeal) as the former trustees had them, *i.e.*, without limit of time, and without need of any purchase or taking of land as the condition of their exercise.

I am confirmed in this conclusion by the 84th section, which repeats, in the very terms of the corresponding clause in the Act of 1840, the special protection given by the 45th section of that Act to the appellants’ Erskine estate, and also to certain lands of other proprietors; ending, however, with the following qualification of that protection, by way of proviso:—“Provided that it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof, within the said limits, by machines worked by the power of steam or other machinery, to the extent authorised by the said recited Acts and this Act.” I do not see how the present appeal could be determined in the appellants’ favour without contradicting this proviso.

It was contended (as I understood the argument) for the appellant that all these powers were, indeed, granted by the Act of 1858 to the respondents, but only in this way, that the respondents must (if they could) acquire the land, which (by reason of their dredging, deepening, or widening operations) would cease to be foreshore, from the appellant and any other owners of the foreshore, under the provisions for taking land by agreement contained in the Lands

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Clauses Act, incorporated with the Act of 1858 by section 4. Such a power, however, would be dependent entirely on the consents of the appellant and the other foreshore proprietors, which they could not be compelled to give. The proviso at the end of the 84th section must, from the antecedent context, necessarily mean that these particular operations might be carried on in the bed or channel of the river adjoining the Erskine estate without the appellant's consent. The compulsory powers of the Lands Clauses Act were not incorporated with the Act of 1858, except for certain special purposes not extending to those operations; and (even as to those special purposes) they were incorporated only for less than two years. It was not contemplated by any of the repealed Acts (as I read them) that the former trustees should "purchase" or "take" any land in the channel or bed of the river which, by reason only of their dredging, deepening, or widening operations, might be permanently covered with water, having before formed part of the foreshore at low tide; much less that they should have no power to carry on such operations at all unless they did so. What was not necessary for this purpose under the former Acts is not (in my opinion) necessary under the Act of 1858. It was insisted that, according to this view, the appellant would practically be deprived of part of his foreshore without compensation, and that this could not have been the intention of the Legislature. To that argument I am unable to accede. If the former Acts did not cover, by the provisions as to compensation contained in them, this particular kind of damage, there would be no reason to expect that the Act of 1858 would do so. If they did cover and provide for it, it may well be that the effect of the 76th section of the Act of 1858 is not to make those powers absolute and unconditional which were previously conditional upon compensation being made for damage done, but that the reference to the "terms of the recited Acts" may be sufficient to preserve the condition as well as the power. There may also, possibly, be questions as to the effect of the compensation clauses in the Harbours Clauses Act and the Commissioners Clauses Act of 1857, both which are incorporated generally with the Clyde Harbour Act of 1858.

All these questions are (as the Lord Ordinary stated) left unprejudiced by the interlocutors now under appeal. It is not necessary, nor do I think it would be convenient, for your Lordships now to determine them; because, however they might be decided, my conclusion on the particular question raised by the present appeal would still be the same. The interlocutors appealed from are, in my opinion, right, and I therefore move your Lordships that the appeal be dismissed, with costs.

EARL CAIRNS.—My Lords, I am of opinion that the Act of 1858, although it in form professed to repeal the catena of previous Acts which had been passed during a century for improving the navigation of the Clyde, yet preserved to the respondents by its re-enacting words the right to improve the navigation by doing the acts now complained of, without any obligation of obtaining the consent or purchasing the land of the appellant beforehand, whatever liability to subsequent compensation for damage it may have made or left them subject to. I have arrived at this conclusion with perhaps more difficulty than seems to have been felt by the Court below; but my grounds are, first, because the words of the enactment of 1858 referred to by the Lord Chancellor, though inartificial and inappropriate, are yet sufficient, looking to the whole scope and history of the legislation, to carry into the new Act the "terms," by which I understand

from the context the "powers," of the old Acts ; secondly, because the contention of the appellant would absolutely paralyze, and possibly destroy, the great public work which it was the object of Parliament to effect, and is not to be adopted unless no other construction is possible ; and thirdly, because the insertion of the 84th section of the Act of 1858 for the protection of the Erskine estate of the appellant would, in my opinion, be absolutely meaningless if the appellant was meant to be left in a position in which he could refuse his consent to allow any works whatever to be executed by the respondents on or over his *solum*. I agree that the appeal should be dismissed, with costs.

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LORD PENZANCE.—My Lords, the respondents in the present appeal are the trustees of the Clyde Navigation, and, as the public body invested by statute with the duty of maintaining and improving the navigation of that important river, have begun to remove, by dredging and carrying away in barges or punts, a portion of the soil on lands which it is admitted belong to the appellants, but which are situated below high-water mark at ordinary times, and which therefore form part of the river channel.

Commencing a period of upwards of a hundred years since, statutes have been passed for the improvement of the navigation of the river Clyde. I do not think it will be necessary, in the determination of this case, for your Lordships to scrutinize very narrowly the precise provisions of these statutes, with the exception, perhaps, of the Act of 1840. They have all been repealed by the last Act of 1858, under which the present trustees were constituted, and it is the proper construction of that Act which must determine your Lordships' decision in the present case. But, speaking generally, it must be observed that by these statutes powers have been conferred from time to time on the trustees of the navigation to deepen and (within the limits of high-water mark) to widen, to an extent sufficient to accommodate the shipping, the navigable channel of the river by dredging and removing the soil, without any previous consent of the persons to whom the land upon which the dredging operations might be performed belonged.

Provisions no doubt were introduced from time to time for compensation to the landowners, but their consent was in no instance rendered necessary.

And this could hardly have been otherwise. Where the growing trade of such a port as Glasgow was in question, it could hardly have been expected that the entire project of improving the navigation should have been left at the mercy of any person who happened to possess any portion of the soil under water at high tide, and who, by refusing to have any portion of that soil removed, might have practically rendered the deepening of the navigable channel impossible.

The Legislature is in the perfectly well-known habit of dealing with such a matter either by way of pecuniary compensation, or, if the land itself is required to be taken and appropriated, by compulsory purchase.

The land here in question being land which is covered with water at high tide, and thus forms part of the channel of the river, is land not available for the ordinary uses of land ; and it may well be that the Legislature thought that the injury done to it by removing part of the surface was one which might properly be met by a system of compensation.

Be that as it may, the fact is that from 1758 down to the year 1840, although every Act provided for works in the way of deepening and improving the

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channel of the river within high-water mark, and provided compensation in case of injury, no provision is to be found for requiring the consent of the land-owners, and none for the compulsory purchase of their lands.

In 1840, no doubt, a larger scheme was set on foot, and received the sanction of Parliament. Two lines were drawn, enclosing a space wider in several places than the existing channel of the river, and consequently including at some points not only land lying within high-water mark, but land above and outside it; and powers were taken by the statute of that year to extend the existing channel of the river to the limits included within these two lines. This involved the absorption, in some places, into the water channel, or the works connected therewith, of what had always been dry land, and the permanent occupation in other places of land which did not belong to the trustees. The trustees were therefore invested for a limited time with power to "take, occupy, and use" any of the land falling within the lines marked out as before mentioned, and specified in the schedule to the Act, "indemnification being always made to the owners," &c. "of such land," &c. But the statute of that year was by no means in its enactments confined to the carrying out of this new and more extensive scheme, with the powers of compulsory purchase necessary for that purpose; for we find it enacted by section 11 that the trustees "are hereby empowered not only to execute and continue the several works authorised by the recited Acts" (and all the previous Acts are recited), but also to execute the "additional works" authorised by the Act.

The effect of this statute, therefore, was, in the first place, to keep alive and give a fresh authority to the preceding Acts for deepening and widening the channel of the river, and, in the second, to authorise the execution of a new scheme for greatly extending the channel of the river, and constructing wet docks and other works in connection therewith.

I have called attention to the exact effect of this statute, because the main contention of the appellants is rested upon its provisions, inasmuch as the land now in question lies within the two lines drawn as the intended limits of the river channel, and is found among those lands which are set down in the schedule of the Act as lands which the trustees had power to purchase.

In this condition of previous legislation (passing by one or two Acts which are not material) the Act now in force, the 21 and 22 Vict. c. cxlix., was passed in 1858.

It was an Act "to consolidate and amend the Acts relating to the river Clyde and harbour of Glasgow."

The preamble recites the former Acts, and then goes on to recite the "great and continued increase of the shipping and trade of Glasgow," and that it is "necessary that, in conformity with the provisions of the recited Acts, the navigation should be further enlarged and improved, and additional accommodation afforded in the harbour," and that it is expedient that "the former Acts should be repealed, and their provisions consolidated and amended."

There can be no doubt, therefore, that the Legislature intended that the powers of the trustees should be rather enlarged than curtailed, or withdrawn, which is a consideration not without importance when your Lordships come to construe the enacting clauses by which a preamble of this character was succeeded.

The clause mainly in question is sec. 76. It is somewhat oddly framed. The mode adopted for conferring on the trustees the powers necessary for the execution of the work confided to them is by declaring that "their undertaking shall

consist of," &c., &c., and then follows an enumeration of their different powers, functions, and duties. No. 5.

Now, it is important for the purposes of the present case to observe that, quite independently of any reference to the former Acts, there is to be found among the matters of which the undertaking of the trustees is declared to consist "the deepening, straightening, enlarging, widening, or confining, dredging, scouring, improving, and cleansing the river and harbour until a depth of at least seventeen feet at neap tides has been attained in every part thereof," also "the digging or cutting the soil or banks of the river or bed thereof, and laying the same on the most convenient banks of the river," and these "works, or such and so many of them as to them shall from time to time seem expedient, they are to carry on and complete."

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In all this there is nothing said of the previous consent of the persons who may be the owners of the soil in those parts of the river in which the "dredging, &c., digging or cutting of the soil" may take place, . . . nor would the necessity for such a previous consent be consistent with any practical measure for carrying out the useful objects to which I have already alluded as declared in the preamble to be the objects for which the legislation was devised and intended.

Stopping therefore at this point, and reading this Act without reference to the question how far the former Acts, although repealed, were intended to be kept alive by virtual re-enactment, I fail to see that the trustees have exceeded the powers conferred on them.

But I am further of opinion that, according to the true reading of this Act, it was intended by the introduction into sec. 76 of the words "in terms of the recited Acts," to declare that the powers and duties, of which the "undertaking" was said to "consist," should be exercised and performed substantially in the manner, and subject to the restrictions, by the former Acts provided, and I adopt the expression of Lord Hatherley in the case cited at the bar, that the former Acts were intended to be "summarised" compendiously by the section in question.

The appellants, indeed, rely upon this view, and they use it in this way. They say the provisions of the Act of 1840 were thus kept alive, and then they say that under that Act the trustees had no power to touch their land unless they exercised the right which they possessed of purchasing the land outright. But I have already pointed out that under that Act the trustees had power, in conformity with the provisions of the former Acts, to dredge, &c., within the channel of the river, that is, within high-water mark, without purchasing the land.

In whichever way therefore the statute of 1858 is regarded, whether as an isolated enactment unconnected with the previous Acts, or as an enactment intended to summarise and consolidate the previous Acts, the acts of the trustees are, I think, justified without the appellants' consent, and the judgment appealed from ought, I think, to be affirmed.

LORD BLACKBURN.—My Lords, the river Clyde flows into the upper or eastern end of the Firth of Clyde, which is an arm of the sea. Glasgow is situated on that river, just where the tide ceases to affect it. Lord Blantyre and his predecessors are owners of the barony of Erskine on both sides of the Clyde. Erskine lies below or to the west of the river Cart, which flows into the Clyde, and is

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both above and below Dumbuck, which is about the place where, in popular language, the river may be said to end and the firth to begin. Dumbarton is lower down, and Port-Glasgow and Newark Castle on the south, and Cardross on the north side of the Firth of Clyde, are some miles farther west, and there the firth is so broad that, in popular language, the river has ended and it is part of the sea. All these places are mentioned in the different Acts relating to the river Clyde and the harbour of Glasgow, which were, by the 21 and 22 Vict. c. cxlix. (2d of August 1858), meant to be repealed, and their provisions consolidated and amended in one Act, but that Act has been drawn in so unskilful a way that I am afraid, in order to understand it, it is necessary to construe the previous Acts just as if they were still in force. In this river and the firth, into which it flows, like all places where the tide ebbs and flows, there is a line marking the boundary of that land which at ordinary low tide is covered with water, and an inner line marking the boundary of that land which at ordinary high tides is covered with water, but not at low water. Lord Blantyre was, by a declarator affirmed by this House in *Lord Advocate and the Trustees of the Clyde Navigation v. Lord Blantyre*,¹ found to be proprietor of the foreshore or portion of land between high-water mark and low-water mark *ex adverso* of his lands of Erskine, but subject always to any rights of navigation or other rights which the public may have over the same, and subject also to any rights conferred upon the trustees of the Clyde navigation by their Acts of Parliament.

Lord Blantyre applied for an interdict to prohibit the Clyde Trustees from interfering in any way with the part of the foreshore No. 131 in the book of reference referred to in 3 and 4 Vict. c. 118. The question is one of relevancy.

It appears by the statements of fact and answers that this is a part of the foreshore included in the declarator; it is several miles above or to the east of Port-Glasgow, and is above both Dumbarton and Dumbuck, and below or to the west of the Cart, and is in its present state under water for about eighteen hours out of the twenty-four. The Clyde Trustees have begun to remove part of this plot, and avow their intention to remove more of it, until they have widened the navigable channel there to the width which, in their opinion, is expedient for enabling vessels resorting to the harbour of Glasgow to pass each other with safety and facility, and until the navigable channel so widened is deepened to seventeen feet. They say that they have the legal power to do this without asking Lord Blantyre's consent. No question as to whether Lord Blantyre is entitled to compensation is raised; that will come hereafter. But one argument of the counsel for the appellant was that, on the true construction of the Acts, the trustees could not under the Acts do what they proposed to do, unless they first bought and paid for the spot, and that their power to buy without the proprietor's consent expired long ago. If this was well founded, it was an answer, but, I think, for the reasons I shall presently give, it was not well founded. The Lord President contented himself with saying that what was going on in the way of operations for deepening the river was quite within the powers reserved or conferred by sec. 76 of the Act of 1858. Lord Shand observed that the operations entirely consist in the removal of soil by dredging, and for that purpose the trustees do not propose to take property permanently or to occupy property permanently; and he says that if there were any doubts as to the effect of sec. 76 it would be entirely removed by sec. 84. I have

¹ *Ante*, vol. vi. p. 72, and L. R. 4 App. Cas. 770.

come, on looking at the matter carefully, to be entirely of the same opinion, but the ingenious arguments at your Lordships' bar convinced me that the drafting of the Act of 1858 was so very inartificial as to render it proper to inquire whether sec. 76 as framed really bore that meaning.

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The first Act of 1758, 32 Geo. III., may, I think, be passed by. It was never acted upon. By the next Act of 1770, 10 Geo. III., the Magistrates of Glasgow are empowered "from time to time, and at all times hereafter, to make and keep the said river Clyde navigable from the lower end of Dumbuck Ford to the bridge of Glasgow aforesaid, so as there may be at least seven feet water at neap tides in every part of the said river within the bounds aforesaid, for ships, vessels, barges, and lighters to come and go to and from the said city of Glasgow, and for that end to alter, direct, and make, or cause to be altered, directed, and made, the channel of the said river, through any land, soil, or ground (part of the present bed of the said river) between the lower end of Dumbuck Ford and the bridge of Glasgow aforesaid, and to make, set up, and erect on both sides of the said river such and so many jetties, banks, walls, sluices, works, and fences for making, securing, continuing, and maintaining the channel of the said river within proper bounds for the use of the said navigation as to the said magistrates and council, and their successors in office, shall seem proper and convenient, and for that purpose to cleanse, scour, deepen, and enlarge, or straighten or confine, the said river and channel thereof, or any part or parts of the same, within the limits aforesaid, and to dig or cut the soil, ground, or banks of the said river, and soil, sand, and gravel in the bed thereof, and to lay the same upon the most convenient banks of the said river, and to plant the banks on each side of the said river, within the bounds aforesaid, with willows or other shrubs for the safety or preservation of the said banks, and for preventing the same from being hurt or carried away by the said river, satisfaction being always made to the owners of the ground that shall be thereby damaged, as in manner hereinafter directed."

The Act of 1809, 49 Geo. III., after reciting that in consequence of the powers vested in the magistrates and council of the said city by the said recited Acts, the navigation of the said river has been greatly improved, and the channel deepened and cleansed, and the trade and shipping of the said river and city have of late greatly increased and are increasing, and the ships and vessels belonging and trading to and from the port of Glasgow are now become more valuable and of larger dimensions, and by continuing the works now carrying on and adopting others the said river may still be further improved, and the channel deepened and enlarged; and that it would be a great advantage to the merchants, traders, and inhabitants of the said city and of the places adjacent, to the owners and masters of vessels navigating the said river, and to the country at large, if the said river was further improved, and the bed and channel thereof further deepened and enlarged, enacts that the trustees, for the purposes of the before recited Acts, shall be empowered, not only to continue the works authorised by the said Acts, but also to carry on such new and additional works as they shall think proper, till such time as the said river is at least nine feet deep at neap tide in every part thereof, between the bridge of Glasgow and the castle of Dumbarton, for ships and vessels to navigate to and from the said city.

By the Act of 1825 the Clyde Trustees are empowered, "not only to continue the works authorised by the said Acts in the manner and way therein described, but also to carry on and execute such new and additional works as they

No. 5. shall think proper, within the high-water mark at ordinary tides, between the bridge of Glasgow nearest the Broomielaw and a straight line drawn from the harbour of Port-Glasgow on the south to the village of Cardross on the north, till such time as the said river is at least thirteen feet deep at neap tides in every part thereof, and particularly to dredge, cleanse, and scour by machines worked by the power of steam or otherwise the said river and bed or channel thereof, to remove all sand-banks or shoals which obstruct the navigation, and to erect and construct jetties, . . . and all other works authorised by the said Acts, and such other new works as shall seem to them proper and expedient for directing the stream of the river, for removing obstructions to the course of the tide, for bringing up a greater quantity of tide water, and for making, continuing, maintaining, and securing the navigable channel of the said river at least of the depth aforesaid, and of as great width as may be found expedient for enabling vessels resorting to the harbour of Glasgow to pass each other with safety and facility, reserving always to the proprietors of lands adjacent to the river all rights to soil acquired from the said river, or other rights competent to them at common law, satisfaction being always made to the owners and occupiers of the lands, fishings, harbours, roadsteads, tenements, or other heritages adjacent to or in the river or frith of Clyde which may be injured or damaged by or in consequence of the said operations, as in manner hereinafter directed : Provided also, and be it enacted, that it shall not be lawful for the said trustees, under the powers conferred by the present Act, to make or construct any jetties or other works on the south side of the said river along the estate and lands of Erskine (without the consent in writing of the proprietor for the time being of the said estate in that behalf first had and obtained), between the ferry of Erskine and a point opposite Frisky Hall ; nor shall it be lawful for the said trustees to make or construct works within the limits aforesaid under and by virtue of the said recited Acts, save and except such as shall be absolutely necessary in order to deepen the said river to nine feet at neap tides in every part thereof, in terms of the said recited Acts, and then only in the event of its being found impracticable to obtain the said depth of nine feet by dredging, scouring, and cleansing the said river or channel by machines worked by the power of steam or otherwise ; such necessity and impracticability to be determined by the opinion of two eminent civil engineers, one to be named by the said trustees, and the other by the proprietor for the time being of the said estate, and, in the event of their differing in opinion, by a third engineer to be named by these engineers ; provided always, that it shall be lawful for the said trustees to deepen the said river by dredging, scouring, and cleansing the bed or channel thereof, within the said limits, by machines worked by the power of steam or other machinery, to the extent of thirteen feet, authorised by the present Act ; reserving always to the proprietor of the said estate, in case such works shall be constructed, all claims for damages, in manner directed by the said recited Acts or by this Act."

In 1840 a wider scheme was taken up, for making wet docks and other works which would require the taking of lands ; and a plan was prepared by an engineer, marking what those works were to be, and what the navigable channel of the Clyde, both within high-water mark and above high-water mark, was intended ultimately to be. And compulsory powers for purchasing the necessary lands were given, but those powers were not to be exercised after 1848. I will read part of the Act obtained in 1840 with this object. By section 11 the trustees are empowered not only to execute and continue the several works authorised

by the said recited Acts, but also, under the provisions and restrictions herein-
after enacted, to make, &c., "the additional works upon, in, or along the river,
and in connection with the said harbour, delineated or represented on the map
or plan hereinafter mentioned." By section 44 the trustees "are empowered
to construct and carry on the several works for deepening, widening, and im-
proving the navigation of the said river and harbour mentioned in or authorised
by the said recited Acts, or delineated or described on the said map or plan,
and sections, and authorised by this Act, until the said river and harbour
throughout every part thereof shall have attained at least the depth of seventeen
feet at neap tides, for the safe and easy navigation of ships to and from the
Broomielaw or harbour of Glasgow, and the wet dock and other works hereby
authorised to be constructed." Section 45 is for the protection of the property
of Erskine belonging to Lord Blantyre, and the properties of Frisky Hall, Corse-
delf, Auchentorlie, and Dumbuck, but with this proviso, "Provided always
that it shall be lawful for the said trustees to deepen the said river, by dredging
the bed or channel thereof, within the said limits, by machines worked by the
power of steam or other machinery, to the extent hereby authorised."

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Now, pausing here, I think it clear from 1848 till further legislation the posi-
tion of the Clyde Trustees was this: They had powers from time to time to widen
and deepen the navigable channel of the Clyde between high and low-water
mark, till it had attained the depth of seventeen feet, and was "of as great a
width as might be expedient for enabling vessels resorting to the harbour of
Glasgow to pass each other with safety or facility." There was no limit as to
the time within which this power was to be exercised, and no consent on the
part of those interested in the land lying below high-water mark was required,
but satisfaction was to be made to the owners of heritages adjacent to or in the
river or firth of Clyde which might be injured or damaged by or in consequence
of the said operations. And not only were such portions of the lands of
Erskine as lay below high-water mark within this general power, but in
the clauses introduced for the protection of the Lords Blantyre and others,
provisoes were introduced expressly declaring that these powers should be exer-
cised there.

The trustees had also powers given them to purchase certain lands, including
those below high-water mark, by consent, and they had formerly powers to pur-
chase them compulsorily, but those last powers had expired in 1848. By an Act
of 1857 fresh compulsory powers to purchase some of those lands was given, but
those powers were to last only for three years.

When the Clyde Trustees went in 1858 before Parliament for a further Act,
the last thing which the Clyde Trustees could have wished was that the Legis-
lature should take away these powers which they possessed to widen and deepen
the navigable channel below high-water mark. And considering how useful
and reasonable those powers were, how much good they had done, and how no
hardship had ever been inflicted on anyone by their exercise, and reading the
preamble of the Act of 1858, which, after reciting the previous Acts, and "that
the great and continued increase of the shipping and trade of Glasgow, con-
sequent on the improvement of the said river and harbour, renders it necessary
that, in conformity with the provisions of the recited Acts, the navigation
should be further enlarged and improved, and additional accommodation afforded
in the harbour, and whereas it is also expedient that the said several Acts should
be repealed, and their provisions consolidated and amended," I think it is not

No. 5. too much to say that the last thing the Legislature could have wished to do was to take away those powers. But the Act of 1858 has been drawn with such
 Mar. 7, 1881. unlucky want of skill as really to afford plausible ground for the argument at
 Lord Blantyre your Lordships' bar, that whatever was meant, the Act as passed expresses an
 v. Clyde Navigation Com- intention to take away these powers. It is a singular instance of the haphazard
 missioners. way in which the Act has been framed, that the clearest and most explicit declaration of the intention of the Legislature to preserve those powers is contained in the proviso at the end of section 84, which is a re-enactment of the 45th section of the Act of 1840, for the protection of the properties of Erskine, the properties of Frisky Hall, Corsedelf, Auchentorlie, and Dumbuck ; "provided that it shall be lawful for the trustees to deepen the said river by dredging the bed or channel thereof within the said limits, by machines worked by the power of steam or other machinery, to the extent authorised by the recited Acts and this Act."

After repealing by section 3 the recited Acts, "subject to the provisions of this Act," and incorporating the Lands Clauses Consolidation Act of Scotland, and other general Acts, with modifications, we come in order to see what those provisions alluded to in section 3 are to section 76. As I read it, the draftsman has here lumped together eight different matters. For some the powers to take lands compulsorily would be requisite. For some those powers are not required. I will read this curious piece of draftsmanship in an abbreviated form :—"The undertaking of the trustees shall," in terms of the recited Acts "consist of the deepening, widening, or confining, dredging, improving, and cleansing the river and harbour until a depth of at least seventeen feet at neap tides has been attained in every part thereof ;" that is one object ; "the altering, directing, or making the channel of the river through any land, soil, or ground, part of the present or former course or bed of the river ;" that is a second object ; "the forming and erecting on both sides of the river of such jetties, &c., for making and maintaining the channel of the river within proper bounds as the trustees shall think necessary ;" that is a third object ; "the digging or cutting the soil or banks of the river or bed thereof, and laying the same upon the most convenient banks of the river ;" that is a fourth ; "the cleansing, scouring, and opening any other streams, brooks, or watercourses which now fall into the river, and the digging and cutting the banks of the same for improving the navigation of the river, the digging, removing, carrying away, and using such earth and other materials therein, upon, or out of the said land as the trustees shall think fit, either for improving the navigable channel of the river, or for bringing in any other streams, brooks, or watercourses to the river, or for bringing up a greater quantity of tidal water in the river ;" that is a fifth ; "the erection and maintenance of wharfs, &c., the erection, construction, and mooring of such beacons and buoys as may be necessary in the harbour and in the river ;" that is a sixth ; "the construction and completion of the several wet docks, river-dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorised to be made and maintained ;" that is a seventh ; "and the repair, maintenance, and improvement of the whole of the said works from time to time as may be found necessary or expedient, subject to the provisions of this Act and the Acts herewith incorporated, the trustees are hereby authorised and empowered to carry on and complete the whole or such and so many of the said works as to them from time to time shall seem expedient ;" that is the eighth and last object.

What is the meaning of the phrase "in terms of the said recited Acts?" It is no doubt a very extraordinary way of carrying out the announced intention of the Legislature to repeal the former Acts, and consolidate their provisions, to say that the powers of the trustees for deepening and widening the river shall be just the same as if the repealed Acts were still in force; but if it does not mean that, what does the phrase mean? I think it does mean that, and so thinking, I come to precisely the opinion much more briefly expressed by the Lord President.

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INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

GRAHAMES, WARDLAW, & CURREY, Westminster—J. & J. ROSS, W.S.—W. A. LOCH,
Westminster—WEBSTER, WILL, & RITCHIE, S.S.C.

THOMAS SCOTT and OTHERS (Pursuers), Appellants.—*Sol.-Gen. Balfour—Benjamin, Q.C.*

No. 6.

JAMES BROWN HOWARD and ANOTHER (Defenders), Respondents.—*Sol.-Gen. Sir F. Herschell—E. E. Kay, Q.C.—Rhind.*

Mar. 24, 1881.
Scott, &c. v.
Howard, &c.

Property—Privileges stipulated for in disposition of heritable subjects—Destruction of subject—Whether privileges transmitted on reconstruction of subjects—Jus quæsitum tertio—Theatre.—The site of a theatre called "The Queen's Theatre and Opera House," as well as the theatre itself, were conveyed to A B by trustees acting for certain shareholders or rentallers, subject to the real burden of a perpetual annuity of £2 to each of the rentallers and their successors or assignees. It was further stipulated that each of the rentallers "shall at all times be entitled to free admission to the audience department of the said theatre other than the present private boxes; . . . but declaring that the said right of free admission shall be personal to each shareholder or rentaller; . . . and also providing and declaring that the said A B and his foresaids shall not be entitled, without the consent of the said shareholders or rentallers, or their foresaids, to convert the said theatre and opera house to any other use and purpose; and also providing and declaring that the said theatre and opera house shall be kept open for performances during at least six months of the year."

This theatre was burned down, as was also a second theatre built on the same site. A third theatre was erected and opened. These several theatres had on various occasions changed hands, but in each case the conveyance was made subject to the burdens incumbent on the disponent under the titles of said subjects, and specially, without prejudice to the said generality, the disponent was taken bound to pay the annuity of £2 to each of the rentallers, and to "allow these parties the privilege to which they are entitled."

The rentallers enjoyed unchallenged the privilege of free admission to the theatre, as rebuilt, for fourteen years after its first destruction by fire.

In a question between the lessees of the theatre and the rentallers, held (aff. judgment of the Second Division) that the privilege of free entry conferred on the rentallers by the original disposition was confined to the theatre in existence at the date of the deed, and expired with its destruction by fire, and that the subsequent conveyances to which the rentallers were not parties were not intended to confer, and did not confer, on them any new right.

(In the Court of Session June 22, 1880, ante, vol. vii., p. 997.)

The pursuers appealed.

Earl Cairns.
Lord Blackburn.
Lord Watson.

EARL CAIRNS.—My Lords, this case lies in an extremely short compass, and for the purpose of the observations which I have to submit to your Lordships it will not be necessary for me to refer to more than two of the deeds or documents which have been commented upon in the argument.

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I will take, in the first place, the deed of 1858. If it is the case that that deed confers upon those who are called in it the rentallers, and who are represented by the appellants at your Lordships' bar, a right to have free admission into whatever theatre may from time to time stand upon the ground mentioned in that deed, then of course, inasmuch as the present theatre is standing upon that ground, the appellants are right in their contention, and do not require to refer to the other documents in the case. My Lords, that deed of 1858 is in the nature of a disposition in favour of one John Brown, who appears to have been one of a certain number of persons who had carried on for some time prior to 1858 the Queen's Theatre and Opera House in Edinburgh as an adventure, in which they were all interested, and the expenses of which they had, in some way or other, among themselves provided. They appear, for some reason, to have been anxious to change that state of things, and for the future to make John Brown the person who would be the owner of the property and who would carry on the theatre; and, accordingly, the deed is itself a conveyance to this John Brown.

Now, the consideration of the deed appears to me to be that John Brown, in place, as I understand it, of paying the purchase-money to them, undertook to pay, and in point of fact did pay, the debts owing upon the concern, and relieve his co-adventurers of those which were not actually paid by him at the time. That was one part of the consideration. In addition, the co-adventurers seem to have had two other considerations passing to them. The one was a burden upon the property of an annuity of £2 sterling to each of the rentallers, that sum, I suppose, representing in some rough way the interest upon the money which each had contributed. The other was certain conditions for free admission which were secured to them.

What passed to John Brown was the ground upon which the property stood (which, I understand, was held in feu of the governors of Heriot's Hospital), and the edifice, which is thus described:—"The edifice now called the Queen's Theatre and Opera House, and the shops and others adjoining thereto, or connected therewith, all erected on the area or piece of ground above described, and the whole furnishings and fittings of and in said whole buildings, as well heritable as moveable." We all know that the furnishings and fittings of a theatre, the moveable property, are generally of very considerable value. No doubt they represented an important item in that which was conveyed to John Brown. Then, to pass over a provision for the payment of the annuity of £2 to each rentaller, the privilege of free admission is thus described: "Providing and declaring that each of the said shareholders or rentallers, or the assignee or successor of such shareholder or rentaller, shall at all times be entitled to free admission to the audience department of said theatre, other than the present private boxes and the box presently set apart for us, the first and second parties hereto, as trustees foresaid, and which box shall continue to be set aside for the sole use of us, the said first and second parties, as trustees foresaid, and our successors." Then, further on, "in the event of a share being acquired by more than one individual, only one of such individuals shall be entitled, in virtue thereof, to free admission." Then it provides and declares that Brown shall not be entitled, without the consent of the shareholders or rentallers, "to convert the said theatre and opera house to any other use or purpose than a theatre or opera house," and also providing and declaring that "the said theatre and opera house shall be kept open for performance during at least six months in each year; and in the event of the said John Brown, or his foresaids, letting the

said theatre and opera house to the lessee or tenant for the time being of the Theatre Royal, Edinburgh, he shall take such lessee or tenant bound, so long as he continues tenant or lessee of said Theatre Royal, to give the shareholders or rentallers of the said Queen's Theatre and Opera House free admission to the said Theatre Royal." No. 6.
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Now, my Lords, every word of that is a stipulation guardedly and carefully connected with this "said Queen's Theatre and Opera House," that is to say, the edifice which then stood upon the ground called by that name. It appears to me that, stopping there, there is nothing in any one of those sentences which would enable you to say that if, without any act done by Brown himself, something has happened which causes that edifice entirely to disappear and no longer to be in existence, there is an engagement on the part of Brown to give this right of free admission to a wholly different building. Supposing it had been the case that, under the last sentence I read, in place of continuing to occupy it himself, he had let the building to a tenant, and the building had disappeared, so long as that building was there he was bound to make the tenant agree to continue the right of free admission; but could it be contended that the tenant would be under an obligation, if he subsequently substituted a different building upon the property, to continue this free right of admission? It was put in argument by the learned counsel at the bar, would John Brown be bound, or would his tenant be bound, if the theatre was burned down, to build upon the ground another theatre? Might he not build a house of a different kind? It would be very difficult indeed to contend that there was anything here which would oblige him to replace the theatre, if it was burned down, by another theatre. There is no such contract in any part of the document. (1)

Then let us see what the reason of the thing would lead us to expect to find. This theatre, as I pointed out, with all its furniture and fittings, was provided, apparently, in the first place, by the money of the adventurers, and that money was repaid to them by Brown, as the purchase-money for the theatre. It was quite natural that when they were dealing with that which had been provided by their own money, they should, as part of the consideration in parting with it, in favour of Brown, make a stipulation for free admission into that building which they virtually had built; but is there any such reason for supposing that, without any stipulation binding them to contribute to the expense of a new theatre, they could have imagined that they would have a similar right to extend their right of free admission into another theatre, provided, not by their own money, but by the money of another person? Then, again, if it had been intended that this right of admission should pass from the existing theatre to a new theatre, one would have expected to find stipulations as to effecting insurance, as to keeping up the insurance, as to employing the money secured by the policy in rebuilding a theatre of a similar kind if the existing one was burned down; and, indeed, express stipulations as to the new building, and the right of admission to the new building. But we find nothing of the sort, and yet it is impossible not to see that the possibility of the theatre being burnt down would be in the minds of those who were entering into this contract, because, in point of fact, the theatre had been burnt down only a few years before. (2)

My Lords, I therefore come to the conclusion that upon this deed, if it stood there, and if the question had been brought before your Lordships, no other deed having intervened, but the theatre having been burnt down and rebuilt,

No. 6. we will say by Brown or by some one representing him, if the case had arisen upon that state of things, I do not see how anyone of those rentallers could have maintained seriously his right to have a free admission into the new theatre. Indeed I am bound to say that I do not think that the learned Judges of the Court below who took the view for which the appellants contend rested their opinions so much upon the deed of 1858 as upon the subsequent deed.

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Then, my Lords, as to the subsequent deed the case is this: It is said, even supposing that we, the appellants, cannot support our case upon the deed of 1858, still, after the theatre was burnt down, and after a new theatre was erected, there comes another deed in 1874 (in the meanwhile the property had passed from Brown to his trustee Soutar), and in that other deed there are stipulations contained, no doubt, as between Soutar and the person to whom he was selling, by which Soutar stipulated in favour of the rentallers in words which seemed to secure to them this right of free admission, and the person who took under this deed from Soutar was therefore bound by that deed to give those rentallers the right which Soutar stipulated for in their favour, whether they would or would not have been entitled to that right under the earlier deed.

Now there again, my Lords, I am bound to say, in the first place, that it would have been a very singular thing if Soutar had been found to have stipulated in favour of the rentallers for these rights, supposing that they had not got them already. Soutar had no interest in doing so, he was not in any way concerned for the rentallers, he was simply acting as the representative of the estate of John Brown, and trying to do the best he could for that estate, trying to get the largest sum of money he could in parting with this property. Of course, the closer the bargain he was making for conditions for third persons the less he would get for that estate. I therefore certainly should expect to find very clear and unambiguous provisions before I could come to the conclusion that Mr Soutar, of all people in the world, was securing for those rentallers something which the rentallers were not entitled to. But, on the other hand, looking at Mr Soutar's position, it is exactly what one would expect to find, that in selling this part of the estate, for which he was a trustee, he would take very good care that he would not, by anything that he did in his conveyance, prejudice any existing right on the part of third parties, because, in doing so, he would very possibly bring upon himself, or bring upon the estate of which he was a trustee and representative, some claim from those persons whose rights he might thus be supposed or alleged to have prejudiced by the form of his conveyance.

That, of course, my Lords, is merely an *a priori* observation, and does not decide the case. It may be that the words are so clear that we shall find that the rights were actually created for the benefit of the rentallers, but if any other exposition can be given to the deed that other exposition would certainly be more in accordance with the antecedent probability of the case.

Now, when I look at this deed of 1874 (I will not complicate the case by referring to the subsequent lease), the words in that deed seem to me to be nothing more than words of ordinary style, fitted and calculated for passing on to the person taking under the deed any obligation which at present was existing in connection with the property, not at all words which in any way necessarily create any new obligation or new benefit for any third party:—"Declaring always that the whole subjects and others hereby disposed are so disposed with and under and subject to the whole burdens and others incumbent on me,

the said William Shaw Soutar, as trustee aforesaid, or on the said Allan McLaren Brown, or on the trust-estate of the said John Brown, under the titles of said subjects from and after" a certain date, "and specially, without prejudice to the said generality, the said William Hugh Logan and his foresaids shall thenceforth pay the annual sums or annuities due to the rentallers or shareholders whose names are enumerated in the schedule," "and allow these parties the privileges to which they are entitled." There is no enumeration of the privileges; there is not even a recital here in the earlier part of the deed of certain privileges of free entry. There is simply a use of those general words, in order to answer which you must first satisfy yourselves as to what the privileges are to which the persons at that time were entitled, that is to say, entitled in point of law. It is not to continue to them advantages which they had been used to have, which they were enjoying *de facto*, but to continue to them privileges which they were entitled to *de jure*. That is what is secured to them, and only that.

My Lords, I cannot see there a single word which in any way creates for any third party any new privilege. It leaves the rentallers in the enjoyment of everything they had in point of law, and gives them nothing further. That I understand to be the view which was taken by the majority of the learned judges in the Court of Session. It seems to me most satisfactory, and I therefore move your Lordships that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN.—My Lords, I so entirely agree with what has been said that I scarcely think it necessary to do more than point out the particular things upon which I think the matter turns, and say that I agree in what has already been said upon them.

I think the first question of all is upon the deed of 1858. What was it that the parties meant by that deed, and what is the effect of the instrument as far as regards this privilege of admission to the theatre? It seems quite clear that it was agreed, first of all, that there should be an annuity of £2 a-year secured upon the land as a real burden, and it was intended that that annuity should be transmitted with each share, and a special manner was provided in which the share might pass. Then there was added that besides the annuity passing with the share there should also pass the privilege of free admission aftermentioned, and that privilege of free admission aftermentioned is stated at page 39, letter B, in these words: "Be entitled to free admission to the audience department of the said theatre, other than the present private boxes," and so forth. Now, what does that mean? It would have been perfectly competent to the parties, if they had wished it, and had expressed it, to say, there shall be free admission to this present existing theatre, so long as this present existing theatre continues to exist, and no longer. If they had said that, nobody could have doubted their meaning, or that it could be carried out. Or they might have said, there shall be a right of free admission to this present theatre so long as it exists, and if this present theatre is destroyed by fire or other accident the disponent shall be obliged to erect another theatre, and give us a similar right of admission into the other theatre when it is erected. They might have done that, but certainly it is pretty clear upon this deed that they have not done it. There would have been a great many provisions required to be made if they had been going to do that; it would have been necessary to pro-

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No. 6. vide who should furnish the money, and so on. But there is nothing said about it.

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My Lords, there is a third provision—what I may call a half-way provision—which they might have agreed to. They might have said: “We (the rentallers) shall be entitled to free admission to this theatre as long as it exists, and if it perishes by fire the disponees shall be under no obligation to rebuild it, but if they should rebuild the theatre they shall be under an obligation to give us free admission into the new theatre when rebuilt, as much as into the old one.” There would have been the same difficulties to some extent as before—nearly all the same difficulties as before—if that had been done,—difficulties about providing who was to furnish the money, and so on. I mention this, because I think that the Lord Ordinary, though he does not in express terms say so, must have persuaded himself that the meaning of the deed of 1858 was to adopt the middle course I have spoken of. He does not give his reasons for that, and I have looked in vain to find them. I do not think that that would be the natural and *prima facie* thing that one would expect the parties to do, and I cannot find a single word in the deed of 1858 doing it.

I come, therefore, to the conclusion that under the deed of 1858 the shareholders would have a right of free admission to the theatre as long as that theatre continued to exist, and yet, when that theatre was destroyed by fire, that right of free admission was gone—had perished with the theatre—and was not revived when the new theatre was built in its place. That, I think, is the opinion of the majority of the learned Judges of the Court of Session, that is to say, of the two Judges whose opinion at present stands; and I can only say that I agree in it.

Then it was said (and that, I think, is the ground upon which Lord Ormisdale put it) that the right was given by a subsequent deed of conveyance. I do not think it is necessary to refer to the same terms in subsequent deeds, because in the deed of 1874 these are the words which are relied upon. In that deed there is a conveyance of this property subject to all the burdens that were imposed by the deed of 1858; and then come the words, “and specially, without prejudice to the said generality, the said William Hugh Logan” shall pay annually the sums or annuities due to the rentallers or shareholders, and their successors and assignees, “and allow these parties the privileges to which they are entitled.” Now, it is to be observed that that is mentioned “specially, without prejudice to the said generality,” as one of the burdens imposed by the deed of 1858, and if the burden imposed by the deed of 1858 had been a burden to admit them to the same privileges in any subsequently built theatre I have little doubt that that would have continued it to them. But if there was not that burden to admit them to any subsequently built theatre, can it be said that this creates *de novo*, and gives a fresh right to these rentallers, and that it was intended to do that by these words? I think not. I think you must look at the words in their natural meaning and signification, and I am convinced that it must have been the object of the parties to say this: We do not say whether or no under the deed of 1858 you, the rentallers, have a right to enter into the substituted theatre as you had into the old one. Mr Soutar, judging from his expression, seems to have rather assumed that they had; but the parties do not say in the deed whether they have it or not. They say: If the rentallers have that right we specially agree that you, the disponees, must keep it up, but we do not settle one way or the

other whether they have that right, and if they assert that they have that right, and you assert that they have not, you two must fight it out between you. I (Mr Soutar) have nothing to do with that. That, my Lords, certainly seems to me to be what is intended.

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Howard, &c.

Lord Ormidale, I observe, says he cannot think that that is the meaning of it. He says, after quoting the words I have just read,—“This cannot, I think, on any fair principle of construction, be held to mean, as was contended by the defenders, merely to import a reservation of the rentallers’ claim to privileges, if they had any.” He does not explain why he does not think that is a fair construction. I own it strikes me very much that that was what they really intended to do. He says they might have expressed it more clearly. Perhaps they might. I scarcely know anything that is so expressed that it might not have been put in clearer language; but certainly, if they meant that which Lord Ormidale says they meant, namely, we give this privilege which they assert now exists, I think they might have used clearer language than they have done if that was their meaning. I confess, my Lords, that my own impression is strongly that the meaning of the words, upon any principle of construction that should be applied, ought to be exactly that which Lord Ormidale thinks it was not. Taking that view of the matter, I think this deed cannot possibly give any new privileges, and consequently there is no ground whatever for maintaining the contention of the appellants founded upon it.

The next deed of conveyance is in exactly similar terms, and carries the matter, therefore, no further. Then comes the lease, which is expressed in words of a different kind altogether; but it is sufficient to say that if the conveyances do not give the privilege, certainly the lease cannot.

LORD WATSON.—My Lords, the appellants are the representatives of a body of gentlemen who up to the year 1858 were the beneficial owners of the Queen’s Theatre and Opera House in Edinburgh, and of the land upon which it was built. In the year 1858 they sold the subjects to the late Mr John Brown, a conveyance being granted by the gentlemen who held the property in question in trust as feuars from Heriot’s Hospital. The considerations upon which the conveyance was granted were three:—First, that the purchaser, the disponee, should pay debts owing by the rentallers to the amount of £14,000; secondly, that each of them should be secured in perpetuity an annuity of £2 per annum over the subjects conveyed; and thirdly, that they should have a certain privilege of admission to the then existing theatre, that last stipulation being the one which has given rise to the present contention.

The annuity was intended to run with the lands, and, accordingly, it has been effectually made a real burden, but the privilege of admission to the theatre, which was the third consideration, is a right of a description which cannot, according to the law of Scotland, be made a feudal burden. It is a mere personal right, a right by contract, and, if transmitted at all, it must be transmitted by its being made successively a matter of contract with all the subsequent disponees who are not the representatives of the original purchaser. It would have been perfectly valid so long as it existed, and was in vigour as against Mr Brown and as against the representatives of Mr Brown, but it would not have been of any force whatever against a third party, a purchaser from Mr Brown or his representatives, unless it was imposed as a personal obligation upon them by the deed of conveyance which they obtained.

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My Lords, the circumstances requiring to be noticed further are these: The property has been held successively by two purchasers who are not the representatives of Mr Brown.

The theatre, since the deed of 1858 was granted, has been twice destroyed by fire, and as often rebuilt. The appellants maintain that the privilege accorded to them by the deed of 1858 is still extant and available to them as against the proprietor of the present theatre, and they maintain, alternatively, that even although that obligation had ceased to exist by reason of the destruction of the theatre by fire, still a new obligation to the same effect had been raised by the deeds transmitting the property to the singular successors of Mr Brown.

(1) My Lords, I do not find that any countenance is given by the learned Judges in the Court below to the first of these contentions; and it appears to me, for the reasons that have already been stated by your Lordships, that it is not well founded. In the first place, the obligation is attached to "the said theatre;" it does not extend further, and "the said theatre," when reference is made to the antecedent, must be held to be the edifice which was then standing. Further, (2) as a condition burdening land, I think it must be strictly read; and, apart from that rule altogether, I can find nothing in the terms of the deed of 1858 which implies that there was to be either a continuing obligation to maintain a theatre upon the land disposed, or that, in the event of a fire and of a new theatre being built on the site, the disponers should have any right of admission to it. No doubt there is an obligation laid upon Mr Brown and his representatives not to convert the theatre to any other purpose. No question arises under that clause. Probably Mr Brown would have been entitled under it to alter the theatre, or to enlarge it, without affecting the right of the rentallers; in fact, it might be that he was entitled under that clause to improve the theatre by taking it down and rebuilding it; that would not put a stop to the right of the rentallers; but that is not the case which arises here. The theatre perished through no act or default on the part of the donee or his representative, and the question which arises is whether any stipulation is to be found to the effect that the rentallers shall have access to the new theatre. My Lords, I can find no language in the deed which expresses or indicates such an intention on the part of the two contracting parties.

(3) Then, there being no obligation extant under the deed of 1858, it is next contended that the deeds which have transmitted the feu of the land have also recreated this burden upon the owners. Now, upon turning to the deed of 1874, which is in the same terms as the subsequent transmissions, what I find there is that Mr Soutar, in parting with this portion of the trust-estate which was held by him, desired to impose upon the donee under that deed all the obligations to which he or his author, Mr Brown, could possibly have been subject under the deed of 1858; and, accordingly, the conveyance is expressly made subject to all the burdens, conditions, and declarations which are contained in that deed. If the deed had stopped there it could not have been contended that any greater burden was imposed than that which was to be found existing under the conditions of the deed of 1858. But then it is said that the particular words which follow have the effect of creating a new right, and these words are "to allow those parties the privileges to which they are entitled." These words, it is necessary to observe, are not inserted as a new burden or a new stipulation, but are only inserted as a particular explanation of certain conditions and declarations in the deed of 1858. I cannot read them, therefore, as meaning anything

else than this : to allow to those parties the privileges to which they are entitled by the deed of 1858. I cannot read them as implying that the parties are to be allowed to enjoy privileges which are not accorded to them by the terms of the deed of 1858. And that, my Lords, appears to me, as your Lordships have held, to be quite sufficient for the decision of this appeal.

I would only desire to say further that the opinion of the two learned Lords of the Court of Session who took a different view of the case from the majority of the Second Division appears to have been influenced a good deal by the state of possession which is proved to have existed in this case,—the fact, in other words, that from 1865 to 1879, after the theatre referred to in the disposition of 1858 was reduced to ashes, these rentallers had for a period of years enjoyed the right of admission as fully and as freely as if the right had been given to them under the deeds. But, my Lords, it humbly appears to me that these facts as to possession cannot legitimately be taken into consideration in construing the deeds. If the deeds had been defective in any solemnity required by law, if they had been imperfect in execution, these facts might have been founded on as validating the deeds *rei interventu*, or, if there had been any ambiguity such as occurred in regard to the extent of the right of free admission, I think they might have been legitimately referred to, to explain the ambiguity. But when you have deeds like these—probative deeds which embody the whole contract and obligations of the parties—it appears to me to be out of the question to refer to possession for the purpose of imposing upon their language a meaning which it does not actually bear.

I therefore concur with your Lordships in the judgment which you propose.

INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs.

SIMON & WAKEFORD, Westminster—J. & J. ROSS, W.S.—ANDREW BEVERIDGE, Westminster
—WILLIAM OFFICER, S.S.C.

THE COLTNESS IRON COMPANY, Appellants.—*Sol.-Gen. Sir F. Herschell—Benjamin, Q.C.*

THOMAS BLACK (Surveyor of Taxes).—*Lord-Adv. M'Laren—Sol.-Gen. Balfour, Q.C.—Crawford.*

No. 7.

April 7, 1881.
Coltness Iron
Co. v. Black.

Revenue—Income-Tax—5 and 6 Vict. c. 35, sec. 60, schedule A, rule 3 ; sec. 100, schedule D, rule 3, and sec. 159—29 Vict. c. 36, sec. 8.—Held (aff. judgment of First Division) that a tenant of a mineral field in computing “the profits received therefrom” for assessment of income-tax is not entitled to write off and deduct from the gross earnings of any particular year a sum to represent the capital expended in pit-sinking exhausted by the year’s workings.

Question, whether in any case expenses of sinking pits can be allowed as deductions from gross profits in assessing for income-tax.

(*Vide ante*, Feb. 6, 1879, vol. vi. p. 617 ; Aug. 1, 1879, vol. vi. (H. of L.) 122 ; and Jan. 7, 1881, current vol. Court of Session Reports, p. 351.)

Earl Cairns.
Ld. Penzance.
Lord Blackburn.

The Coltness Iron Company appealed.

At delivering judgment,—

EARL CAIRNS.—My Lords, this is an appeal from the First Division of the Court of Session, in which the appellants, an iron company at Coltness, contend that in the rating for the property and income-tax they ought not to be assessed on a sum of £9027, a portion of the gross proceeds of their mines for the year ending the 5th of April 1878. The description of this sum of £9027, upon which the appellants contend that they should not be rated, as given in the

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case originally, was this : "The Coltness Iron Company, carrying on business at Coltness, appealed against the assessment made on them under schedule D of the Act 5 and 6 Vict. c. 35," "and subsequent Income-Tax Acts referring thereto, in respect of the profits arising from their business for the year preceding (1878) in so far as the said assessment includes a sum of £9027, being the costs incurred by them in sinking new pits ; and for which they maintain they were not assessable. The Coltness Iron Company stated, and it is the fact, that for a number of years they have carried on business as coal and iron-masters, and have opened up several mineral fields, sinking new pits at their own expense from time to time as the old ones have become exhausted ; and they submitted that in ascertaining the profits on which they are liable to be assessed under the said Act, there ought to be deducted from the gross annual receipts derived from their business the sums expended by them in sinking the said pits."

This and the other statements in the special case, when the appeal first came before your Lordships, were not deemed by your Lordships to be sufficiently explicit, and you remitted the case for amendment. This amendment has now been made, and I will read the statement as to this sum of £9027 in the amended case. "The sum of £9027 claimed as a deduction from the assessments by the appellants does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating 2s. a ton on iron made, and 1½d. a ton on coal sold during the year ; it being estimated that this will properly represent the amount of capital expended on making bores and sinking pits which has been exhausted by the year's working. The cost of making bores and sinking pits is charged in the books of the company to an account called 'sunk capital account,' and is written off annually by a sum computed at the respective rates above specified on the quantities of iron made and coal sold in the year, as representing the capital expended on pit-sinking exhausted by the year's working. The working charges deducted and allowed in ascertaining the profits for assessment include the whole cost of getting and raising the minerals after the pits are sunk, and of manufacturing the metal and selling the iron and coal, and the general expenses of the concern."

It therefore now appears that the statement in the case as it originally stood is not sustained, and that the sum in question does not represent the cost of pit-sinking during the year of which the profits are taken. I am not prepared to say that under the words of 5 and 6 Vict. c. 35, a mine-owner might not in some cases be entitled to an allowance in respect of the cost of sinking a pit, by means of which pit the minerals are gotten which are the source of profit for the year in which the pit was sunk. I desire to reserve my opinion on that point until the question arises. But in the present case the question is altogether different. It is, as now explained, Can a mine-owner write off and deduct from the gross earnings of his mine in a particular year a sum to represent that year's depreciation of all the pits in the mines whenever sunk ? I am clearly of opinion that this cannot be done. It may be proper for a trader, or for a trading company, to perform in his or their books an operation of this kind every year, in order to judge of the sum that can in that year be safely taken out of the trade and spent as trade profits. But I am clearly of opinion that the owner of a mine cannot *qua* owner thus manipulate his accounts when the question is, under section 60 of the principal Act, What is the "amount of profits received" from the mine in each of the five years upon which the average is to be taken ?

My Lords, I do not think this question is affected by 29 Vict. c. 36. That Act provides that mines shall be charged and assessed according to the rules prescribed by schedule D of the principal Act, so far as such rules are consistent with No. 3 of schedule A. But the thing to be assessed remains the same. No. 7.
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Your Lordships were referred by the appellants to a decision, viz., *Knowles v. M'Adam*, in the Exchequer Division of the High Court of Justice in England,¹ as an authority in their favour. Your Lordships are now sitting in appeal from the Court of Session, but even supposing that case were a Scotch authority I am bound to say that it is a decision which does not seem to me to be capable of being supported, and which I could not advise your Lordships to follow.

I therefore move your Lordships that this appeal be dismissed, with costs; but this should not include any costs of or rendered necessary by the remit, the occasion for which arose out of a want of accuracy in stating the case, chargeable to both parties alike.

LORD PENZANCE.—My Lords, the argument of the appellants was based on the interpretation which they gave to the word “profit” in the Act. And it was contended that they could not be properly said to have made any profit out of their mines until a certain portion of the cost of making the bores and sinking the pits, necessary to approach the mineral-bearing strata, was deducted.

In a general, and perhaps a strict and logical sense, I think this is true. But it is also, and equally true, I think, that the cost of the mineral strata themselves, whether they have been hired or bought, should be included in any calculation which had for its object the ascertainment of the actual profit obtained by the company out of the entire adventure—so much for the prime cost of the mineral bed, so much for approaches to it in the shape of pits, so much for working it and getting the mineral to the surface, so much for getting the mineral to the market, and against all these the price obtained for the mineral sold—these would be the elements of a profit and loss account of an entire adventure of this nature. But is this the sense in which the word “profit” is used in the Act? I think not.

The intention of the Act, it is abundantly clear, was in schedule A to tax “property.” If a man had bought an estate the tax was intended to be paid by him on the annual value of that estate, without reference to where he got it, or how he got it, or how much he paid for it. So if a man built a house or bought a house, he was intended to pay tax on the annual value of the house, no matter what it cost. Nor does anything turn upon the fact that the estate is a permanent and undecaying species of property, while the house is a species of property of a less durable kind; he was intended to pay tax upon it as long as it lasted.

What, then, is the case of a mine? In the schedule A, which is the schedule applicable to “property,” a “mine” is in express terms included as a species of “property,” and is made the subject of a tax. The only question is, how shall the annual value of this species of property be ascertained? It is to this object that the rule No. 3, found in section 60 of the Act, is addressed. That rule assumes the ownership of the “mine,” passes by altogether the sum of money which it may have cost, either in the way of purchase or rent, and proceeds to describe the method of calculating its “annual value” to the owners thereof,

¹ L. R. 3 Ex. D. 23.

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and this it declares shall be the average "profit" over a period of five years, "received therefrom." The words "profits received therefrom" are here introduced to define the annual value of the thing which is to be taxed, which is the "mine," and it could not, I think, be intended that for the purpose of calculating the "annual value" of a "mine," the original cost of the "mine" itself, or any part of it, should be first deducted. On the contrary, the words "profits received therefrom," in this connection, mean, I think, the entire profit derived from the "mine," deducting the cost of working it, but not deducting the cost of making it.

I do not think the subject is elucidated, but rather confused, by the illustration brought forward in argument of the merchant or trader, who spends a sum of money or invests capital in the purchase of goods, and sells them again at an advance in price. No doubt in such a case the "profit" can only be ascertained by first deducting the original cost of the goods. If a man spends £100 in the purchase of goods and sells them for £140, his profit is not £140, but at most £40 only.

But when such a matter as that is brought under the provisions of this Act for taxation, the wide difference between it and the present case is at once apparent; for the merchant or trader is taxed in such a case not in respect of any "property" which he possesses, and of which he enjoys the fruits, but only upon the profits which he realises annually in his trade; whereas the owner of a "mine" is taxed in respect of that "mine" as a fixed and realised "property" which belongs to him, and from which he reaps an annual benefit; and the words "annual value" or "profit received" from that "property" are introduced into the statute, not as the subject of taxation, but only as the measure of the taxation to which the "property" shall be subjected.

A pit sunk to approach the mineral underground is not unlike a road made above ground, from the pit's mouth to the highway, as a means of transporting the mineral to the market. If a man were possessed of such a mine and such a road, it would be true that as the mineral was gradually worked out the road, and the capital sunk in making it, equally with the pit, and the capital involved in making it, would gradually be exhausted and lost; but the decaying character of the property would not make it the less subject to be taxed, according to its annual value or the profit obtained by using it, as long as the mineral lasted.

This, I think, is the principle that runs through the entire Act, and your Lordships could not, I think, sustain the present appeal without introducing principles which would entirely subvert the method of taxation which the Legislature intended, and according to which this statute has hitherto been administered.

I agree that the judgment of the Court below should be affirmed, and this appeal dismissed, with costs, subject to the exception mentioned by my noble and learned friend.

LORD BLACKBURN.—My Lords, this case was stated in order to be able to ask your Lordships to review the decision of the Court of Session in the case of *Addie v. Solicitor of Inland Revenue*,¹ and reliance was placed on the decision of the Exchequer Division in *Knowles v. M'Adam*.² Both of those decisions were pronounced at a time when there was no appeal against either; and as they were, I think justly, considered inconsistent with each other, it is important that both should be brought under review.

¹ *Ante*, vol. ii. p. 431.

² L. R. 3 Ex. D. 23.

The Coltness Company appealed against the assessment for the year 1878, in No. 7.
 so far as the assessment includes a sum of £9027, being the cost incurred by April 7, 1881.
 them in sinking new pits. It was thought that the statement of facts contained Coltness Iron
 in the case was not sufficiently full to enable this House finally to dispose of Co. v. Black.
 the points of law on which its decision was asked, and it was directed that it
 should be amended, which was done. And the result shews that this was re-
 quisite; for the amended case, besides entering into various details as to the
 mode of pit-sinking and working the mines in the appellants' mineral field, con-
 tains a statement as to what the £9027 consisted of, which I think could not
 have been collected from the statements in the original case.

I think it is not necessary to inquire what other points might possibly have
 been raised on the other facts, still less to decide them, if that statement shews
 that the sum of £9027 is not properly to be deducted from the assessment. I
 will read that statement. "The sum of £9027 claimed as a deduction from the
 assessment by the appellants does not represent the cost of pit-sinking during
 the year, but is a sum arrived at by calculating 2s. a ton on iron made, and 1½d.
 a ton on coal sold during the year; it being estimated that this will properly
 represent the amount of capital expended on making bores and sinking pits
 which has been exhausted by the year's working. The cost of making bores
 and sinking pits is charged in the books of the company to an account called
 'sunk capital account,' and is written off annually by a sum computed at the
 respective rates above specified, on the quantities of iron made and coal sold in
 the year, as representing the capital expended on pit-sinking exhausted by the
 year's working. The working charges deducted and allowed in ascertaining the
 profits for assessment include the whole cost of getting and raising the minerals,
 after the pits are sunk, and of manufacturing the metal and selling the iron and
 coal, and the general expenses of the concern."

The phrase "capital exhausted" does not occur anywhere in the Income-Tax
 Acts. It is taken from a passage in Mr M'Culloch on Political Economy, where
 he says,—"Profits must not be confounded with the produce of industry
primarily received by the capitalist. They really consist of the produce on its
 value remaining to those who employ their capital in an industrial undertaking
 after all their necessary payments have been deducted, and after the capital
 wasted and used in the undertaking has been replaced. If the produce derived
 from an undertaking, after defraying the necessary outlay, be insufficient to re-
 place the capital exhausted, a loss has been incurred; if the capital is merely
 sufficient to replace the capital exhausted, there is no surplus, there is no loss,
 but there is no annual profit, and the greater the surplus is, the greater the
 profit."

I do not feel at all inclined to dispute the sufficiency of this definition. I
 think that if a building society had taken a building lease, and it became neces-
 sary at any time to ascertain what profit or loss had been made by it from that
 lease, all the money expended in building houses would be placed on one side
 of the account, and on the other all that had been received for houses let or
 sold, and the value during the residue of the building lease of the houses then
 remaining in the society's hands, and that value would of course be less and less
 as the lease drew nearer to an end; and if in the first year of the building lease
 a house was built at a cost of, say, £10,000, and the profit or loss on the lease
 had to be estimated when the residue of the building lease was reduced to, say,
 five years, and the lease of the house for those five years would sell for only,

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say, £5000, I do not think it inaccurate to say that in computing the profit or loss on the building lease, £5000 would be allowed as capital invested in building that house and now exhausted. But that is certainly not the scheme of the income-tax as far as regards building leases and other properties comprised in schedule A, No. 1. The tax is imposed on the annual value of the block of buildings, which is to be taken at the rack-rent at which the same are worth to let for the year. By no process of reasoning could that rack-rent be made to depend on the sum which had been expended in building the houses, or to be greater or less according as the building lease was longer or shorter. Mines are not comprised in schedule A, No. 1, but in schedule A, No. 3, and the tax is imposed on them by a different set of words certainly. And if the decision in *Knowles v. M'Adam*¹ is correct, it is imposed on a radically different principle. I have felt myself constrained to advise your Lordships to say that the case of *Knowles v. M'Adam*¹ was wrongly decided.

I think the question thus raised can hardly be decided without examining at some, I fear tedious, length the enactments on the construction of which it depends. No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him. But when that intention is sufficiently shewn it is, I think, vain to speculate on what would be the fairest and most equitable mode of levying that tax. The object of those framing a taxing Act is to grant to Her Majesty a revenue; no doubt they would prefer, if it were possible, to raise that revenue equally from all, and, as that cannot be done, to raise it from those on whom the tax falls with as little trouble and annoyance and as equally as can be contrived; and when any enactments for the purpose can bear two interpretations, it is reasonable to put that construction on them which will produce these effects. But the object is to grant a revenue at all events, even though a possible nearer approximation to equality may be sacrificed in order more easily and certainly to raise that revenue, and I think the only safe rule is to look at the words of the enactments and see what is the intention expressed by those words.

Before, however, proceeding to examine the words of the Income-Tax Acts, on which, in my opinion, everything depends, I wish to point out that, long before any income or property-tax was imposed for general revenue, the parochial authorities in England raised a revenue for parochial purposes, which was very much in the nature of an income and property-tax. And the language used in the Income-Tax Acts is such as to convince me that the Legislature had in their contemplation what had been done in this branch of the law, which, if not exactly *in pari materid*, is at least an analogous subject. I think it more convenient to state briefly what was the state of the law as to rating real property in general, and (though, by a very narrow construction, the specific mention of coal mines was held to exclude all other mines) of coal mines, quarries, &c., in particular.

By the statute of 43 Eliz. c. 2, the churchwardens and overseers of the parish were empowered to raise, "by taxation of every inhabitant, parson, vicar, and others, and of every occupier of lands, houses, tithes, impropriate or propriations of tithes, coal mines, or saleable underwoods in the said parish," a sufficient sum. The power to rate the inhabitants as such was put an end to by a temporary Act, 3 and 4 Vict. c. 89, continued from year to year, and finally made perpetual by

¹ L. R. 3 Ex. D. 23.

37 and 38 Vict. c. 96. The power to tax the occupiers of the species of property named in the Act of Elizabeth continued.

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In 1827 (*King v. Attwood*¹) a case was stated for the Court of King's Bench as to the principle of rating coal mines. Chief Justice Abbott delivered a judgment which is so germane to the subject we are now considering that I will read the whole of it, as it is not long :—" We are all of opinion that the owner and occupier of a coal mine should be rated at such a sum as it would let for, and no more. As to the other points, the first was that the rate should not be imposed upon the coal produced, because that was part of the realty. It is the first time that such a proposition has ever been submitted, although many coal mines in various parts of the country have constantly been rated, and the argument in support of it is wholly untenable. The Legislature has expressly made coal mines rateable, and they must be rated for what they produce, viz., the coals. Slate quarries and brick earth are also exhausted in a few years, but nevertheless the rate is always imposed on that which is produced. The other argument was, that the rate could not be imposed until the expense of planting the mine had been recouped. But I cannot discover any distinction between expenses incurred in bringing a mine to a productive state and in building a house. The attempt to distinguish them is perfectly novel, and if a house is to be rated as soon as it is built and occupied, it must follow that a coal mine is rateable as soon as it is set to work and produces coal, although it may happen that the expense of sinking it may never be recovered. If the tenant of a mine expends money in making it more productive, that is the same as expending money in improving a farm or a house, in which cases the tenant is rateable for the improved value."

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I do not say that what Lord Tenterden here lays down as to the taxation of a coal mine is necessarily either just or expedient ; but though this case was decided before the earlier Income-Tax Acts, it was an authoritative declaration of what had been held to be law before, and must have been well known to that large proportion of the legislators who habitually acted at quarter sessions.

The Legislature in 1836, by 6 and 7 Will. IV. c. 96, enacted that all poor-rates shall be made " upon an estimate of the net annual value of the several hereditaments rated thereunto ; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent tax, if any, and deducting therefrom the probable average annual cost of the repairs, assurance, and other expenses, if any, necessary to maintain them in a state to command such rent." And in the form of the rate prescribed there is to be in one column a statement of the " gross estimated rental," and in another of the " rateable value."

The Act 5 and 6 Vict. c. 35, adopts, without any variations which affect this question, the language of the former Income-Tax Act, 46 Geo. III. c. 65. Before that there had been an earlier Income-Tax Act, 43 Geo. III. c. 122, from which there are changes, and I think some of those changes throw light on what was the intention of the Legislature in the substituted enactments. The first Income-Tax Act, 43 Geo. III. c. 122, sec. 31, comprised in schedule A all lands, tenements, hereditaments or heritages, and enacted that for them there shall be charged throughout Great Britain in respect of the property thereof, for every 20s. of the annual value thereof the sum of 1s. ; and enacted that " the said

¹ 6 B. and C. 277.

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duty shall be construed to extend to all manors and messuages, to all quarries of stone, slate, limestone, or chalk ; mines of coal, tin, lead, copper, mundic, iron, and other mines ; to all iron mills, furnaces, and other iron works, and other mills and engines of the like nature ; to all salt springs or salt works," and many more things.

The Legislature here classed together in one schedule properties, such as agricultural land, which from their nature will continue permanently to exist ; and properties, such as quarries, which will certainly come to an end within a period longer or shorter, but the duration of which can be generally calculated ; and properties, such as ironworks, which are real property, deriving their annual value from being ancillary to trade. It imposed one tax at one rate upon them all, and gave one general rule that the annual value should be understood to be the rack-rent ; and it directed that the tax should be paid by the occupier, who might deduct a proportionate part from his rent. And by No. III. there is allowed a deduction for repairs not exceeding five per cent on the annual value of a dwelling-house, or two per cent on the annual value of a farm. But there is not, expressly at least, any allowance made for repairs in respect of other kinds of real property. And by schedule B there is imposed, in addition, a tax on the occupier of all such properties (with some exceptions not material to be noticed), and the first of the rules for estimating the annual value of properties before described in schedules A and B in England is that no such property shall be charged at less than the last poor-rate, which shews that those who framed that Act were thinking of the analogous case of the parochial taxation for the relief of the poor.

The statute 43 Geo. III. c. 122, also, by sec. 84, imposes a duty, by schedule D, upon the annual profits, *inter alia*, of every trade, and by the rules therein the duty shall be computed upon a sum not less than the full amount of the profits upon a fair and just average of three years without any other deduction than is hereafter allowed ; and the third rule is, no deductions shall be made on account of any sums expended on repairs of premises occupied for the purposes of such trade, nor for any sum expended for the supply or repairs, or alteration of any utensils or articles employed for the purpose of such trade, beyond the sum usually expended for such purpose according to the average of three years. I conjecture that during the three years that elapsed between the passing of 43 Geo. III. c. 122, and the passing of 46 Geo. III. c. 65, experience had shewn that there were difficulties in working this scheme, and that claims for deductions had been made ; for whilst most of the provisions of the first Act were re-enacted, those to which I have above referred were all materially altered. It is not necessary to go through 46 Geo. III. c. 65 ; for the provisions of that Act are re-enacted in 5 and 6 Vict. c. 35, without any alteration which seems to me material to notice.

The third rule as to schedule D, which I have above quoted, still continued to be negative in its form, that no deductions should be made under several enumerated pretences, but the number of these was considerably increased, and—why, I do not know—instead of saying that the duty should be imposed on a fair and just average of the amount of the profits for three years, it is imposed "on the balance" of such profits. I have not been able to discover any difference in the meaning of the two phrases.

The several rates and duties granted by 5 and 6 Vict. c. 35, are imposed by sec. 1, schedule A, for all lands, tenements, hereditaments, or heritages in Great

Britain, which shall be charged yearly, "for every 20s. of the annual value thereof, the sum of sevenpence." Then, by section 60, the properties chargeable under schedule A, instead of being, as in statute 43 Geo. III. c. 122, treated together in one schedule, are treated of under numbers. By No. 1 (which gives the general rule, which is the same as that which in 43 Geo. III. c. 122, was applied to all in schedule A), the annual value shall be "understood to be the rent by the year at which the same are let at rack-rent, if they have been let at rack-rent within seven years before the assessment; but if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year." And by section 63, in addition to the duties to be charged under schedule A, there shall be levied the duty under schedule B on all properties to be charged according to the general rule in No. 1, with some exceptions not material to this case.

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The rules, which expressly gave a power to allow for repairs a sum not exceeding a certain percentage on the annual value of houses and farms, are not re-enacted. Nor are the rules above quoted, which refer to the poor-rate in England as being the test of annual value. It is not material in this case to inquire whether the rack-rent mentioned is to be measured by what, in statute 6 and 7 Will IV. c. 96, is called the gross estimated rental, without making any allowance for those annual repairs which the tenant would certainly take into consideration when bidding that rent. It could not have been intended that the rack-rent should be less than the rateable value.

No. 2 and No. 3 comprise properties which are comprised in the general description in schedule A, but which it was not thought expedient to include in schedule B, though in the first Income-Tax Act they had been so included. One would anticipate that the duty imposed on those would be on the rack-rent which they would have been worth to let by the year, and something more in lieu of the duty imposed by schedule B. And as the duty imposed by the poor-law and the duty imposed by the first Income-Tax Act was precisely the same on properties like quarries, which are terminable, and properties which are permanent, one would expect that no distinction would now be made. Whether that is so or not must depend on the true construction of the words used, which, with reference to No. 3, are these:—"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited," that is, of quarries, &c., and what may be called miscellaneous properties, one year; of mines, &c., five years. No definition is given of profits for one year. That is left to be ascertained as a matter on the construction of the Act. The rules which are contained in secs. 60, 61, 62, and 64 relate to many things—as to the place where the duties shall be assessed, and the persons by whom they are to be assessed, and also as to many allowances to be made; but I can find nothing in them to throw any light on the construction of the words, "the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited," that is, in some cases one year, and in some five.

It may be convenient here to notice two arguments not, I think, relied on by the Solicitor-General in his argument at your Lordships' bar, though he had used them before the Exchequer Division in *Knowles v. M'Adam*.¹ It was said

¹ L. R. 3 Ex. D. 23.

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by Lord Cairns in *Gowans v. Christie*¹ that a lease of mines "is not in reality a lease at all in the sense in which we speak of an agricultural lease. There is no fruit—that is to say, there is no sowing and reaping in the ordinary sense of the term, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land." I think this is a perfectly accurate statement. But the argument that no income-tax should be imposed on what is, perhaps not quite accurately, called rent reserved on a mineral lease, because it is a payment by instalments of the price of minerals forming part of the land, any more than on the price paid down in one sum for the out and out purchase of the minerals forming part of the land, is, I think, untenable. Even if it had not been, as decided in *The King v. Attwood*,² the constant course from the statute of Elizabeth downwards to construe an annual tax imposed on coal mines, quarries, and the like, as being imposed on that which is produced from them, I should say that no other construction could be placed on the 60th section of 5 and 6 Vict. c. 35, especially after seeing in what manner the Legislature, in 43 Geo. III. c. 122, had dealt with them; though I think that the judgment of the Exchequer Division in *Knowles v. M'Adam*³ seems an authority to the contrary. From that judgment, however, to which I shall afterwards return, I must ask your Lordships to dissent.

It has also been sometimes argued that it is very unjust to tax at the same rate a terminable interest, such as that in a mine, which must at some time be worked out, and a fee-simple interest, which will endure so long as this world continues in its present state. I will not inquire whether this is just or not. There is much force in the argument on the other side, that if the interest is terminable, so is the tax, and will cease when the interest ceases. But, whether just or not, there can be no doubt that the same annual charge is imposed upon a terminable annuity and on one in perpetuity; and, what seems harder, that the same annual charge is imposed upon a professional income, earned by hard labour, often extending over many years before any return is got, and, when earned, precarious, as depending on the health of the earner.

In 5 and 6 Vict. c. 35, the different schedules were kept apart and complete in themselves, but I think wherever there was any provision in any one of the schedules that throws light on what is meant by annual value, or annual profits, or capital, it may be very material in construing the meaning of those words used in other parts of the Act. Thus I think that the provision under the fifth head of No. 2, that an allowance may be made from the amount to be taxed on fines, "if it be proved that such fines, or any part thereof, have been applied as productive capital, on which a profit has arisen or will arise, otherwise chargeable under this Act for the year in which the assessment shall be made," and the provision in schedule D, that "no deduction shall be made on account of any sum employed or intended to be employed as capital," neither of which was in 43 Geo. III. c. 122, throw some light on each other, and may fairly be referred to in inquiring what is meant by "the average amount for one year of the profits received within the time limited." But schedules A and B were complete in themselves, and schedule D, which was regulated by sec. 100, was complete in itself. The duties were, however, assessed by different commissioners, and in different places. By 29 Vict. c. 36, sec. 8: "The several and respective concerns described in No. III. of schedule A of" "5 and 6 Vict. c. 35, shall be

¹ 11 Macph. (H. L.) 12, 45 Scot. Jur. 172, L. R. 2 H. L., Sc., p. 284.

² 6 B. and C. 277.

³ L. R. 3 Ex. D. 23.

charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by schedule D of the said Act, so far as such rules are consistent with the said No. III. Provided that the annual value or profit and gains arising from any railway shall be charged and assessed by the commissioners for special purposes."

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In *Knowles v. M'Adam*,¹ Chief Baron Kelly says,—“It is quite clear that sec. 8 of 29 Vict. c. 36, transfers the present case” (that of a coal mine) “from schedule A to schedule D,” and the judgments of the Barons in that case seem to me to depend a good deal on this, as it seems to me, erroneous assumption. I think that the duties are to be assessed according to the rules in schedule D, and consequently all the anxiously-devised provisions for keeping the returns under schedule D secret and confidential, to be found from sec. 100 to sec. 131, are made in future to apply to returns for the concerns described in No. III. of schedule A, and any rule expressed as to the mode of computing the balance of the profits and gains during the period of three years given in schedule D which is not inconsistent with No. III., may, perhaps, be made in future to apply to the mode of computing the annual profits of properties chargeable under No. III. And I see that in *Addie v. Solicitor of Inland Revenue*² reliance is placed in the judgment of the Lord President on the 3d rule as to concerns under the first case of schedule D, that no deduction is to be made “for any sum employed, or intended to be employed, as capital.” But I do not think reliance can be placed on this. If, from the nature of the concerns in No. III., an allowance ought to be made for capital, then this rule should be rejected as inconsistent with No. III. If no such allowance should be made, the rule is not required.

In *Forder v. Handyside*³ the Exchequer Division came to a decision as to repairs, estimated but not actually incurred, which, whether it was right or wrong, is no longer, since 41 Vict. c. 15, sec. 12, to apply. And, as there is no question in the case at bar as to repairs, it is unnecessary to inquire whether it was right or wrong.

If the effect of sec. 8 of 29 Vict. c. 36, was to transfer cases in schedule A, No. III., to schedule D, it would change the respective times on an average for which the profits were to be assessed. Mines would be reduced from a five-year period to a three-year period. Quarries and things of that sort would be raised from a single year to three. I cannot think this was either intended or expressed. But, on the assumption that it had this effect, the Exchequer Division came, in *Knowles v. M'Adam*,⁴ to a very startling decision. In that case a company had bought for a very large sum the minerals in beneficial leaseholds of coal mines, having an average of thirty-two years to run, and in freeholds. The decision of the Exchequer Division was that the effect of transferring the mines, as they thought, from schedule A to schedule D, was to cause the company to be assessed as persons carrying on the trade of vendors of coal, who had bought wholesale a large quantity of coal, not stored in warehouses but in the earth, and which they were going to sell in the course of their trade; and that they ought to be assessed on the principle of valuing the stock-in-trade, that is, the coals thus stored in the earth at the beginning of the three years, and again valuing the stock at the end of the three years; and taking the difference between them as being to be added to or deducted from the net receipts during that period in estimating the profits

¹ L. R. 3 Ex. D. 23.³ L. R. 1 Ex. D. 233.² *Ante*, vol. ii., p. 431.⁴ L. R. 3 Ex. D. 23.

No. 7. for the three years. The effect of this would be that though the mines were worked so as to produce a large profit above the working expenses, yet if they were worked by a purchaser who had over-estimated the value of the minerals, and paid such a price for them that he was a loser, no income-tax was to be paid in respect of those mines. That is a result which never could have been intended by the Legislature, and if it follows by legitimate reasoning from the interpretation put upon 29 Vict. c. 36, sec. 8, it seems to me a *reductio ad absurdum*, shewing that the interpretation was wrong.

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I therefore advise your Lordships to hold that the decision in *Knowles v. M'Adam*¹ was erroneous. I do not wish to lay down any general proposition, either that money expended in sinking pits can never be in the nature of expenses incurred within the five years in working the coal, so as to be properly taken into account in estimating the profits made at that period; or to say what, if any, the circumstances are under which it may be done. That, I think, had better be left to be determined when the case arises. I think it enough to say that this sum of £9027, described in the case, is not such as ought to be deducted.

The result is that, in my opinion, the interlocutor below should be affirmed, and the appeal dismissed, with costs, with the modification proposed by the noble and learned Earl.

INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs, except the costs incurred by reason of the remit.

GRAHAMES, WARDLAW, & CURBEY, Westminster—MURRAY, BEITH, & MURRAY, W.S.—
W. H. MELVILL, Solicitor of Inland Revenue, London—D. CROLE,
Solicitor of Inland Revenue, Edinburgh.

No. 8. SIR TOLLEMACHE SINCLAIR, BART. (Defender), Appellant.—*Sol.-Gen. Sir F. Herschell—Webster, Q.C.*
April 7, 1881. THE CAITHNESS FLAGSTONE QUARRYING COMPANY (Pursuers), Respondents.
Sinclair v. Caithness Flagstone Quarrying Co. —*Benjamin, Q.C.—Asher.*

Writ—Holograph Writing regarding Heritage—Agreement between Landlord and Tenant written by factor to Landlord's dictation.—Where a proposed additional agreement between a landlord and tenant was dictated by the landlord to his factor in the tenant's presence and handed to the tenant unsigned, and subsequently accepted by the tenant in writing, *held* (*aff. judgment of First Division*) that the writings did not constitute a completed contract, the first writing being neither holograph of the landlord nor the writ of his factor, and that the tenant was therefore entitled to resile.

Agreements and Contracts—Construction and Effect—Lease.—By agreement, supplementary to their lease, the tenants of certain quarries agreed to construct a tramway from the quarries “by the end of the policy of Thurso Castle to their works at Thurso East,” and “to compensate the tenants along the line for any damage done to their farms.” The landlord, who was proprietor of Thurso Castle, agreed “to give gratuitously the land required for the tramway.”

From the southmost corner, and along the west wall of the policy, there ran a private occupation road belonging to the landlord, between the policy wall and the foreshore of the estuary of Thurso river, leading from the public road to the tenants' works, and thence to the offices of Thurso Castle. By this road the tenants had been accustomed to cart their material from the quarries to their works, and on it there was room to lay a tramway without interfering with other traffic. It was the only practicable route outside the policy. But before reaching the tenants' works it passed through the works of another quarry com-

¹ L. R. 3 Ex. D. 23.

pany, who, it was alleged by the tenants, would object to the construction of the tramway through their yard. No. 8.

In a question between the landlord and tenants, the latter claiming right to make their tramway through the policy of the former, *held* (rev. judgment of First Division) that the meaning of the agreement between the parties was that the tramway should be constructed outside the policy wall, and that the landlord was not bound to give the tenants any right to the ground required, except such rights as belonged to him, but must give them the use of his name in any proceedings necessary to vindicate their rights. April 7, 1881. *Sinclair v. Caithness Flagstone Quarrying Co.*

(In the Court of Session, July 9, 1880, *ante*, vol. vii. p. 1117.)

The defender appealed.

Ld. Chancellor
(Selborne).
Lord Black-
burn.
Lord Watson.

LORD CHANCELLOR.—My Lords, it is impossible to regard the litigation in this case without feelings of regret, and I am satisfied that your Lordships ought not, on technical grounds, to abstain now from dealing with it in the way which may appear to you best calculated to put an end to it, by doing substantial justice between the parties. The respondents, who were pursuers in the action, are lessees under the appellant of (what appear to be) valuable and important quarry works, and they have made an expenditure, which must be considerable, in part performance of the agreement out of which the litigation has arisen. The alternative conclusion of their summons, and their first plea in law, are wide enough to enable your Lordships to give them whatever they really ought to have, although they may be wrong in that particular view of their rights for which they have contended, and which they have presented as if it were the only possible view, in their condescendence. If the form of the allegations in the 5th and 6th articles of the condescendence had been regarded in the Inner-House as narrowing and limiting the summons, so as to disable the Court from giving effect to the alternative conclusion, except in a sense which practically nullifies it (and which, having regard to the words “in any other place,” and “under and subject to the terms of said agreement,” I do not myself think it will fairly bear), I have no doubt that a formal amendment of the record, under the Act of 1868, ought to have been, and would have been, allowed. The parties had gone into evidence on the whole matter, with reference to every possible view of the effect of the agreement, and the proper mode of performing it. The addition of a few words to the pursuers’ statements would have removed all technical objection, without rendering any further evidence really necessary. There is no trace of any such technical objection having been taken before the Inner-House; the case was there dealt with on grounds of substance, not of form. My opinion is that your Lordships ought also so to deal with it, in accordance with what I have always understood to be a principle acted upon here, that objections of a merely formal kind, which do not appear to have been insisted upon, and which would have been remediable, in the Court below, ought not to prevail upon appeal.

Upon the merits, both parties have contended for more than they were justly entitled to. The contention of the defender (appellant here), that the agreement of the 21st of February 1878 was altered by the unsigned proposal of the 28th of September 1878, and Mr Gunn’s letter of the 21st of October following, is untenable in law, that proposal not being holograph of the defender, in whose name it throughout speaks, and Mr Logan (whose holograph it is) not having written it under any authority then entrusted to him by the defender to negotiate an agreement on his behalf. But I think it is only just to say, that the blame of the subsequent failure to settle the dispute upon the terms of that pro-

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posals does not appear to me to rest exclusively with either party; and, as the costs of the litigation have not been either caused, or substantially increased by the appellant's contention on this point, I think the case may properly be dealt with, both as to costs and otherwise, without any further reference to it.

Upon the construction of the agreement of the 21st of February 1878, I think that the respondents are wrong.

The material facts, with reference to which that agreement ought to be construed, are the following:—The respondents are lessees from the appellant, Sir Tollemache Sinclair, for the residue of a term of twenty-one years, commencing at Martinmas 1874, of the Weydale and other quarries, and of a piece of ground, with buildings thereon, occupied and used by them for the purpose of their pavement works at Thurso East. Their quarries are at a considerable distance to the south from these pavement works. The whole of the land between the quarries and the end of the policy or home grounds of Thurso Castle, where the appellant resides, belongs to the appellant, being in the occupation of his agricultural tenants, who were bound by their contracts to give up to him, for a suitable compensation, such part of the lands occupied by them as he might require for roads. These lands are separated from the castle policy by the public turnpike road leading from Thurso to Wick, and the policy itself runs down to a sharp angle, point, or end, to the south-west, abutting upon this public road. The agricultural land, already mentioned, lies on the other side to the south. The soil of the turnpike road is vested in the appellant, subject to the rights of the public, and to the powers of the road trustees. The policy is bounded westward by a park wall, on the western side of which there is an occupation road diverging from the turnpike road at the exact point where the policy ends, and proceeding thence northwards. This occupation road is itself bounded to the west for some distance from its junction with the turnpike road by a public park not the property of the appellant; and afterwards, for some distance further, by the shore of the Thurso estuary, which does belong to the appellant. Along this it continues to run, close to and in a line with the policy wall, until it reaches a parcel of land lying between the policy and the estuary, which is also a part of the appellant's estate, but is leased by him as a pavement yard to another company called "The Co-operative Pavement Manufacturing Company at Thurso," for a term of eleven years, commencing at Whitsuntide 1872. The same occupation road is continued northward through this parcel of land until it passes into the respondents' pavement works at Thurso East, where it terminates. The soil of this occupation road belongs throughout to the appellant. The co-operative company are bound, by their contract with him, to keep it, where it passes through their pavement yard, free from obstructions, "so as to admit of full and free access to and from Thurso East at all times during the currency of their lease." The respondents are, by the terms of their lease, entitled to use it; and they are bound to bear two-thirds of the expense of keeping it in repair through the whole of its course from the turnpike road to Thurso East, the other third being borne by the appellant. They have, in fact, been in the habit of carrying along it, in waggons and trucks, all the stone brought from their quarries to their pavement works; and it appears from the evidence that in or about 1870 there was a "stone tramway" laid down upon it, which "continued to be used till the stones got so much worn that they became useless." Whether the *solum* of this road, where it passes through the

and of the co-operative company, is included in that company's lease, is not

upon the evidence clear ; but the more probable inference from that evidence seems to me to be that it is not. No. 8.

The distance northwards from the southern angle, point, or end of the castle policy, to the nearest part of the respondents' pavement works at Thurso East, is more than one-third of the whole extent of the policy grounds, measured in a straight line from south-west to north-east. April 7, 1881.
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It appears, from the evidence of the witnesses for the appellant, that there would be no practical difficulty in carrying a tramway or railway (in continuation of that already made by the respondents from the Weydale Quarry, under the agreement of the 21st of February 1878, to a point near, and a little to the south-west of, the end or southern angle of the castle policy), along the occupation road, without interfering with any use of it, for access or egress to or from the pavement yard, to which the co-operative company may be entitled. It is stated to be about twenty-five feet in breadth in its narrowest part, and, at its widest, twenty-nine feet, of which (according to the evidence of the witness Belfrage, which I see no reason to disbelieve) ten feet only would be required for the width of the tramway and the trucks passing along it, seventeen feet of roadway remaining available, at the same time, for other traffic.

The agreement, which your Lordships have to construe with reference to this state of facts, provided that the respondents should "construct a tramway or railway from the Old Weydale Quarry by the Moss of Weydale, thence near Stainland House, near Oldfield House, and by the end of the policy of Thurso Castle to their works at Thurso East." The Moss of Weydale, Stainland House, and Oldfield House were all in that part of the appellant's estate which was let to his agricultural tenants, to the south of the turnpike road. Neither the turnpike road nor the occupation road is mentioned in the agreement ; but the former must necessarily be crossed by the intended tramway or railway. The respondents further agreed "to compensate the tenants along the line for any damage done to their farms during the currency of their leases." The appellant agreed "to give gratuitously the land required for said tramway or railway." There were also stipulations, which need not be stated in detail, as to a contribution by the appellant towards the maintenance of the road when made ; as to payment of one-half of the value of the tramway by the appellant to the respondents, in the event of his letting the Weydale Quarries to any other person, or taking them into his own hands, at the end of the respondents' term ; and as to a right given to the respondents to sell the materials of the tramway in certain other events. The agreement concluded with these words :—"The direction of the line to be adjusted between Mr Logan and the company,"—Mr Logan being the appellant's man of business.

The principal contest has been upon the meaning of the words "by the end of the policy of Thurso Castle ;" the respondents insisting that, as the appellant was "to give gratuitously" all the land required for the tramway, and as the tramway was to be carried as far as the respondents' works at Thurso East, it must be carried up to those works from the turnpike road through the policy itself, where no other rights or claims of right than those of the appellant could possibly come in question. This would have involved a passage, not through any small corner of the policy which could reasonably be described as its "end," but through more than one-third of its entire length ; and it appears to me that a construction which could have such an effect would do extreme violence to the natural meaning of the words. If those words had been "by the policy" f

No. 8. they might possibly have meant by way of the policy; as "by the Moss of Weydale" meant by way of or through the Moss. But "by the end" naturally means that the tramway was to pass by, and to be carried on the outside of that angle or point in which (as has been stated) the policy ends. It cannot have been intended to exclude from the line of the tramway everything in the nature of an existing roadway over which other persons besides the appellant and the respondents might have some rights of passage or traffic; because it was, at all events, absolutely necessary that the tramway should at some point cross the turnpike road. If, at that point, the agreement on the appellant's part might be performed by giving gratuitously to the respondents all his right to that part of the solum of the turnpike road, leaving them to make their own terms with the turnpike trustees, still more might it be performed by giving up to them, for the like purpose, as much as might be necessary of the solum of the occupation road, or of the seashore in which, subject to their own right of way, and to the rights (whatever they might be) of the co-operative company, the appellant had the absolute property. If, indeed, there had been no land belonging to the appellant which he could gratuitously give to the respondents, westward of the policy wall—if it had been apparent from the facts that the parties could not have had in their contemplation any mode of carrying the tramway from the turnpike road to the respondents' pavement works except through the policy—it might have been necessary to interpret the words, "by the end of the policy," in a sense different from their natural and *prima facie* construction; but the facts being such as they actually are, and having been within the knowledge of both parties at the date of the agreement, I think the natural construction of those words must prevail. There was no legal or other impediment to the construction of the tramway along the course of the occupation road (whether with or without any deviation where the road skirts the seashore) up to the point where the occupation road enters the pavement yard of the co-operative company; and I think it probable, upon the evidence (though in the absence of the co-operative company it cannot be so decided), that the tramway might lawfully be carried, by the concurrence of the appellant and the respondents, along the course of the same road, through the co-operative company's yard. Supposing, however, that it might be necessary for the respondents, during the residue of the co-operative company's lease, to obtain the consent of, or make some terms with that company (as they would be obliged to do with the turnpike trustees), I think they must be regarded as having entered into the agreement with sufficient knowledge of that possible liability, and without any engagement on the part of the appellant either to indemnify them from it or (if any difficulty should arise out of it) to let them carry the tramway through the castle policy. I do not think that the possibility of such a difficulty arising could constitute a reason for interpreting the words "by the end of the policy" in any other than their natural sense. What happened afterwards cannot be used in aid of the construction of those words. It is, however, satisfactory to know that the position in which the respondents will be placed by holding them to the natural construction of the agreement is not different (so far as the passage through the yard of the co-operative company is concerned) from that in which they would have been placed by the arrangement to which they, through Mr Gunn, were willing to consent on the 21st of October 1878, if that arrangement had been carried into effect. By the proposal, of which Mr Gunn then signed his acceptance, they would have acquired a right to carry the tramway along a narrow

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strip of land now lying within the policy wall (which was to have been taken down and rebuilt on the east side of the tramway), up to the point where the occupation road enters the yard of the co-operative company, but no further. It would have been just as necessary under that proposal as under the agreement of the 21st of February to continue the tramway along the course of the occupation road through the co-operative company's yard in order to reach its intended terminus in the respondents' works at Thurso East.

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Taking this view of the rights of the parties, it appears to me that the declarations contained in the interlocutor of the First Division, now appealed from, are less favourable than they ought to have been to the appellant; and that the appellant ought not to have been required to state in a minute in what line he proposes that the portion of the tramway therein mentioned shall be formed, and what ground he proposes to furnish for that purpose. I think, therefore, that the interlocutor appealed from ought to be reversed, except in so far as it recalls the interlocutor of the Lord Ordinary. I have had an opportunity of seeing the terms of the order, which one of my noble and learned friends, who is peculiarly conversant with the administration of justice in Scotland, proposes to substitute for it; and, agreeing as I do with the form of order which he suggests, I recommend to your Lordships that it should be adopted. I am also quite content that the costs of the appeal and the expenses in the Court below should be disposed of (as my noble and learned friend proposes) by giving them to the appellant, who has succeeded upon the substantial question raised in the respondents' condescendence.

LORD BLACKBURN.—My Lords, this cause comes before your Lordships in a manner which has given me some anxiety. My difficulty has principally been that I doubted whether it was competent, on this state of the proof, to decide a question which has not yet arisen, and may probably never arise, namely, what were the obligations which, by the agreement of the 21st of February 1878, the defender took upon himself, in case the co-operative society should raise an objection to the tramway being laid along the private road running through their yard. It was for some time supposed by both parties that they were bound by the substituted agreement of September-October 1878. I agree with and need not repeat the reasons for saying that this substituted agreement was one from which either of the parties could resile, and when either did so resile the parties were remitted to their rights under the agreement of February 1878, which, though informal, had been so acted upon that neither party could resile from it.

But for some months both parties were under the belief that they were bound by this substituted agreement. According to it the line was to run along the west end of the policy, and then across the co-operative company's yard above the road. The co-operative company were under no obligation to assent to this line crossing what was unquestionably their yard, and it appears from a document, No. 102 of process, that they asked for an apparently unreasonable concession as the consideration of their assent. Whether they would have persevered in this demand we cannot tell, for the pursuers were dissatisfied with the agreement of September-October on other grounds, and being advised, and rightly advised, that they could (in point of law) resile from that agreement, they did so, and then the parties were remitted to their rights under the agreement of the 21st of February.

The co-operative company never were asked if they had any objection to rails

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being laid on the private road, and consequently never objected to it. And it by no means follows that because they asked for an unreasonable concession in return for their assent when they had a clear right, reason or none, to refuse their assent, they should object where their right to object, unless they shewed some damage to themselves, would be, to say the least, very doubtful.

I doubted whether it was not premature to decide this question; but I agree that we cannot enable the parties to dispose of the whole matter really in controversy without having recourse to a new action unless we do decide this question. And, having had the advantage of reading and considering the opinion of my noble and learned friend opposite (Lord Watson) I am satisfied that we both can and ought to decide it.

I think it will be convenient now to read the document on the construction of which, I think, everything depends. (His Lordship then read the agreement of the 21st of February 1878, which will be found in Lord Watson's opinion, *post*, p. 85).

I think that the words "by the end of the policy of Thurso Castle," in their primary and natural sense, mean skirting the policy outside the end of it, but I do not think they are so express as necessarily to mean nothing else. And if the state of things with relation to which the agreement was made had been known to both parties to be such that no tramway could practically have been made outside the park wall and between it and the river, so that no tramway could have been made to the company's works at Thurso East without going across the policy, I think that the words might have been construed in a secondary sense as meaning that the line was to go across the policy near its end. But this is not the case. The private road of Sir Tollemache, which is used as a cart road by the pursuers, is a line along which a tramway might very well be laid. It is suggested that the co-operative company might object to rails being laid along the road where it passes between the two portions of land accupied by them as a pavement yard. It is, I think, a mistake in fact to say that they have objected. And in common with all the Judges below, I do not see on what ground they could object. But even if they had a right to object, and exercised that right, that would not, as I think, be an admissible ground for construing the agreement of the 21st of February 1878. It would raise the question, whether under this agreement Sir Tollemache did more than agree to allow the pursuers to take this road for the purpose of laying the tramway on it without making any charge for it, leaving it to them to overcome the objections of the co-operative company if they were unfounded, or, if the co-operative company were able to shew that they had a valid ground of objection, whether Sir Tollemache was bound to make compensation in damages for having promised more than he could perform.

I have, not without hesitation, come to the conclusion that it is necessary to decide this; and I think, therein agreeing with Lord Shand and the Lord Ordinary, that all that the defender bound himself to do was to give the pursuers such rights in the ground as belonged to him, and allow them to use such rights for the purpose of forming the line and overcoming any opposition that might be offered to it, making no charge for so doing. But I do not think that the agreement involves any engagement on the part of the defender to indemnify them against such opposition, or, in the improbable event of its being well founded, to allow the pursuers to carry the line across the policy.

I should have come to this conclusion on the words, and from the nature of

the agreement, but the express stipulation as to making compensation to the tenants along the line for any damage done to their farms during the currency of their leases strongly confirms that view. It was known to both parties that the defender had reserved in his leases a right to take possession of such part of their farms as was needed for the purpose of making roads across them, making compensation; and I think that they agreed that the pursuers should exactly stand in his shoes in that respect. And this, I think, throws light upon the intention of the parties as to what was to be done in regard to the road through the co-operative company's yard.

I think that this was not the view taken by the Lord President, Lord Deas, and Lord Mure, and I think that, construing the interlocutor appealed against by the aid of what they said, the finding in it that the defender is "bound to furnish gratuitously the ground necessary for the formation," &c., must be, or at least may be, read as deciding this question against the defender. It is the only point in which I think their interlocutor wrong, but I think it is wrong in that, and that it should be altered in the manner proposed by Lord Watson.

I agree that the defender was justified in coming to this House to get rid of this interlocutor, and though he, no doubt, was also desirous of setting up the substituted agreement of September-October 1878, and was wrong in that, I think he should be allowed his expenses of the appeal, as well as those in the Court below.

LORD WATSON.—My Lords, the respondent company are tenants of the slate and pavement quarries of Weydale, Heathfield, and others, in the parish of Thurso and county of Caithness, under a lease from the appellant for a period of twenty-one years, ending on the 11th of November 1895. The subjects let to the company include a yard at Thurso East, lying on the west side of the policy of Thurso Castle, between the policy wall and the Thurso River, in which the rough material from the quarries is dressed and prepared for market. Down to the year 1878 the undressed stones were carted from the quarries, which are situated about three miles to the south-east of the yard.

On the 21st of February 1878 an informal written agreement was entered into between the appellant and the company, by which the latter undertook to construct "a tramway or railway from the Old Weydale Quarry by the Moss of Weydale, thence near Stainland House, near Oldfield House, and by the end of the policy of Thurso Castle, to their works at Thurso East." The company agreed to compensate the tenants along the line for any damage done to their farms during the currency of their leases, and the appellant, on the other hand, agreed to "give gratuitously the land required for the said tramway or railway." It was also arranged that the direction of the line should be adjusted between Mr Logan, the appellant's factor, and the company. The agreement, though improbativ, has been validated *rei interventu*. The route from the Old Weydale Quarry northward, till it approaches the county road leading from Wick to Thurso *via* Castletown, was amicably adjusted in July 1878. The county road runs along the wall which bounds the policy of Thurso Castle on the south-east; and a private road, belonging to the appellant, branches off from it, at the southernmost corner of the policy, and leads straight north, running for some distance along the west wall of the policy, after which it intersects a pavement yard leased by the appellant to the Caithness Co-operative Company, and then enters the yard of the respondent company, from which there are accesses to the

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offices of Thurso Castle. The line of tramway, so far as adjusted in July 1878, was shortly thereafter constructed ; and, pending the disputes which have arisen as to its further course, it has been extended up to the public road at the southmost end of the policy of Thurso Castle. From the quarries to that point stone and slates are carried by means of the tramway, and are thence conveyed to the yard in carts along the private road. That road has all along been used by the respondents for cartages to and from their yard at Thurso East ; and by the terms of their lease they are under obligation to pay two-thirds of the cost of maintaining it in a good and sufficient state of repair.

The respondents, in July 1878, proposed that the tramway, after crossing the county road, should enter the policy a little way to the east of its southmost corner, and should thence proceed northward through the policy until it reached their yard ; and the precise line which they proposed to follow was marked out, and submitted to Mr Logan for his consideration. The respondents allege that Mr Logan did actually agree to and adjust with them the line thus indicated ; but they have failed to prove the allegation, and it is certain that the appellant objected, and has ever since disputed the right of the respondents to construct any portion of the tramway within the policy under the agreement of the 21st of February 1878.

The action in which the present appeal is taken was not raised by the respondents—for reasons which will shortly appear—until the 15th of August 1879. It concludes that the appellant be ordained to give them the use and possession of land for the purpose of completing the tramway, and that either (1) “ within and by the end of the policy of Thurso Castle,” or (2) “ in any other place as suitable and convenient for the pursuers in every respect.” The second of these conclusions is wide enough to cover every possible line of access to the respondents’ yard, other than a line “ within and by the end ” of the policy, and is therefore sufficient to include any line outside the policy. The action is laid upon the agreement of February 1878, and the respondents first allege that in July of that year Mr Logan, acting for the appellant, finally adjusted and settled with them the line then staked out through the policy in terms of the agreement libelled on, and failing that, they allege right to have some other equally convenient route. The terms of the 6th article of their revised condescendence not only make it clear that before bringing the appellant into Court they insisted upon a route within the policy, but very strongly suggest that it was their intention, under the alternative conclusion of the summons, to demand no other route. Their main contention has been that they are entitled, under the agreement in question, to pass through the policy, and in support of that claim they aver (Cond. 5) that “ there is no route outside the policies of Thurso Castle over which the said proposed tramway, as described in the agreement, could be constructed to the pursuers’ works, or along which the defender could gratuitously give the pursuers land on which to lay the said tramway. Immediately outside the said policies there is a road which occupies the whole available space for a tramway between the policies and the shore of Thurso River, and the ground occupied by the Co-operative Pavement Company, over which the defender can give no right to make a tramway, intercepts all communication between the pursuers’ works and the point where the tramway line, so far as already constructed, ends, unless the tramway be led through the policy of Thurso Castle the whole way from the said public road between Thurso and Wick to the pursuers’ works.” I do not think these averments were intended to convey the

idea that the formation of a tramway along the private road, all the way from the county road to the respondents' works, is a physical impossibility. What, in my opinion, the respondents thereby meant to assert, and do assert, is that the appellant was not in a position to give them an absolute right to form the tramway upon that part of the road which intersects the yard of the co-operative company—that the appellant was bound, under the agreement of February 1878, to give them an absolute right to ground for the tramway, free of all claims at the instance of third parties—and that, being unable to fulfil that obligation by giving a route through the co-operative company's yard, he must implement it by giving a route through his policy.

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The appellant meets these allegations with a general denial, and the only substantive defence which he sets up is founded on two missives, dated respectively the 28th of September and the 21st of October 1878, by which he maintains a valid agreement was constituted, binding the company, subject to the provisions therein made in his favour, to take a strip of the policy ground twenty feet in breadth, along the east side of the private road, for the formation of their tramway. The following is the history of those two missives. At a meeting which took place on the 28th of September, between the appellant, his factor, and several members of the respondent company, an offer was written by Mr Logan, to the appellant's dictation, by which, in consideration of certain alterations to be made upon the conditions of the respondents' lease, the appellant undertook to give them the said strip of ground, provided they took down the policy wall and rebuilt it on the east side of the tramway. That writing was handed, unsigned, to the members of the company present, by the appellant, and the offer therein contained was formally accepted, by a holograph letter, written and subscribed by the managing partner of the company, dated the 21st of October 1878.

I think the Lord President is under a misapprehension when he says that the contract embodied in these two missives "was no sooner agreed to than the parties differed as to what it meant." On the contrary, whilst both parties acted on the footing that the contract was binding until June 1879, I can find no trace of any difference having arisen as to its meaning before the month of May 1879. It appears to have been assumed on both sides that the execution of another deed was necessary in order to give effect to the provisions of the contract, and accordingly, on the 29th of October 1878, a deed of agreement, in duplicate, subscribed by the appellant, was sent by Mr Logan to the respondents for their signature, with a request that one of the duplicates should be returned to him, to be put up with the principal lease. So far from objecting to the terms of the deed, the managing partner of the respondent company, on the 31st of October, informed Mr Logan by letter that it could not be signed by all the partners owing to the absence of one of them, and a month afterwards he wrote to Mr Logan that, in consequence of the continued absence of that partner, he could not yet send the signed deed, but would do so as soon as possible. It does, however, appear that in May 1879 some objection was taken by the respondents to the terms of the agreement, whereupon a minute was substituted for it, which was sent in draft to the respondents on the 19th of May by the appellant's solicitors. On the 31st of May the respondents wrote that they had not been able to finish the revisal of the draft minute, but hoped to be able to do so in a day or two. The objections which they ultimately stated to the terms of the minute were confined to one clause, providing "that

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the tenants shall have liberty to occupy the said strip of ground for a tramway only, and that until the expiry of the said lease at the term of Martinmas 1895, and no longer." They apparently asserted their right to use the strip in question in perpetuity, and that not only for tramway purposes, but as storage ground. Mr Logan, on the 9th of June 1879, refused to concede that right, and refused to give them possession of the ground until the clause was adjusted, either amicably or by a Court of law. In reply to that communication the respondents, on the 17th of June, intimated that they resiled from the contract of September and October, and reverted to their rights under the agreement of February 1878 ; and they at the same time requested Mr Logan to point out the route along which their tramway was to be laid in terms of that agreement. I observe that two of the learned Judges of the First Division regard the words of the disputed clause as additional to and constructive of the contract, and hold that the respondents were ready to adopt, in the minute proposed, the *ipsissima verba* of the contract, and that Mr Logan was wrong in insisting that words should be inserted which were not in the original writing. I am unable to concur in that view, because it is based on the assumption that the whole terms of the contract were to be found in the appellant's unsigned offer of the 28th of September, and ignores the fact that, in the respondents' acceptance, which is *pars contractus*, the strip of land in question is described by them as "tramway route added to our present lease."

From the time when they first intimated their departure from the September-October agreement, the respondents have persistently claimed either the route staked out by them in July 1878, or some other equally convenient route through the policy of Thurso Castle. On the other hand, the appellant has, with no less persistency, maintained that the respondents are still bound by the agreement of September-October, and that they must, subject to its conditions, take the strip of land therein specified. In their eagerness to make good these respective contentions, the parties seem to have lost sight of the possible alternative of the respondents being only entitled, under the agreement of February, to complete their tramway along a line outside the policy. But the case, as presented to the House, affords ample materials for disposing of that alternative, which is certainly within the conclusions of the summons. The respondents' allegations, which I have already quoted, negating the possibility of any route without the policy, and the appellant's denial of them, have been supported by proof ; and they appear to me directly to raise these two questions—(1) whether, by the agreement of February, the appellant is under an absolute obligation to provide the ground necessary for the formation of the tramway ; and (2) whether there is any possible route outside the policy.

I shall now advert to the manner in which the case has been dealt with in the Court below.

The Lord Ordinary (Lord Rutherford Clark) assoilzied the appellant from the conclusions of the summons ; and the grounds of his judgment are given in the opinion which his Lordship delivered when advising the cause. The learned Judge did not think it necessary to dispose of the appellant's defence, founded on the agreement of September and October 1878. He held that the respondents' case failed, because, according to the just construction of the agreement of February, upon which it was laid, the tramway was to be constructed not within but without the policy, and the appellant merely assented, so far as his

rights and interests were concerned, to the respondents making a tramway, and did not undertake to find them the means of making it. No. 8.

The Lords of the First Division recalled the Lord Ordinary's judgment, and found (1st) that under the agreement of February the respondents are "entitled and bound to construct the tramway therein mentioned;" and (2d) that the defender, on the other hand, is bound to "furnish gratuitously" the ground necessary for the formation of the tramway throughout its whole length, and, in particular, the ground necessary for the formation of that portion hitherto unformed; and, with these findings, they appointed the appellant "to state in a minute in what line he proposes that this portion of the tramway shall be formed, and what ground he proposes to 'furnish' for that purpose." The proposition affirmed by the first of these findings does not appear to have been disputed by either of the parties. In the second the words "furnish gratuitously" were introduced for the purpose of construing, in accordance with the opinions of the majority of the Judges, the expression "give gratuitously," which occurs in the agreement, as implying an obligation on the appellant to give land for the tramway, unincumbered by the rights or interests of any third parties.

The majority consisted of the Lord President, Lord Deas, and Lord Mure. The Lord President said,—“Sir Tollemache Sinclair is under an obligation to find a way for this tramway to go from the public road up to the works at Thurso East; and it will be for him to consider in what way he can best fulfil that obligation.” Lord Deas was of opinion that the difficulty of carrying the tramway through the works of the co-operative company was a “difficulty which must be overcome by the landlord;” whilst Lord Mure held the deed of February 1878 to be “an agreement binding Sir Tollemache Sinclair to find ground for the use of that company for the purposes of the tramway to be made to their works.” Their Lordships were of opinion that, according to their primary meaning, the words “by the end of the policy” indicated a line of tramway without the policy; but it is my impression that in the event of the appellant being unable or unwilling to furnish a line through the co-operative company's yard, their Lordships would have construed these words as imposing upon him an obligation to give a route through his policy. Upon this point the Lord President said,—“But while I construe the agreement in his favour as not imposing upon him an absolute obligation to permit the tramway to go through his policy, I think it does impose upon him an obligation to do what is necessary on his part to enable the pursuers to fulfil their obligation to him, to construct the tramway from one of its termini to the other.” Their Lordships were unanimously of opinion that the agreement of September-October was improbativ, and that no *rei interventus* having followed, the respondents were entitled to resile from it in June 1879. Lord Shand differed from his three brethren as to the construction of the contract, holding, with the Lord Ordinary, that under the agreement of February the line of tramway was not to be within the policy, and that the appellant only undertook to give such right to the land required as he was possessed of.

Upon the assumption that the agreement of February 1878 was rightly construed by the Judges of the majority, I should be of opinion that they did right in appointing the appellant to lodge a minute stating what ground he proposed to furnish. If the appellant, in obedience to that order, had judicially stated that he was able and willing to secure to the respondents the right to lay their tramway along the private road, including that portion of it which passes through

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the yard of the co-operative company, I see no reason to doubt that the Court would have proceeded, failing the agreement of parties, to settle the line of tramway along that road. On the other hand, if the appellant had lodged a minute setting forth that he was willing, so far as his rights were concerned, to permit the tramway to be formed along the private road, but declined to make any arrangement with the co-operative company, I think the Court would have compelled him to give ground within his policy.

hote I am of opinion, with all the Judges of the First Division, that the missive of the 28th of September 1878 is not a valid holograph writ. I do not doubt that a missive written and signed by a factor or agent, professing to bind his principal, is a probative holograph writ according to the law of Scotland; and that, when duly accepted, it will bind the principal if he gave authority, and will subject the writer in damages, if he did not. It appears to me, however, to be sufficient for the decision of this point that Mr Logan, who wrote the document, was not, in any sense, a party to the negotiations on the 28th of September, which resulted in its delivery to the respondents, for their consideration and acceptance. These negotiations were conducted by the appellant in person, and it does not appear from the evidence that Mr Logan ever had, or supposed he had, any authority from the appellant to make such an offer. Even if Mr Logan had been the sole negotiator, acting in the appellant's absence, and by his instructions, I doubt whether the writing would have been thereby validated. The general rule of the law of Scotland is that a holograph writing, in order to be effectual, must be subscribed by the writer. In the absence of subscription equivalents have been admitted, such as a reference to the document in a subsequent holograph and subscribed writing by the same person, or the occurrence of the writer's name in the body of the unsigned writing. In the present case there is no such subsequent writ, and the name which does occur in the writing itself, as that of the offerer, is unfortunately not the name of the writer. The appellant's allegations of *rei interventus* are so palpably irrelevant that I do not think it necessary to make any further reference to them.

But I cannot agree with the construction which has been put by the Lord President and by Lords Deas and Mure upon the agreement of February 1878. The primary meaning of the expression, "by the end of the policy," certainly is that the line shall be carried without the policy. No doubt "by" is a flexible word, and its meaning may vary with the context. It may signify "by means of," as in the expression "going by a road." Or it may mean "through," as when one speaks of going "by a field" to a point which is on the other side of it. But, *à priori*, the presumption is that a gentleman who stipulates that a tramway shall be carried "by the end" of his policy does not intend that it shall go through his policy. And that such was not the intention of the parties to the agreement of February becomes the more apparent on referring to the Ordnance sheet, which is incorporated with the conclusions of the action. The policy of Thurso Castle comes to a very narrow point at its southmost corner or extremity, where the private road to the respondents' yard strikes off from the county road. That southmost corner is plainly what the parties intended to designate by the expression "the end of the policy," and even if the word "by" were read as "through," it appears to me that no route could, in any reasonable sense, be described as "through the end of the policy," which did not lead from the county road to the private road. The line of tramway which the respondents claim is a line running, not through the end of the policy, but through the policy itself.

Accordingly concur with Lord Rutherford Clark and Lord Shand in holding that, under the agreement libelled, the stipulation of the parties is that the tramway shall pass outside the walls which enclose the policy of Thurso Castle. No. 8.
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I am also of opinion that, by agreeing to "give gratuitously" the land required for the tramway, the appellant merely undertook to give the respondents such right as was vested in him, leaving them to settle with any persons who might have a right or interest entitling them to object to the formation of a tramway. It appears to me that these words, according to their natural import, do not mean that the appellant shall purchase or procure the interests of third parties in the ground to be occupied by the tramway, for the benefit of the respondents, but that he shall permit the respondents to use his rights in the ~~solum~~ without making any charge therefor; and I am unable to find, either in the terms of the agreement or in the circumstances of the case, aught that compels me to attach to the words any other than their natural meaning. The evidence shews that, practically, the only route from the county road to the respondents' yard, outwith the policy of Thurso Castle, is along the private road already described; and the only obstacle to laying the tramway along that road which the respondents have suggested is, that the co-operative company may refuse to allow its being laid along that portion of the private road which intersects their works. Although there are no *termini habiles* for deciding the point, in the absence of the co-operative company, I can see no reasonable ground for holding that the company could successfully resist the continuation of the tramway to the respondents' works, and there is no evidence that they have attempted or intend to offer any resistance. The terms upon which they proposed to allow the tramway to be made through their works had no reference to its construction along the road, but upon the *solum* of the yard exclusively occupied by them, and that was an operation which they had an undoubted right to prevent. I do not think it ever occurred to the parties, when they contracted in February 1878, that any difficulty would be raised by the co-operative company, and I am confirmed in that impression by the fact that the respondents subsequently negotiated with the appellant on the footing that the strip of land, which he was to give for the formation of the tramway, should terminate at the yard of the co-operative company. Of course the appellant must not only give the respondents such rights as he has, but must also allow them to use his name in any proceedings which may become necessary for the vindication of these rights.

For these reasons I am of opinion that the appellant is entitled to decree of absolvitor from the conclusions of the action, so far as these conclude that he shall be ordained to give possession and use of any part of his policy for the formation of a tramway. The sixth article of the revised condescendence for the respondents is so framed that the Court below might have difficulty, owing to the present shape of the record, in adjusting a line of tramway without the policy by a decree under the conclusions of the summons. But that difficulty may be removed by a very slight amendment of the record; and it is plainly for the interest of both parties that the whole matter in dispute between them should be disposed of without resort being had to a new action. I therefore think your Lordships ought to reverse the interlocutor appealed against, except in so far as it recalls the Lord Ordinary's interlocutor of the 27th of February 1880; to declare that the appellant is entitled to absolvitor from the first alternative conclusion of the summons, and also from the second alternative conclusion,

No. 8. in so far as the same relates to the possession and use of land within the policy of Thurso Castle, and that, under the agreement of the 21st of February 1878, the appellant is not bound to give to the respondents any rights in the ground required for the completion of the tramway, except such rights as belonged to him, he being always bound to allow the respondents to use his name in any proceedings they may be advised to take for the vindication of these rights; and subject to these declarations, to remit the cause to the First Division of the Court of Session, with directions to dispose of the second alternative conclusion of the summons, in so far as the same relates to the possession and use of land without the policy of Thurso Castle, and to allow the parties to make such amendments of the record as may be necessary for that purpose. And, seeing that the appellant has succeeded in his resistance to the demands of the respondents, for a line through his policy, and that he was justified in coming to this House in order to get rid of the finding pronounced by the First Division, I think he ought to have the costs of the appeal and his expenses in the Court below.

April 7, 1881.
Sinclair v.
Caithness
Flagstone
Quarrying Co.

“ ORDERED and adjudged :—That the said interlocutor of the Lords of Session in Scotland, of the First Division, of the 9th of July 1880, complained of in the said appeal, be and the same is hereby reversed, except in so far as it recalls the interlocutor of the Lord Ordinary of the 27th of February 1880 : And it is declared that the appellant is entitled to absolvitor from the first alternative conclusion of the summons, and also from the second alternative conclusion, in so far as the same relates to the possession and use of land within the policy of Thurso Castle, and that under the agreement of the 21st of February 1878 the appellant is not bound to give to the respondents any rights in the ground required for the completion of the tramway, except such rights as belonged to him, he being always bound to allow the respondents to use his name in any proceedings they may be advised to take for the vindication of their rights ; and, subject to these declarations, it is ordered that the cause be and the same is hereby remitted to the First Division of the Court of Session in Scotland, with directions to dispose of the second alternative conclusion of the summons, in so far as the same relates to the possession and use of land without the policy of Thurso Castle, and to allow the parties to make such amendments of the record as may be necessary for that purpose : And it is further ordered that the respondents do pay or cause to be paid to the said appellant the costs incurred by him in respect of the said appeal to this House, and also his expenses in the Court below,” &c.

SIMSON & WAKEFORD, Westminster—WEBSTER, WILL, & RITCHIE, S.S.C.—W. A. LOCH, Westminster—MACKENZIE, INNES, & LOGAN, W.S.

No. 9. ALEXANDER WILLIAM MACDOUGALL (Defender), Appellant.—*Davey, Q.C.*
—*Grosvenor Woods.*

May 17, 1881.
Macdougall v.
Earl of Bread-
albane.

THE EARL OF BREADALBANE AND HOLLAND (Pursuer), Respondent.—
Sol.-Gen. Balfour—A. Young.

Ld. Chancellor
(Selborne).
Lord Black-
burn.
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Superior and Vassal—Non-entry—Proof of Superior's title.—In 1821 A entered with B as his superior in the lands of S. A's predecessors had entered in the same way with B's predecessors in 1740 and 1795. The lands of S were subsequently sold, but no entry was asked by B or his successors from 1821 down to 1879, when B's successor brought an action

for payment of casualty against a singular successor of A. The defender maintained that there was no evidence to establish the identity of the lands of S possessed by him with the lands of which the pursuer held the superiority, and that his lands of S really held of another subject superior. *Held* (aff. judgment of First Division) that as the defender had failed to prove that the superiority of his lands of S belonged to some one other than the representative of the superior with whom the previous entries had been made he was liable in the casualty.

No. 9.

May 17, 1881.
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albane.

(In the Court of Session, Nov. 4, 1880, in the current volume, p. 42.)
The defender appealed.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

WM. ROBERTSON, London—H. & H. TOD, W.S.—R. S. TAYLOR, SON, & HUMBERT, London—
DAVIDSON & SYME, W.S.

THE COMMISSIONERS OF SUPPLY OF THE COUNTY OF ABERDEEN (Defenders), No. 10.
Appellants.—*Sol.-Gen. Balfour—Benjamin, Q.C.—Irvine.*

A. D. MORICE (Clerk to the Wellington Suspension Bridge Trustees), May 17, 1881.
(Pursuer), Respondent.—*Sol.-Gen. Sir F. Herschell—Badenach Nicolson.* Commis-
sioners of
Supply of
Aberdeenshire
v. Wellington
Suspension
Bridge Trus-
tees.

Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. c. 51), secs. 7 and 37—Effect of adoption of Act in one county and not in adjoining county where bridge and road situated partly in both.

THE Wellington Suspension Bridge, over the river Dee at Aberdeen, was erected and maintained under the local Acts 10 Geo. IV. c. xliii., and 23 Vict. c. xxvi. The trust created by the above-mentioned Acts embraced ~~not only the bridge~~ but 650 yards of road in the parliamentary burgh and county of Aberdeen, and four miles of road in the county of Kincardine. Ld. Chancellor (Selborne). Lord Blackburn. Lord Watson.

In consequence of the county of Kincardine having adopted the Roads and Bridges (Scotland) Act, 1878, while the county of Aberdeen had not yet done so, Mr A. D. Morice, clerk to and as representing the Wellington Suspension Bridge Trustees, raised this action against the County Road Trustees of Kincardine, and the Commissioners of Supply of the County of Aberdeen, concluding that it "ought and should be found and declared, by decree of the Lords of our Council and Session, that the Act 10 George IV. cap. xliii., . . . and the Act 23 Vict. cap. xxvi., . . . have ceased to be of force and effect within the county of Kincardine; and farther, and whether or not it be so found and declared, it ought and should be found and declared, by decree foresaid, that the pursuers have ceased to be under any obligation, right, privilege, or duty in regard to the management or maintenance of the said bridge over the river Dee, . . . known as the Wellington Suspension Bridge, and the road . . . by the said bridge toward the city of Aberdeen, and that the defenders, the said County Road Trustees of Kincardine, and the Commissioners of Supply of the county of Aberdeen, are bound to maintain and keep in proper repair the said bridge and road; and further, it ought and should be found and declared, by decree foresaid, that the pursuers have ceased to be liable for the debts incurred by them as trustees foresaid, and for the sums subscribed for the erection and creation of the said bridge and road, and that the defenders, the said County Road Trustees of Kincardine, and the Commissioners of Supply of the county of Aberdeen, are jointly and severally liable therefor, and are bound to free and relieve the pursuers thereof: Or otherwise, in the event of the pursuers being

No. 10.
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 sioners of
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 tees.

under any obligation, right, privilege, or duty in regard to the manage-
 ment or maintenance of the said bridge and road, or any part thereof,
 then it ought and should be found and declared, by decree foresaid, that
 the pursuers are entitled to demand and take, or cause to be demanded
 and taken, within the county of Aberdeen, as or for tolls or pontage, before
 any passage over the said bridge shall be permitted, the various sums pro-
 vided and in manner provided by the said Act 10 George IV. cap. xliii."

On 3d January 1880, the Lord Ordinary (Young) pronounced this
 interlocutor:—"Repels the defences for the Commissioners of Supply
 of the county of Aberdeen: Decerns and declares in terms of the first
 alternative conclusions of the summons, with the qualifying declaration
 that the liability of the defenders respectively is according to the propor-
 tions in which the road and bridge referred to in the said conclusions are
 situated in the counties of Kincardine and Aberdeen respectively."

The Kincardine County Road Trustees acquiesced in the judgment, but
 the Commissioners of Supply for the county of Aberdeen reclaimed.

The Second Division, on 19th March 1880, adhered to the Lord Ordi-
 nary's interlocutor.

The Commissioners of Supply for the county of Aberdeen appealed.

The House of Lords reversed the interlocutors appealed from, and re-
 mitted the cause with the declarations "That the true effect of the Roads
 and Bridges (Scotland) Act, 1878, is to continue in force the provisions of
 the Acts 10 Geo. IV. cap. xliii., and 23 Vict. cap. xxvi., so far as relates to
 the powers and duties thereby imposed upon the pursuers for the manage-
 ment and maintenance of that part of the bridge and road mentioned in the
 record which is within the county and the parliamentary burgh of Aber-
 deen, together with the powers of demanding and taking tolls or pontage
 within the county and the parliamentary burgh of Aberdeen, conferred by
 such Acts, so long as the said Roads and Bridges Act shall not be in force
 in the county and parliamentary burgh of Aberdeen, and that so far, and
 so far only, as the pursuers may fail in the proper performance of such
 duties of management and maintenance, or as the receipts from such tolls
 as aforesaid may be insufficient to provide for the same, the appellants
 (the Commissioners of Supply for the county of Aberdeen) are likewise
 bound to maintain and keep in proper repair the said bridge and road
 within the said county and parliamentary burgh: And that, under and
 by virtue of the said Roads and Bridges (Scotland) Act, 1878, the liability
 of the pursuers to the debts incurred by them as trustees under the said
 Acts of 10 Geo. IV. and 23 Vict. has now ceased, and has fallen upon,
 and now belongs to, the County Road Trustees of Kincardine and the
 appellants the said Commissioners of Supply for the county of Aberdeen,
 severally, in the proportions to be fixed and adjusted under the provisions
 of the said Roads and Bridges Act; and that the said Commissioners of
 Supply for the county of Aberdeen are entitled to receive from the pur-
 suers all surplus of income accruing to the pursuers from the tolls which
 may be exacted on the said bridge or road within the said county and parlia-
 mentary burgh of Aberdeen, after providing for the expense of managing
 and maintaining the said bridge and road; and that the pursuers are and
 will be entitled to be freed and relieved, by the said Commissioners of Sup-
 ply, from the proportion of the debts aforesaid, belonging, under the provi-
 sions of the said Roads and Bridges Act, to the county and parliamentary
 burgh of Aberdeen, until the time when the said Roads and Bridges Act
 shall be in force in the said county and parliamentary burgh of Aberdeen,
 the pursuers paying over such surplus income, if any, to the said
 Commissioners of Supply for the county of Aberdeen: And it is declared
 that so far as relates to that part, and that part only, of the said bridge

and road which is within the county of Kincardine, the said Acts of No. 10. 10 Gorge IV. and 23 Vict. have ceased to be in force, and the pursuers have ceased to be under any obligation or duty, or to have any right or privilege, in respect thereof; and that the said County Road Trustees of Kincardine are bound to maintain and keep in proper repair that part of the said bridge and road which is within the county of Kincardine, and to free and relieve the pursuers from the proportion of the said debts belonging, under the provisions of the said Roads and Bridges Act to the said county of Kincardine: And it is ordered that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with these declarations and this judgment."

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MARTIN & LESLIE, London—BAXTER & BURNET, W.S.—SIMSON & WAKEFORD, London—HENRY & SCOTT, S.S.C.

JOHN HISLOP (Respondent), Appellant.—*D.-F. Kinnear, Q.C.—Davey, Q.C.*

No. 11.

MRS CHRISTIAN MACRITCHIE OR LECKIE, AND OTHERS (MacRitchie's Trustees) (Complainers), Respondents.—*Sol.-Gen. Balfour, Q.C.—Wallace.*

June 23, 1881.
Hislop v. MacRitchie's Trustees.

Superior and Vassal—Special stipulations in Feus—Restrictions on Building—Enforcement by one Vassal against another holding of common superior.—The fact of several feuars of adjoining plots of building ground in the same street holding from a common superior does not, by itself, entitle any one of those feuars to claim the benefit of restrictions contained in the feu-contract of another unless some mutuality and community of rights and obligations is otherwise established between them, and this can only be done either (1) by the superior making it an express condition of his feu-contract that he will insert the same general restrictions in all feus granted by him in the same street or locality; or (2) by reasonable implication from a reference in all the feu-contracts to a common plan or scheme of building prepared and adopted by the superior; or (3) by mutual agreement between the feuars themselves.

A superior feued out ground for building detached villas to form one side of a square on his property. All the feuars were put under restrictions as to building, but these restrictions, though similar, were not uniform, but adapted to the situation of the various houses, and there was no reference in the feu-contracts to any general building plan as having been adopted by the superior, and, except that all the houses had a uniform frontage, so far as related to their distance from the street in front, no uniform plan appeared to have been adopted; nor was there any undertaking by the superior in any of the feu-contracts to impose the same or any restrictions upon adjoining feuars. A and B, who held adjacent feus, and whose houses had been built before the date of their feu-contracts, were each restricted from erecting additional buildings, with certain specified exceptions. The excepted buildings were different in each case, but both feuars were restricted from building on the front area between their houses and the street. *Held* (rev. judgment of Second Division) that the restrictive provision as to building in B's feu-contract did not create a *jus quæsitum* in favour of A, but was merely a condition of tenure between superior and vassal; and that A was not entitled to enforce it against B to the effect of preventing him enclosing the space in front of his house for the purpose of a carriage show-room.

Title to Sue—Effect of "consent and concurrence."—Where the principal party to a suit has an interest or right of his own, but so qualified by or dependent upon some *jus tertii* or some limitation or condition that he has no title to sue separately, his defect of title may be cured by the "consent and concurrence" of the person by or on whose right his is qualified or dependent. But when the principal party to a suit has no interest or right of his own, his

No. 11. defect of ~~title~~ cannot be cured by the "consent and concurrence" of the person to whom alone the right of action truly belongs.

June 23, 1881.
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tees.

Where a feuar of building ground had no title to enforce a restriction in the feu-contract of a neighbouring feuar, *held* (rev. judgment of Second Division) that the "consent and concurrence of the superior" did not obviate the objection to his title to sue.

Process—Amendment of Record—Court of Session Act, 1868, sec. 29.—Observed (per Lord Watson) that the provisions of the Court of Session Act, 1868, sec. 29, did not warrant the importation of a new party into a suit for the purpose of obviating an objection to the title to sue of the original pursuer.

Ld. Chancellor
(Selborne).
Lord Black-
burn.
Lord Watson.

(IN the Court of Session, Dec, 17, 1879, *ante*, vol. vii. p. 384.)
The respondent appealed.
At delivering judgment,—

LORD CHANCELLOR.—My Lords, the effect of the interlocutors appealed from in this case is to enforce against the appellant at the suit of the respondents certain restrictions on building contained in a feu-contract dated the 6th of June 1782, between one James Jollie, and Andrew Dick, the appellant's predecessor in title,—Jollie being the superior, and Dick the vassal, under the contract.

These interlocutors are right, if the respondents, who are neighbouring feuars under the same superior, were and are, by the combined effect of their own and the appellant's titles, interested in the obligations and restraints imposed upon the appellant by Dick's feu-contract, so as to be entitled to enforce those obligations and restraints for their own interest; or (however this may be), if the superior is, or ought to be deemed, a party complainant in the action, in such a sense as to be suing for his own separate interest. If neither of those propositions can be established, the appellant ought to have been assoilzied from the action, and the present appeal ought to be allowed.

James Jollie was, in 1782, absolute owner of the whole ground, in the city of Edinburgh, which is now bounded by Gayfield Square to the north-east, East Broughton Place and Union Street to the south-west, and on the other two sides by Antigua Street and Gayfield Street. He divided it into four plots or parcels, one of which, consisting of two roods or thereabouts, was feued by him to Andrew Dick on the 6th of June 1782. This feu-contract recites that Dick had then lately enclosed that parcel of land and had built upon it two separate houses, conform to a plan of elevation approved by Jollie. The feu is described as, in one part bounded by ground lately feued by James Jollie to persons named Besillie and Moffat, and in all other parts by Jollie's remaining property, and by the street (then belonging to Jollie) upon the north-east. This feu-contract contained the restrictions on building which the respondents seek to enforce; and it also contained an agreement concerning certain walls of enclosure which Dick had built, or was to build, for the purpose of dividing his land from the parcels adjoining it, to the effect that such walls of enclosure were to "be mutual," and that "one half of the expense of building the said mutual walls should be paid by the neighbouring feuars," Jollie thereby becoming bound "that the said feuars should fulfil that part of the agreement." There is no provision in this contract that either Besillie and Moffat (the persons spoken of as already feuars of part of the adjoining land), or any future feuars of any other part, should have the benefit of, or be in any way interested in, the restrictions as to building, or should be bound in favour of Dick and his successors in title by any similar restrictions. No general scheme or plan of

building upon or otherwise using the adjoining parcels of land, or any of them, is indicated or referred to. The express provision already mentioned as to enclosure walls is adverse to any implication of an intention that in other respects mutual burdens, for each other's benefit, should be imposed upon Dick and the adjoining feuars. No. 11.
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The land so feued to Dick is now divided between two proprietors. The house, No. 2 Gayfield Square, with the ground belonging to it, which is vested in the appellant, constitutes one half of that feu. No. 3 Gayfield Square (now vested in another proprietor), and the ground belonging to it, constitutes the other half, and intervenes between No. 2 and the respondents' feu, No. 4.

No. 1 on the other (or east) side of No. 2 was feued to Besillie and Moffat by contract dated the 14th of June 1783, in implement (doubtless) of some earlier agreement. It contained provisions and restrictions as to building, to the effect that a house or houses, the erection of which was contemplated with a frontage towards Gayfield Square, should be set back from the street, as Dick's houses were, and should not exceed two stories in height. As to the rest of the land in this feu, the stipulations were different from those in Dick's feu-contract, and there was nothing in it, expressly or by implication, communicating to those feuars the benefit of any of the obligations entered into by Dick (except as to the inclosure walls) or making any obligation entered into by those feuars (with the same exception) a *jus quæsitum* for Dick's benefit.

The next feu granted was of No. 4 Gayfield Square, and the land belonging to it to the respondents' predecessor in title (one Fitzsimmons) on the 13th of February 1784. The house fronting Gayfield Square in line with Nos. 1, 2, and 3, appears to have been then already built upon it, and so far from placing Fitzsimmons under restrictions corresponding with those placed on Dick, he was expressly authorised to build other houses on the south-east part of it, so as to range in point of height with some which Jollie, the superior, then contemplated building towards the street now called East Broughton Place. There is no reference in this feu-contract to the restrictions on building to which Dick's feu was subject, still less anything purporting to communicate to Fitzsimmons any benefit from those restrictions.

The fourth and last plot of ground was afterwards feued, as to part, to Fitzsimmons (who conveyed it to Ferrier), and as to the rest to Ferrier, with provisions as to building similar in substance to those in the feu-contract of No. 4 to Fitzsimmons.

No general scheme or plan of building was embodied or referred to in any of these feu-contracts; and (except that the houses Nos. 1, 2, 3, 4, and 5, have a uniform frontage, so far as relates to their distance from the street, towards Gayfield Square) no such general plan appears to have been followed in building upon any of the plots of ground feued.

Under these circumstances, it appears to me to be clear that this case does not come within the principle of *McGibbon v. Rankin*¹ and the other authorities of that class. The restrictive provision as to building in Dick's feu-contract was not, in any sense, *jus quæsitum tertio*; it was merely a condition of tenure between superior and vassal. The fact of several feuars of neighbouring plots of building land in the same street holding from a common superior, does not, by itself, entitle one of those feuars to claim the benefit of restrictions

¹ 9 Macph. 423.

No. 11. contained in the feu-contract of another, unless some mutuality and community of rights and obligations is otherwise established between them; which can only be done by express stipulation in their respective contracts with the superior, or by reasonable implication from some reference in both contracts to a common plan or scheme of building, or by mutual agreement between the feuars themselves. Here there are none of those things. It follows that the respondents at your Lordships' bar have no interest of their own, no right or cause of action against the appellant. They are strangers to the contract in which the restrictions which they seek to enforce are contained.

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The appeal, therefore, must be allowed, unless the fact that the note of suspension and interdict is expressed to be "with consent and concurrence of the Governors of Cauvin's Hospital," makes the Governors of the hospital (whom I assume to have now the title of superiority, which at the time when the several feus was granted was vested in James Jollie), parties suing for their own title and interest, independently of any right, title, or interest in the respondents.

The majority of the Judges of the Second Division (Lord Young dissenting), appeared to have thought that the Governors of Cauvin's Hospital were, in substance, complainers in this action, so as to cure, by the strength of their title, any infirmity or defect in the title of the respondents. I am not, myself, able to concur in that opinion, and I am not satisfied that it would have been the conclusion of those learned Judges if they had thought (as I do) that the respondents had no title of their own upon which they could sue in their own right.

The pleadings are throughout constructed upon the view that the respondents, the feuars of No. 4 (and they only), are "complainers" in the suit. The reasons of suspension and interdict, the answers to the statement of facts for the present appellant, and the pleas in law for the complainers, are those of the feuars, and of the feuars only. Nor is it easy to conceive why the superiors, if they intended to be complainers at all, should not have been so in the ordinary form. I think it plain, upon the whole record, that the consent and concurrence of the superiors was thought necessary, and was alleged in the note of suspension and interdict, only because it was with and to them that the obligation of which the feuars claimed the benefit was originally undertaken. There is no definite averment of the superior's title, as there surely ought to have been if it had been intended to make a case on which the superiors might stand without the feuars, and which could be met by separate defences available against the superiors only.

This particular form of suit with "consent and concurrence" seems to be not uncommon in Scotland, when the principal parties have an interest or right of their own qualified by or dependent upon some *jus tertii* or some limitation or condition, which might be an obstacle or impediment to their suing without such consent, but which ceases to be so when they have it. No authority was cited for the general proposition that under this form of suit the consenting or concurring parties ought to be or can be regarded as sole or principal actors, when it turns out that the parties suing as principals on the record have not the interest or right which they claim. I infer from what was said by the Lord Justice-Clerk that his Lordship was not prepared to affirm that general proposition; and I have myself no hesitation in stating that I think it untenable in law.

The result is, that, considering the respondents to be strangers, not entitled to the benefit of the restrictions in the feu-contract of the 6th of June 1782, I

think this appeal ought to be allowed; and I therefore move your Lordships that the interlocutor appealed from be reversed, and the case remitted to the Court of Session, with directions to sustain the third plea in law for the appellants, and to refuse the reasons of suspension, with expenses. The costs of the appeal to this House will follow the event.

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LORD BLACKBURN.—My Lords, James Jollie, in the years 1782, 1783, and 1784, gave out feus of what now forms one side of Gayfield Square, in Edinburgh. His title is now in the Governors of Cauvin's Hospital.

The Lord Ordinary states the first question thus:—"The feus of Gayfield Square were given out by James Jollie. The complainers (the respondents before this House) are the proprietors of feu No. 4, while the respondent (the appellant before this House) is the proprietor of feu No. 2. The purpose of this action is to restrain the respondent from building in contravention of the conditions of his feu, and to have him ordained to remove such buildings as he has built in contravention of these conditions. The first question is, whether the conditions of the feu-contract of the respondent are enforceable by a co-feuar? The Lord Ordinary thinks that they are. The feu-contracts contain similar, though not identical, conditions as to building. These conditions seem to the Lord Ordinary to have been inserted for the joint behoof of the feuars, and are therefore enforceable by any one against the others."

A great deal of house property in Scotland is held under feus containing in the feu-charters restrictions as to what is to be done. Such restrictions are, *prima facie*, enforceable only by the superior, who alone is a party to the contract of feu. If he has entered into another contract of feu, the superior may, if he considers that the relations he has entered into with that other feuar render it either morally or legally incumbent on him so to do, enforce those restrictions for the benefit of that feuar, though the latter be no party to the contract which created the restrictions. It may, at first sight, seem not very material whether the restriction is to be enforced by the superior suing at the instance of the co-feuar, probably (after having taken due security for his indemnity) permitting him to conduct the litigation, or by the co-feuar direct; but practically it makes a good deal of difference. I think it must be taken as settled that where it appears that the restrictions were entered into for the benefit of other feus, either already existing or to be created by the superior thereafter, the restriction may be enforced by each co-feuar as far as his interest is concerned. It might have been better if the question whether it so appeared had been from the first considered to depend entirely on the construction of the contract of feu, applying the ordinary rules of construction to the terms used in it; but there are expressions used in some of the judgments on this subject which, if taken literally, seem to go further.

As many houses are bought and sold, the price being regulated according as it is thought that the purchaser has a direct remedy to enforce such restrictions as are in his favour against his neighbours, or, on the other hand, that he can easily by dealing with the superior, and the superior alone, get relieved from such restrictions on his own property as are burdensome, I think it desirable in this, as in all conveyancing questions, not to depart from what has been established.

But I think that in the case now at the bar there is nothing to indicate that restrictions were imposed for the benefit of the co-feuars, beyond the fact that

No. 11. the feus were all given out nearly at the same time, and that some of the conditions inserted in the feus are similar to each other. That, and the fact (which exists in most cases where a square has been built at about the same time, whether on land belonging to one estate or to several), that the houses are built so as to produce a considerable degree of uniformity, are all that the respondents' counsel could point out as tending to shew that the restrictions were originally imposed for the benefit of the co-feuars; and though some expressions used by Lord President Hope¹ and Lord President Inglis seem to indicate an opinion that this is enough to justify the conclusion that the restrictions were imposed for the benefit of the co-feuars, I think no decided judgment has yet been given on the ground that that alone is enough.

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I come to the conclusion that the cases should not be carried further than they have already been, and consequently I must advise your Lordships to differ from the opinion expressed by the Lord Ordinary.

The other question is a very technical one of pleading. Practically the difference between being permitted to enforce the restrictions by suing in the co-feuar's name, with the concurrence of the superior, and by suing in the name of the superior for the benefit of the co-feuar, seems to me only to consist in the greater probability that the superior will permit the one course to be taken than the other. I think it more desirable that the superior should distinctly know what he is doing; and there being no authority in favour of the respondents' contention, I think this point also should be decided in favour of the appellant.

I therefore agree with the judgment proposed by the noble and learned Lord on the woolsack.

LORD WATSON.—My Lords, the Governors of Cauvin's Hospital are the superiors of a piece of ground lying upon the west side of Gayfield Square, in the city of Edinburgh, which was feued out in lots for building purposes about the end of last century. The northern portion, consisting of nearly one half of the ground in question, was given off in five separate lots, upon each of which there has been erected a dwelling-house fronting Gayfield Square, with offices behind. These houses are erected on the same building line, and in front of each there is an open space twenty feet in breadth, separated from the street by a low wall and railing, which the feuar is under obligation to maintain. Upon the background of No. 5, which is the northernmost of these lots, there has also been erected a large hall, and upon the background of No. 4 an additional dwelling-house, these buildings having frontage to other streets belonging to the superiors. The buildings which I have just described are sanctioned by the terms of the respective feu-rights, all of which contain an express prohibition against the erection of any other buildings.

The appellant, who is now the proprietor of lot No. 2, was proceeding to convert his dwelling-house and offices into a carriage manufactory, and the alterations which he was in course of making for that purpose included the erection of a show-room, one story in height, upon the vacant space between the house and Gayfield Square, and also the erection of buildings of similar character, and of considerable extent, upon the background. It was not seriously disputed at the bar, and it does not appear to me to admit of reasonable doubt, that these operations were in direct violation of that condition of the appellant's feu-right

¹ 2 W. & S., 302.

by which he is bound "not to erect any other buildings upon the said piece of ground (i.e., lot No. 2), except the tenement of houses and walls of enclosure already erected thereon." No. 11.

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The process of suspension and interdict, in which the present appeal is taken, was raised at the instance of the respondents, who, as trustees of the late Thomas Elder MacRitchie, W.S., are proprietors of the feu forming lot No. 4, "with consent and concurrence" of the superiors, the Governors of Cauvin's Hospital. The object of the action is to enforce the condition of the appellant's feu-contract, by interdict against the erection of any buildings on lot 2 other than those which are expressly sanctioned by the terms of that contract.

The Lord Ordinary was of opinion that the respondents, MacRitchie's trustees, had, *per se*, a good title to enforce the restriction, and he accordingly granted interdict to the effect craved. On a reclaiming note to the Second Division of the Court, the Lord Justice-Clerk and Lord Gifford (Lord Young dissenting) affirmed the judgment of the Lord Ordinary, on the ground that, assuming the respondents to have no right to enforce the restriction, they were entitled to decree in respect of the consent and concurrence of the superiors, who had the right. Lord Gifford seems to have been of opinion, with the Lord Ordinary, that the feuars of these five lots were mutually entitled to enforce the conditions of their respective feu-rights. So far as expressed, the opinion of the Lord Justice-Clerk upon that point is unfavourable to the respondents. Lord Young held that the respondents had of themselves no title to sue, and that the appellant must prevail, because the defective instance of the respondents could not be validated by the mere consent and concurrence of parties having a good title to insist for the same remedy in an action at their own instance.

It is settled by a series of decisions in the Courts of Scotland that every one of a class of feuars deriving their title from a common superior may have an implied right or *jus quæsitum* to enforce conditions occurring in contracts between the superior and his co-feuars to which he was not a party. In some cases it is made a matter of express stipulation by the superior, in contracting with his vassals, that each of them shall have that right. The right in those cases, when it has been held to arise by implication, appears to me to have been originally admitted upon considerations of expediency, and partly with the view of avoiding circuitous and unnecessary litigation.

Both parties, in their argument at the bar, assumed, and rightly assumed, that in order to the constitution of such a *jus quæsitum*, it is essential that the conditions to be enforced shall appear in all the feu-rights, that they shall in all cases be similar, if not identical, and of such a character that each feuar has an interest in enforcing them. But the respondents carried their argument so far as to maintain that these considerations, where they are found to co-exist, sufficiently indicate that the conditions of feu were intended for the mutual benefit of all the feuars, and must therefore be held to confer upon each feuar a right of action against his co-feuars for the enforcement of these conditions. The respondents did not assert that the proposition thus advanced by them has as yet been judicially determined in their favour, but they did maintain that it is strictly in accordance with the principle of the decided cases, that contention being founded mainly, if not altogether, upon certain *dicta* of Lord President Hope in the case of the *Governors of Heriot's Hospital v. Cockburn*,¹ and of

¹ 2 W. & S., 302.

No. 11. Lord Ardmillan in the recent case of *Robertson v. North British Railway Company*.¹ In the latter case Lord Ardmillan said :—"Where in titles originally springing from the same person there is an undoubted and substantial interest in one feuar, to enforce a restriction such as this, partaking of the nature of a servitude, against another feuar, the law will recognise a title available and sufficient to support his interest and to enforce the restriction."

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If these words were taken as a complete statement of the law applicable to cases like the present, they would support the contention of the respondents, and so would the language used by Lord President Hope in the *Governors of Heriot's Hospital v. Cockburn* which I have not thought it necessary to quote. The soundness of Lord President Hope's *dicta* has been seriously questioned in subsequent cases, but I doubt whether either of the learned Judges intended, in the passages relied on by the respondents, to give an exhaustive definition of what is requisite in order to create a right in one feuar to enforce the conditions of another feu. Their statements of the law are unimpeachable if read with reference to the circumstances of the case in which they were uttered. If they were intended to have a wider application they were unnecessary for its decision.

The fact of the same condition appearing in feu-charters derived from a common superior, coupled with a substantial interest in its observance, does not appear to me to be sufficient to give each feuar a title to enforce it. No single feuar can, in my opinion, be subjected in liability to his co-feuars, unless it appears from the titles under which he holds his feu that such similarity of conditions and mutuality of interest among the feuars either had been or was meant to be established. According to the tenor of the feu-disposition, or feu-contract, as the case may be, the feuar and his superior are the only parties to it; and I am of opinion that no *jus quæsitum* can arise to any *tertius* except by the consent of both these contracting parties. That being so, unless the feuar, either in express words or by implication, gives his consent to the introduction of a *tertius*, the superior cannot as against him create any such interest, by imposing the same conditions to which he has submitted upon another feu in his vicinity.

In dealing with this question it is necessary to keep in view that when the feuar has a *jus quæsitum*, his title, and that of the superior, to enforce common feuing conditions are independent and substantially different rights. The title of the superior rests upon contract, a contract running with the estate of superiority and burdening the subaltern estate of the vassal. The right of the feuar, though arising ex contractu, is of the nature of a proper servitude, his feu being the dominant tenement; consequently he cannot enforce it against other feuars except in so far as he can qualify an interest to do so. Again, the superior's consent to discharge the condition cannot affect the right of the feuar, and as little can the feuar's renunciation of his servitude impair the superior's right to enforce the condition. It appears to me that it would be unreasonable and contrary to all principle to hold that a feuar was subject to such a servitude, except upon evidence warranting the inference that in accepting a title to his own feu he had it in contemplation, and tacitly agreed, that such a burden should be imposed upon him. And seeing that the burden when imposed affects the land which is the subject of his feu, I think the evidence of his con-

¹ *Ante*, vol. i., p. 1218.

sent to its imposition can only be derived from the titles under which his feu is held. What kind or amount of evidence derivable from his titles will suffice to indicate the feuar's consent is a question which must depend upon the circumstances of each case.

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If the *dicta* upon which the respondents found were to be taken *per se*, and as expressing all that is required in order to create mutual servitudes as between the feuars, the superior would necessarily have the power of creating such servitudes without the consent, and even against the wish, of the feuars burdened thereby. I should not have been prepared to except to that view of the law, had I been of opinion that the creation of such servitudes was in substance and effect nothing more than an assignation to each feuar of the superior's right as against his co-feuars. But the effect of an assignation is to divest the cedent of his right, at least to the extent to which it is assigned; whereas the effect of creating mutual servitudes among the feuars is to leave the superior's right as against each of them undiminished and unimpaired, and to subject the feuar in liability to a body of servitude owners, whose interest, as well as that of the superior, he must purchase or settle for before he can obtain a release from the conditions of his feu-charter. I know of no principle upon which that liability ought to be imposed upon a feuar except of his own consent; and, so far as I am aware, there is no decision by which his liability has been affirmed in the absence of evidence from which his consent was matter of legitimate inference.

Note

The first case in which it was held that each member of a class of feuars had an implied right to enforce a common condition was that of the *Governors of Heriot's Hospital v. Cockburn*, already referred to. But the judgment of the Court of Session was reversed by this House, as being unnecessary to the disposal of the cause. The next decision was in the *Magistrates of Edinburgh v. Macfarlane*,¹ and similar judgments have been given in subsequent cases. All of these appear to me to fall under one or other of two categories, either (1) where the superior feus out his land in separate lots for the erection of houses, in streets or squares, upon a uniform plan; or (2) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him.

To the first of these categories belongs *M^r Gibbon v. Rankin*.² The superior in that case had laid off a piece of ground for the formation of a continuous line of houses or terrace, and from time to time granted separate feu-charters of the site of each house, and in each charter there occurred the same condition regarding the size and design of the buildings to be erected, coupled with a stipulation that it should be inserted by the superior in all the other feu-rights of the terrace. The defender, who was infringing the condition, objected to the title of the pursuer, whose charter of feu was posterior in date to his own; but the Court held that, in stipulating that the condition should be imposed upon his co-feuars, the defender must have had in contemplation that it was to operate for the mutual benefit of all the feuars, and be mutually enforceable by them.

*Robertson v. North British Railway Company*³ affords an illustration of the cases falling under the second category. A superior feued to A a piece of ground lying within the city of Glasgow, subject to the restriction, *inter alia*,

¹ 20 D. 156.² 9 Macph. 423.³ *Ante*, vol. i., p. 1213.

No. 11. that no part of it should be used for the storage of manure ; and on the express condition that the restriction was to be imposed by A upon all his disponees or sub-feuars. A, without taking infeftment, conveyed part of the ground to B, and the remainder to C. The restriction was duly inserted in the feudal title completed by B ; but C made up his title without any notice of the restriction, and subsequently conveyed to D, a singular successor, against whom an action was brought to enforce the restriction, by a pursuer deriving right from B. The defender maintained that the restriction was not validly imposed upon him, and that, even if it were, B and those in his right had no title to enforce it. As to the first of these points, the majority of the First Division were of opinion, upon grounds which appear to me to admit of considerable doubt, that the restriction was well imposed upon D as well as upon his author, C ; and upon that footing their Lordships were of opinion that it was a mutual restriction, and that B had a good title to compel its observance by D.

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The *ratio decidendi* in such cases as *M'Gibbon v. Rankin* seems to have been that a feuar, who stipulates with his superior that a particular restriction shall be imposed upon all his fellow-feuars as well as upon himself, must intend that he shall have the power of enforcing it against them, and that they shall have the like power as in a question with him. In *Robertson v. North British Railway Company*, and similar cases, the principle of decision appears to me to have been that a sub-feuar or disponee acquiring a building lot, subject to a particular condition, with notice in his titles that the common author, whether his immediate or over-superior, has imposed that condition upon the whole area of which his lot formed a part, must be taken as consenting that the condition shall be for mutual behoof of all the feuars or disponees within the area, and that all who have interest shall have a title to enforce it. In other words, the feuar is held as consenting to be bound by the law laid down by the common author for the benefit of all future feuars. I have been unable to find any decision proceeding upon the principle that a superior who feus out a portion of his estate to A under a precise restriction as to building, and who, in giving a title to A, neither undertakes, nor intimates an intention, to impose similar restrictions in feuing the remainder of his ground, can thereafter confer upon every feuar who acquires a building lot in the vicinity a *jus quæsitum* enabling him to sue A directly.

In the present case, the respondents' title to sue appears to me to fail in two essential particulars. The titles to the appellant's feu are of older date than those of any other of the five lots in question, with the exception of lot 3, which was originally included in the same feu-contract of the 6th of June 1782. That deed lays no obligation upon the superior to observe any limitation in building upon the adjacent ground, or to impose any such limitation upon those to whom he might subsequently feu or dispoise it. No doubt there are words occurring in the deed from which it might be inferred that it was in the view of the superior to feu the adjoining ground on both sides ; but there is not a single expression which can reasonably be held to indicate the superior's intention to restrict the adjoining feuars, and still less to imply that he meant to come under an obligation to that effect. Again, the several restrictions as to building contained in the titles of the appellant and the respondents do not, in my opinion, so resemble each other as to raise the inference that they were intended to be mutual. These restrictions are, in both sets of titles, expressed in the same words ; but in substance they are very different. The one is a prohibition against building

anything except a single house, fronting Gayfield Square, with offices. The other is a prohibition against building anything more than two dwelling-houses with offices, the one fronting to Gayfield Square on the east, and the other to street on the west. The restriction imposed upon the appellant has, in the case of the respondents, been departed from to the extent of allowing them to build a second dwelling-house upon the west end of their feu—a departure which seems to me to be fatal to the existence of that similarity and consequent mutuality of restriction upon which the argument of the respondents was mainly rested.

I have accordingly come to the conclusion that the respondents had and have no title, in their own persons, to raise and insist in the present action. That leaves the question whether their right to sue, which I assume to be *nil*, has been validated by the consent and concurrence of their superiors, to the effect of entitling them to decree in the terms of the prayer of the note of suspension and interdict.

It was argued for the appellant that the superiors, the trustees of Cauvin's Hospital, have waived their right to enforce the restriction in his titles by permitting others of their feuars in the vicinity to violate the building conditions to which they were subject. If that proposition were clearly made out, it would be sufficient for the disposal of the case; but I am unable to adopt the appellant's argument, which was necessarily based upon an implied obligation on the part of the superiors to impose and enforce these conditions for his behoof. It appears to me that the case must be disposed of on the footing that the superiors have still a good title to enforce the restriction as against him; and that they have given their consent and concurrence to the instance of the respondents. I think the appellant is barred, by his pleadings on the record, from maintaining that such consent and concurrence was not in point of fact given. Upon this branch of the case I concur in the views which were expressed by Lord Young in the Court below. Actions at the instance of one party with the consent and concurrence of another, are of every day occurrence in the practice of the Courts of Scotland. In all such cases, the proper instance is that of the leading pursuer or complainer who sues in his or her own right and title. Thus a wife, *sante matrimonio*, sues with consent of her husband, and a minor with consent of his curators; but the right of action is vested in the wife and the minor only, and decree passes in their favour, the interposition of their legal guardians, as parties consenting, being merely required as a judicial precaution against any neglect of their interests in the conduct of the suit. Various other illustrations of the practice are to be found in the opinion of Lord Young, and it is unnecessary to repeat them here. But I know of no authority for holding that, according to the law or practice of Scotland, a person who has no right or title whatever can sue an action, provided he obtain the consent and concurrence of the party to whom alone such right or title belongs.

The reasons assigned for their judgment by the Lord Justice-Clerk and Lord Gifford appear to me to be unsatisfactory. The Lord Justice-Clerk deals with the case as if the superiors had the primary right and the respondents "a subordinate and derivative title to enforce" the restriction in question. If the respondents were really possessed of a subordinate and derivative title, I should come to the same conclusion as his Lordship; but that is not their true position. The respondents may, indeed, have an interest to prevent the erection of the buildings contemplated by the appellant; but their interest is no greater than

No. 11. it would be if they had no feudal relation to the superiors of the appellant's feu, or if there were no restriction in the appellant's titles. They have no right or title, primary or subordinate, to enforce the restriction, neither have they any title to compel the superiors to enforce it. Lord Gifford, on the other hand, seems to hold it conclusive of the present question that "he who is merely a consenter to a disposition of heritage is held to be really a disposer, if the true title of the subject be found to be in him." That illustration embodies a correct statement of the law, but it has no bearing upon judicial procedure; and if admitted as an analogy would necessarily lead to the result that any stranger might insist in an action with regard to landed estate in which he had no right or interest, provided he sued with the consent and concurrence of the proprietor.

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It was suggested by Lord Gifford that the instance of the respondents, assuming it to be defective, might be cured by amending the libel, to the effect of allowing the superiors to stand as complainers for their interest, under the provisions of section 29 of the Court of Session Act of 1868 (31 and 32 Vict. c. 100). That clause enacts that "all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." I cannot doubt that the amendment proposed by the learned Judge would have been unwarranted by the terms of the statute, which contemplate alterations on the record with the view of facilitating the determination of the real questions at issue between the original parties, but not the importation of new parties into the litigation.

On these grounds, I am of opinion that the interlocutors under appeal ought to be reversed, and a remit made in the terms proposed by your Lordships.

INTERLOCUTORS appealed from reversed, with costs, and the cause "remitted back to the Court of Session in Scotland, with directions to sustain the third plea in law for the appellant, and to refuse the reasons of suspension, and find the respondents liable in expenses, and to ordain the respondents to repay to the appellant the expenses in the Court of Session."

WILLIAM ROBERTSON, London—MACANDREW & WRIGHT, W.S.—FRANK W. REYNOLDS, London—LINDSAY MACKERSY, W.S.

No. 12.

JAMES M'BAIN (Roney's Trustee), Appellant (Complainer).—

Sol.-Gen. Balfour, Q.C.—Benjamin, Q.C.

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M'Bain v.
Wallace & Co.
&c.

JOHN WALLACE & CO. AND OTHERS, Respondents (Respondents).—

Charles, Q.C.—R. V. Campbell.

Sale—Delivery—Ship—Payment by instalments during construction—Bankruptcy of shipbuilder—Mercantile Law Amendment Act, 1856, sec. 1.—Held (in aff. judgment of Second Division) that the rule introduced by sec. 1 of the Mercantile Law Amendment Act whereby a purchaser's right to enforce delivery from the seller is secured against the subsequent diligence of the seller's creditors, "including sequestration," applied in a case where a ship was sold by the builder in the course of construction, and remained in the seller's hands undelivered at the date of his sequestration.

Question, whether by the common law of Scotland the property of the ship passes to the purchaser without delivery as the instalments of the price are paid.

Observations on the case of Simpson v. Duncanson, 1786, M. 14,204.

Sale—Right in security—Security over moveables—Ship—Mercantile Law Amendment Act, 1856, sec. 1.—A, a shipbuilder who had a vessel on the stocks, applied to B & Co., to whom he was already indebted, to assist him with

advances to enable him to complete the vessel. B & Co. only consented on condition that the vessel should be sold to them, as they considered that in no other way would they be safe to make the advances asked. This was agreed to, and an absolute contract of sale was entered into by the parties unqualified in any way, though there was admittedly an honourable understanding that should the vessel realise a profit beyond the sum paid by B & Co., they would communicate the benefit to A.

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The advances already made were attributed towards the agreed-on price, the balance of which was paid by instalments as required, for which receipts were granted by the seller "to account of the purchase price." At the same time, to raise money to keep the purchasers out of cash advances, bills to the necessary amount were drawn by B & Co. and accepted by A and discounted by B & Co. While the vessel was in course of completion B & Co. entered into negotiations for the sale of the vessel, in which they described it as a vessel belonging to A in which they had a personal interest, as they were under considerable advances to A against the vessel. They did not succeed in selling the vessel, and before it was completed and delivered A was sequestered. The accommodation-bills above mentioned were not retired by B and Co. till after A's sequestration.

Held that though the motive of the transaction undoubtedly was to secure advances made and to be made by B & Co., and although there might be not only an honourable understanding but even a binding collateral agreement as to the appropriation of any surplus on the sale of the vessel over the sum advanced, still the contract was a clear contract of sale and nothing else, which fulfilled every condition of the provision of the Mercantile Law Amendment Act, 1856, sec. 1, and that there was nothing in the transaction or the accompanying circumstances to affect the operation of that provision as regarded the rights of the creditors of the seller.

(In the Court of Session Jan. 7, 1881, current vol., p. 360.)

Mr M'Bain, Roney's trustee, appealed.

At delivering judgment,—

Ld. Chancellor
(Selborne).
Lord Black-
burn.
Lord Watson.

LORD SELBORNE.—My Lords, your Lordships have listened to lengthened arguments in this case, but it appears to me that there are really only two questions which are ultimately material to the judgment. The first is, whether this is a contract of sale. Now, the appellant is under very great difficulties when he denies that it is a contract of sale, because upon the face of the instrument it is as carefully prepared and clearly expressed a contract of sale as anything can possibly be. And when we turn to the parole evidence, although no doubt on the one side and on the other there is a contrariety of statement, yet the purchasers (the respondents) most positively say that what is expressed in the instrument is that which was intended. It was done, no doubt, with the motive of securing the money which the purchasers had at stake, but it was done deliberately by way of purchase, because that was the best and most effectual way of accomplishing the object which the parties had in view. In corroboration of that, if corroboration were necessary, we find that the preliminary heads of the agreement, afterwards extended by this contract, begin, "memorandum for contract of sale and building contract;" and, if they could properly be looked to, the entries in the books of the law-agent are to the same effect. The statement on the other side is absolutely inconsistent with what appears upon the face of the instrument, and there is no reduction of the instrument asked for. It is not an allegation of something consistent with the instrument; it is an allegation entirely destructive of it. Therefore, as it appears to me, my Lords, the first point must be decided, in accordance with the instrument, that this was a sale, whatever may have been the motive, reason, and purpose which led to that sale; and its *bona fides* is really not in dispute.

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My Lords, I think I may, under those circumstances, pass very lightly over what was afterwards written and done. There was a course of action upon this contract, shewing, as I think, a clear intention to adhere to it; because certain cheques were from time to time drawn, by the persons who under the contract are technically, at all events, purchasers, for the whole amount of the agreed purchase-money, namely, £2500, and £50 further, which represents, as I understand, certain extra work done upon the ship. The fact that those were payments of purchase-money under the contract is evidenced by a series of documents signed, as often as any of those payments were made, expressly stating that they were "to account of the purchase price" payable by the purchasers for the ship in question, and these documents are all subscribed by Roney, who was, on the face of the contract, the seller. It is said that those payments are not to be regarded as real payments, because, not for all of them, but for all except £120 in the whole, there were acceptances given at the same time by Roney, who received the money. But it seems to me to be perfectly clear that the object of those acceptances was simply to keep the purchasers out of cash advances until the period of time at which, if those payments had not been made, the purchase-money would have been payable under the contract. Looking to this appropriation of payments made by the receipts for the cheques, it appears to me to be an irresistible conclusion that as between Roney and the purchasers, the purchasers, and not Roney, were liable and bound to take up those bills, as in point of fact they did, although not, as far as I know, till after the sequestration. In that state of things, those bills having been taken up, the money has in fact been paid by the purchasers, and to the full amount.

My Lords, I cannot but observe that, whatever may have been the intentions of the parties with regard to any ulterior arrangements or settlements between them, I find nothing to lead me to the conclusion that those intentions extended so far as in any event whatever to pay, or repay, the £2550 to the purchasers, otherwise than by means of the realisation of the property purchased. Personal debt, independent of this contract, I do not find to have resulted from the transaction between the parties. What is alleged is this—and there is undoubtedly some evidence in support of it—that the parties contemplated that the purchasers should realise this ship by sale, but that having originally gone into the transaction in a certain sense with a view to their own security, and evidently not having fixed the £2500 as a price in the ordinary way of bargain where the motive is to become possessed of and to retain the article purchased, the purchasers would not, if the article when sold fetched more than that amount, and any interest, costs, and so on, which might be due, take advantage of any gain or profit, which, according to the letter of the contract, they might possibly be able to realize.

My Lords, I cannot say that I find in this evidence any very clear or satisfactory proof of a positive agreement having been at any time made for that purpose, although I do find something sufficient to shew that there was a sense of moral obligation, at all events on the part of the purchasers, so to act, and that it was their apparent intention so to act. It may be that what happened between them may raise that, beyond moral obligation, into a legal or equitable obligation, which the Courts would enforce; and that certainly, I think, appears to have been the opinion of the learned Judges in the Court below. I will assume for the present purpose, that there might be sufficient grounds for that conclusion, but at the most it can come to nothing more than this—that this being in in-

tention expressly a contract of sale, there is a bye-agreement, a collateral agreement, not in form of a regular back-bond, but of that nature, by reason of which, when the property purchased is realized by a subsequent sale, something will be done between the parties to adjust the mutual rights or equities which they have consented to establish between them. That appears to me not only not to destroy the sale as a sale, but really to proceed upon the contract as its foundation and basis, and to be something growing out of that contract which the parties, according to the hypothesis, agreed to do. Therefore, it appears to me that there is no ground whatever for treating this otherwise than as a sale.

I postpone the consideration of the correspondence which passed with a view to the subsequent sale or re-sale of this property, because that seems to connect itself naturally with another argument on the question of reputed ownership. Postponing that, I have first very lightly to pass over the argument founded upon the Scotch law as laid down in the case of *Simpson v. Duncanson*,¹ or supposed to be laid down in that case, independently of the Mercantile Law Amendment Act. I frankly confess that unless *Duncanson's* case is to be explained, as it was put at the bar, upon the footing of a constructive delivery, I do not very distinctly or clearly understand what the law is which that case decided: it is admitted to be exceptional. Upon the face of the decision itself, as reported by Lord Monboddo, it seems, it was not that the property in the ship had vested, but that there was an obligation on the part of the trustee or assignee in bankruptcy, taking the property, to repay the money which had been laid out upon it,—which is a very different thing. But, put it as you will, the case of *Simpson v. Duncanson* does not appear to me to be an authority on which it is so satisfactory to rest the decision of the question now before your Lordships as it is to rest it upon the terms of the Mercantile Law Amendment (Scotland) Act, which render a consideration of the difficulties which might have arisen in regard to *Duncanson's* case now immaterial.

By the general law of Scotland there must be tradition, or delivery, in order to give effect to a contract of sale; but by the Mercantile Law Amendment Act, for the express purpose of assimilating the law of Scotland, on such points, to the law of England, it is provided that where goods have been sold but have not been delivered to the purchaser, but have been allowed to remain in the custody of the seller, the mere want of delivery shall not enable the creditors in bankruptcy of the seller to defeat the sale. I have already said that, in my opinion, whether in some sense security was the object or not, there was here a sale in fact and in intent. The statute does not say that, there being a sale, that is to be taken out of the operation of the statute, because the parties may have some further contract or agreement, or understanding *inter se*, with regard to the subject of the sale. This is a case in which, if there was a sale at all, there was a sale unaccompanied with a delivery to the purchasers. The subject was allowed to remain in the custody of the seller. Every condition of this statute was fulfilled, and I cannot see any ground upon which your Lordships can qualify those conditions of the statute for the purpose of defeating a *bona fide* transaction which is otherwise lawful. It appears to me, therefore, that the statute removes all the difficulties and questions which might otherwise have arisen as to the doctrine of *Simpson v. Duncanson*, and that, having regard to that clause of the statute, the conclusion arrived at by the Court of Session is correct, the only difficulty upon that point being that the Court of Session have

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Case law
doubtless
founded on
§ 2 of Act
in this case
and also in
Spencer v
Doherty
7 R

¹ Mor. Dict. 14,204; also Bell's Com. M'Laren's ed., vol. i. p. 189.

No. 12. not based their conclusion upon the statute as distinctly as I think your Lordships will be disposed to go.

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With regard to reputed ownership, I really think it is very far from necessary to say much, because beyond all question what Lord Justice Turner said in the case of *Holderness v. Rankin*¹ is true, that the fact of an unfinished ship being in a shipbuilder's yard is not enough by itself to raise a reputation of ownership on the part of the shipbuilder. I see nothing to distinguish this particular case from the ordinary one. If, in point of fact, this ship was not, after the sale, the property of the shipbuilders, the mere fact of its remaining in their yard unfinished could not create the reputation of its being so ; and whether or no it was left at their order and disposition for the purpose of creating a reputation of ownership, and to enable them to deal with it in a way which would bring it within the scope of the bankruptcy law, is a question to be determined upon the evidence ; and I can see no evidence whatever in support of that proposition. All that is referred to in support of it is a correspondence, shewing plainly enough that communications passed from time to time between the shipbuilder in whose yard this vessel was, and those whom I have called the purchasers, and also the brokers ; and latterly, with one intending purchaser. That correspondence, taken as a whole (and every part of it is consistent with the rest), shews plainly, that it was intended and desired to find a purchaser for this unfinished vessel. References were made in the correspondence to the builder, but that would happen in the ordinary course of things if the person to whom the vessel belonged desired that it should be sold, whether it belonged to the builder, and whether it could be sold without his concurrence or not. Nothing was done or said from which I should infer that there was any authority which would have enabled him to deal with it without the concurrence and consent of the respondents. Their interest is several times referred to, and referred to in a manner which appears to me to be perfectly consistent with the absence of any reputation of ownership in the builder, or any intention to create it. No doubt, my Lords, in those letters the ship is frequently spoken of as the builder's ship ; but the letters are not written to persons who are induced by their means to deal with the ship upon the footing of its being the property of the builder. They are not published to the world. Nothing appears to have happened with regard to these letters out of which a reputation of ownership could grow. Therefore, my Lords, it appears to me that there is nothing in that argument.

The last point that was mentioned, about the notice extending to the use of the building yard, may be said now to be at rest. It is admitted on all hands that such use as is necessary to enable the ship to be taken away is proper and not in dispute. On the other hand, any indefinite use of the building yard your Lordships do not understand to be claimed, and certainly if it were claimed it would receive no countenance from anything which your Lordships are likely to say.

There remains only the question whether any addition should be made to the interlocutor refusing the interdict. Now, the interdict is simply sought for to prevent those things from being done according to the notice which are authorised by the contract, and necessary to enable possession to be taken of the ship, and the ship to be sold, and such use, as I have already said, to be made of the building-yard as is absolutely necessary and indispensable. The interdict

¹ 29 L. J. (Ch.) 753.

seeks to prevent that, and the question is, is it according to contract or not? No. 12.
 If the contract is good, as I think your Lordships will hold it to be, those things appear to me to be authorised by the contract; and to refuse an interdict which would prohibit them appears to me to be a necessary consequence. July 27, 1881.
 If your Lordships are of that opinion, it appears to me that to go further, and to enter into the question of the ulterior rights of the parties under any collateral agreement which may exist between them, would not only not be necessary to protect any rights which may exist under such an agreement, but in the present state of the evidence I think your Lordships have not the materials upon which it would be possible or satisfactory to make any such declaration, or right to attempt it. M'Bain v. Wallace & Co. &c.

On the whole, my opinion is that the judgment under appeal is right, and I move your Lordships that the interlocutor be affirmed, and the appeal dismissed, with costs.

LORD BLACKBURN.—My Lords, I am entirely of the same opinion.

It seems to me that it will be most convenient to consider first the true effect and construction of the Mercantile Law Amendment (Scotland) Act, 19 and 20 Vict. c. 60, sec. 1. Now, there is a preamble to that Act explaining what the object of it is, and there is a similar preamble explaining the object of another Act, for there was one passed for England and one for Scotland in the same year. The object of the two Acts was this :—They were passed because there was a difference between the mercantile law of England and the mercantile law of Scotland which was found inconvenient in practice, and therefore it was desired to assimilate them in certain respects,—in some respects, doubtless, by making the English law similar to the Scotch, and in other respects by making the Scotch law similar to the English. It is therefore almost as important in construing that Act to know what was the English law as to know what was the Scotch law, and I believe that upon neither is there any real dispute.

By the English law when there was what civilians would call *emptio perfecta*, and what English lawyers call a bargain and sale,—a contract for good and valuable consideration to pass the property in particular chattels,—as soon as that was ascertained—the property did pass, and the purchaser, although he might not be entitled to delivery—for there might be a vendor's lien or something else to prevent delivery—was entitled nevertheless to the property in the goods, to the *jus in re* as well as to the *jus ad rem*. That made a very considerable practical difference between the law of England and the law of Scotland, for the law of Scotland was like the civil law upon which it was founded, the maxim of the civil law being *traditionibus et usucapionibus non nudis pactis transferuntur rerum dominia*. When there was not an actual delivery, however complete the contract might be,—although it was *emptio perfecta* to the fullest extent, amounting to all that in the great chapter of the Digest upon that subject has been considered to be *emptio perfecta*, and although every farthing of the price was paid,—yet the *dominium rei*, the *jus in re*, did not pass to the purchaser. Although he had the *jus ad rem*, and could, as long as the vendor was *sui juris*, compel the vendor to deliver to him the goods, he had not the *jus in re*. The practical result of that was that a creditor in Scotland might issue diligence and seize the goods, as still the goods of the vendor, that is to say, of the person who had sold them, although every farthing of the price had been paid; and further than that, if a sequestration had taken place, the

No. 11. Lord Ardmillan in the recent case of *Robertson v. North British Railway Company*.¹ In the ~~latter~~ case Lord Ardmillan said :—"Where in titles originally springing from the same person there is an undoubted and substantial interest in one feuar, to enforce a restriction such as this, partaking of the nature of a servitude, against another feuar, the law will recognise a title available and sufficient to support his interest and to enforce the restriction."

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tees.

If these words were taken as a complete statement of the law applicable to cases like the present, they would support the contention of the respondents, and so would the language used by Lord President Hope in the *Governors of Heriot's Hospital v. Cockburn* which I have not thought it necessary to quote. The soundness of Lord President Hope's *dicta* has been seriously questioned in subsequent cases, but I doubt whether either of the learned Judges intended, in the passages relied on by the respondents, to give an exhaustive definition of what is requisite in order to create a right in one feuar to enforce the conditions of another feu. Their statements of the law are unimpeachable if read with reference to the circumstances of the case in which they were uttered. If they were intended to have a wider application they were unnecessary for its decision.

The fact of the same condition appearing in feu-charters derived from a common superior, coupled with a substantial interest in its observance, does not appear to me to be sufficient to give each feuar a title to enforce it. No single feuar can, in my opinion, be subjected in liability to his co-feuars, unless it appears from the titles under which he holds his feu that such similarity of conditions and mutuality of interest among the feuars either had been or was meant to be established. According to the tenor of the feu-disposition, or feu-contract, as the case may be, the feuar and his superior are the only parties to it; and I am of opinion that no *jus quæsitum* can arise to any *tertius* except by the consent of both these contracting parties. That being so, unless the feuar, either in express words or by implication, gives his consent to the introduction of a *tertius*, the superior cannot as against him create any such interest, by imposing the same conditions to which he has submitted upon another feu in his vicinity.

In dealing with this question it is necessary to keep in view that when the feuar has a *jus quæsitum*, his title, and that of the superior, to enforce common feuing conditions are independent and substantially different rights. The title of the superior rests upon contract, a contract running with the estate of superiority and burdening the subaltern estate of the vassal. The right of the feuar, though arising ex contractu, is of the nature of a proper servitude, his feu being the dominant tenement; consequently he cannot enforce it against other feuars except in so far as he can qualify an interest to do so. Again, the superior's consent to discharge the condition cannot affect the right of the feuar, and as little can the feuar's renunciation of his servitude impair the superior's right to enforce the condition. It appears to me that it would be unreasonable and contrary to all principle to hold that a feuar was subject to such a servitude, except upon evidence warranting the inference that in accepting a title to his own feu he had it in contemplation, and tacitly agreed, that such a burden should be imposed upon him. And seeing that the burden when imposed affects the land which is the subject of his feu, I think the evidence of his con-

¹ *Ante*, vol. i., p. 1218.

mentioned exists, but it is not made by statute applicable to sequestration, or a case where the party has failed, but it rests upon the grounds of common law. A simple creditor who issues process and poinds the goods might at common law poind them as against the person who has sold the goods, if that person retained the *jus in re*, though he had lost the *jus ad rem*; notwithstanding the statute he may poind them as a creditor where the possession of the vendor (to borrow the phrase used by Lord Justice-Clerk Inglis in the case of *Sim v. Grant*,¹) has been allowed by the purchaser to be such as is quite inconsistent with his having the *jus ad rem* by virtue of his personal contract of sale. It is very true that inasmuch as the vendor had, by the common law of Scotland before this Act was passed, the legal right of property, you could not properly say that he was "the reputed owner" of goods of which he was himself the actual owner. But the same principle which would have made a third person become the reputed owner, so as to give a creditor a right to seize them in his possession because the true owner had allowed them to be in his possession, appears to me to apply when you are applying the statute. If you can shew that the man who has acquired the *jus ad rem* has allowed the vendor to keep possession of the goods in such a way as is quite inconsistent with his *jus ad rem*, it seems very reasonable indeed to say that that shall be considered as analogous to a case of reputed ownership, and, that being so, the Mercantile Law (Scotland) Amendment Act does not take the goods out of it. It says that, without delivery, a contract of sale shall be good to pass the property as against creditors, but it does not say that, without delivery, the property shall pass, where, if there had been delivery, and the goods had been left in this particular way with the vendor afterwards, they would have been made liable to the diligence of his creditors. So far, I think, the argument is quite right, but it is inapplicable to the present case. The effect of the contract of sale upon the goods with reference to the diligence of creditors is made exactly the same as if there had been an actual delivery, and as it would be under the English law.

It has been endeavoured to be argued that if there was here, by the side of the contract of sale, a collateral agreement that the ship should be only held as security, that would prevent the contract of sale operating under the Mercantile Law Amendment Act so as to require no delivery to prevent any diligence or sequestration. I cannot agree with that argument at all. I do not think that the point exactly arises here. I listened to the observations of the noble and learned Lord on the woolsack, and I agreed in the reasons which he gave. It seems to me that in this case the contract of sale was agreed upon probably with the motive and intention that the party should thereby be able safely to make advances and have the security of the goods that had been sold to him; but, whatever the motive and intention might be, it was as clear a contract of sale as anything could possibly be in its inception. I think that is perfectly plain. The evidence also leaves no doubt upon my mind that there was in this case a feeling of moral obligation on the part of Messrs Wallace that, if this ship should turn out to be worth much more than the £2500, they would not keep the surplus. I think that that is repeatedly recognised in the different letters which passed. My present idea would be that, although there was that moral obligation or honorary obligation, it never was reduced to a contract at all. The Solicitor-General says—If there was such a contract, when was it made, where

¹ 24 D. 1033.

No. 11. that no part of it should be used for the storage of manure ; and on the express condition that the restriction was to be imposed by A upon all his disponees or sub-feuars. A, without taking infestment, conveyed part of the ground to B, and the remainder to C. The restriction was duly inserted in the feudal title completed by B ; but C made up his title without any notice of the restriction, and subsequently conveyed to D, a singular successor, against whom an action was brought to enforce the restriction, by a pursuer deriving right from B. The defender maintained that the restriction was not validly imposed upon him, and that, even if it were, B and those in his right had no title to enforce it. As to the first of these points, the majority of the First Division were of opinion, upon grounds which appear to me to admit of considerable doubt, that the restriction was well imposed upon D as well as upon his author, C ; and upon that footing their Lordships were of opinion that it was a mutual restriction, and that B had a good title to compel its observance by D.

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The *ratio decidendi* in such cases as *M'Gibbon v. Rankin* seems to have been that a feuar, who stipulates with his superior that a particular restriction shall be imposed upon all his fellow-feuars as well as upon himself, must intend that he shall have the power of enforcing it against them, and that they shall have the like power as in a question with him. In *Robertson v. North British Railway Company*, and similar cases, the principle of decision appears to me to have been that a sub-feuar or disponee acquiring a building lot, subject to a particular condition, with notice in his titles that the common author, whether his immediate or over-superior, has imposed that condition upon the whole area of which his lot formed a part, must be taken as consenting that the condition shall be for mutual behoof of all the feuars or disponees within the area, and that all who have interest shall have a title to enforce it. In other words, the feuar is held as consenting to be bound by the law laid down by the common author for the benefit of all future feuars. I have been unable to find any decision proceeding upon the principle that a superior who feus out a portion of his estate to A under a precise restriction as to building, and who, in giving a title to A, neither undertakes, nor intimates an intention, to impose similar restrictions in feuing the remainder of his ground, can thereafter confer upon every feuar who acquires a building lot in the vicinity a *jus quæsitum* enabling him to sue A directly.

In the present case, the respondents' title to sue appears to me to fail in two essential particulars. The titles to the appellant's feu are of older date than those of any other of the five lots in question, with the exception of lot 3, which was originally included in the same feu-contract of the 6th of June 1782. That deed lays no obligation upon the superior to observe any limitation in building upon the adjacent ground, or to impose any such limitation upon those to whom he might subsequently feu or dispose it. No doubt there are words occurring in the deed from which it might be inferred that it was in the view of the superior to feu the adjoining ground on both sides ; but there is not a single expression which can reasonably be held to indicate the superior's intention to restrict the adjoining feuars, and still less to imply that he meant to come under an obligation to that effect. Again, the several restrictions as to building contained in the titles of the appellant and the respondents do not, in my opinion, so resemble each other as to raise the inference that they were intended to be mutual. These restrictions are, in both sets of titles, expressed in the same words ; but in substance they are very different. The one is a prohibition against building

anything except a single house, fronting Gayfield Square, with offices. The No. 11.
other is a prohibition against building anything more than two dwelling-houses,
 with offices, the one fronting to Gayfield Square on the east, and the other to a June 23, 1881.
 street on the west. The restriction imposed upon the appellant has, in the case Hislop v. Mac-
 of the respondents, been departed from to the extent of allowing them to build Ritchie's Trus-
 a second dwelling-house upon the west end of their feu—a departure which tees.
 seems to me to be fatal to the existence of that similarity and consequent
 mutuality of restriction upon which the argument of the respondents was mainly
 rested.

I have accordingly come to the conclusion that the respondents had and have
 no title, in their own persons, to raise and insist in the present action. That
 leaves the question whether their right to sue, which I assume to be *nil*, has
 been validated by the consent and concurrence of their superiors, to the effect
 of entitling them to decree in the terms of the prayer of the note of suspension
 and interdict.

It was argued for the appellant that the superiors, the trustees of Cauvin's
 Hospital, have waived their right to enforce the restriction in his titles by per-
 mitting others of their feuars in the vicinity to violate the building conditions to
 which they were subject. If that proposition were clearly made out, it would be
 sufficient for the disposal of the case; but I am unable to adopt the appellant's
 argument, which was necessarily based upon an implied obligation on the part
 of the superiors to impose and enforce these conditions for his behoof. It
 appears to me that the case must be disposed of on the footing that the superiors
 have still a good title to enforce the restriction as against him; and that they
 have given their consent and concurrence to the instance of the respondents. I
 think the appellant is barred, by his pleadings on the record, from maintaining
 that such consent and concurrence was not in point of fact given. Upon this
 branch of the case I concur in the views which were expressed by Lord Young
 in the Court below. Actions at the instance of one party with the consent and
 concurrence of another, are of every day occurrence in the practice of the Courts
 of Scotland. In all such cases, the proper instance is that of the leading pur-
suer or complainer who sues in his or her own right and title. Thus a wife,
stante matrimonio, sues with consent of her husband, and a minor with consent
 of his curators; but the right of action is vested in the wife and the minor only,
 and decree passes in their favour, the interposition of their legal guardians, as
 parties consenting, being merely required as a judicial precaution against any
 neglect of their interests in the conduct of the suit. Various other illustrations
 of the practice are to be found in the opinion of Lord Young, and it is unneces-
 sary to repeat them here. But I know of no authority for holding that, accord-
 ing to the law or practice of Scotland, a person who has no right or title what-
 ever can sue an action, provided he obtain the consent and concurrence of the
 party to whom alone such right or title belongs.

The reasons assigned for their judgment by the Lord Justice-Clerk and Lord
 Gifford appear to me to be unsatisfactory. The Lord Justice-Clerk deals with
 the case as if the superiors had the primary right and the respondents "a sub-
 ordinate and derivative title to enforce" the restriction in question. If the
 respondents were really possessed of a subordinate and derivative title, I should
 come to the same conclusion as his Lordship; but that is not their true position.
 The respondents may, indeed, have an interest to prevent the erection of the
 buildings contemplated by the appellant; but their interest is no greater than

No. 11. it would be if they had no feudal relation to the superiors of the appellant's fen, or if there were no restriction in the appellant's titles. They have no right or title, primary or subordinate, to enforce the restriction, neither have they any title to compel the superiors to enforce it. Lord Gifford, on the other hand, seems to hold it conclusive of the present question that "he who is merely a consenter to a disposition of heritage is held to be really a disponent, if the true title of the subject be found to be in him." That illustration embodies a correct statement of the law, but it has no bearing upon judicial procedure; and if admitted as an analogy would necessarily lead to the result that any stranger might insist in an action with regard to landed estate in which he had no right or interest, provided he sued with the consent and concurrence of the proprietor.

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It was suggested by Lord Gifford that the instance of the respondents, assuming it to be defective, might be cured by amending the libel, to the effect of allowing the superiors to stand as complainers for their interest, under the provisions of section 29 of the Court of Session Act of 1868 (31 and 32 Vict. c. 100). That clause enacts that "all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." I cannot doubt that the amendment proposed by the learned Judge would have been unwarranted by the terms of the statute, which contemplate alterations on the record with the view of facilitating the determination of the real questions at issue between the original parties, but not the importation of new parties into the litigation.

On these grounds, I am of opinion that the interlocutors under appeal ought to be reversed, and a remit made in the terms proposed by your Lordships.

INTERLOCUTORS appealed from reversed, with costs, and the cause "remitted back to the Court of Session in Scotland, with directions to sustain the third plea in law for the appellant, and to refuse the reasons of suspension, and find the respondents liable in expenses, and to ordain the respondents to repay to the appellant the expenses in the Court of Session."

WILLIAM ROBERTSON, London—MACANDREW & WRIGHT, W.S.—FRANK W. REYNOLDS, London—LINDSAY MACKERSY, W.S.

No. 12. JAMES M'BAIN (Roney's Trustee), Appellant (Complainer).—
Sol.-Gen. Balfour, Q.C.—Benjamin, Q.C.
July 27, 1881. JOHN WALLACE & CO. AND OTHERS, Respondents (Respondents).—
M'Bain v. *Charles, Q.C.—R. V. Campbell.*
Wallace & Co.
&c.

Sale—Delivery—Ship—Payment by instalments during construction—Bankruptcy of shipbuilder—Mercantile Law Amendment Act, 1856, sec. 1.—Held (in aff. judgment of Second Division) that the rule introduced by sec. 1 of the Mercantile Law Amendment Act whereby a purchaser's right to enforce delivery from the seller is secured against the subsequent diligence of the seller's creditors, "including sequestration," applied in a case where a ship was sold by the builder in the course of construction, and remained in the seller's hands undelivered at the date of his sequestration.

Question, whether by the common law of Scotland the property of the ship passes to the purchaser without delivery as the instalments of the price are paid.

Observations on the case of Simpson v. Duncanson, 1786, M. 14,204.

Sale—Right in security—Security over moveables—Ship—Mercantile Law Amendment Act, 1856, sec. 1.—A, a shipbuilder who had a vessel on the stocks, applied to B & Co., to whom he was already indebted, to assist him with

advances to enable him to complete the vessel. B & Co. only consented on condition that the vessel should be sold to them, as they considered that in no other way would they be safe to make the advances asked. This was agreed to, and an absolute contract of sale was entered into by the parties unqualified in any way, though there was admittedly an honourable understanding that should the vessel realise a profit beyond the sum paid by B & Co., they would communicate the benefit to A.

The advances already made were attributed towards the agreed-on price, the balance of which was paid by instalments as required, for which receipts were granted by the seller "to account of the purchase price." At the same time, to raise money to keep the purchasers out of cash advances, bills to the necessary amount were drawn by B & Co. and accepted by A and discounted by B & Co. While the vessel was in course of completion B & Co. entered into negotiations for the sale of the vessel, in which they described it as a vessel belonging to A in which they had a personal interest, as they were under considerable advances to A against the vessel. They did not succeed in selling the vessel, and before it was completed and delivered A was sequestered. The accommodation-bills above mentioned were not retired by B and Co. till after A's sequestration.

Held that though the motive of the transaction undoubtedly was to secure advances made and to be made by B & Co., and although there might be not only an honourable understanding but even a binding collateral agreement as to the appropriation of any surplus on the sale of the vessel over the sum advanced, still the contract was a clear contract of sale and nothing else, which fulfilled every condition of the provision of the Mercantile Law Amendment Act, 1856, sec. 1, and that there was nothing in the transaction or the accompanying circumstances to affect the operation of that provision as regarded the rights of the creditors of the seller.

(In the Court of Session Jan. 7, 1881, current vol., p. 360.)

Mr M'Bain, Roney's trustee, appealed.

At delivering judgment,—

LORD SELBORNE.—My Lords, your Lordships have listened to lengthened arguments in this case, but it appears to me that there are really only two questions which are ultimately material to the judgment. The first is, whether this is a contract of sale. Now, the appellant is under very great difficulties when he denies that it is a contract of sale, because upon the face of the instrument it is as carefully prepared and clearly expressed a contract of sale as anything can possibly be. And when we turn to the parole evidence, although no doubt on the one side and on the other there is a contrariety of statement, yet the purchasers (the respondents) most positively say that what is expressed in the instrument is that which was intended. It was done, no doubt, with the motive of securing the money which the purchasers had at stake, but it was done deliberately by way of purchase, because that was the best and most effectual way of accomplishing the object which the parties had in view. In corroboration of that, if corroboration were necessary, we find that the preliminary heads of the agreement, afterwards extended by this contract, begin, "memorandum for contract of sale and building contract;" and, if they could properly be looked to, the entries in the books of the law-agent are to the same effect. The statement on the other side is absolutely inconsistent with what appears upon the face of the instrument, and there is no reduction of the instrument asked for. It is not an allegation of something consistent with the instrument; it is an allegation entirely destructive of it. Therefore, as it appears to me, my Lords, the first point must be decided, in accordance with the instrument, that this was a sale, whatever may have been the motive, reason, and purpose which led to that sale; and its *bona fides* is really not in dispute.

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My Lords, I think I may, under those circumstances, pass very lightly over what was afterwards written and done. There was a course of action upon this contract, shewing, as I think, a clear intention to adhere to it; because certain cheques were from time to time drawn, by the persons who under the contract are technically, at all events, purchasers, for the whole amount of the agreed purchase-money, namely, £2500, and £50 further, which represents, as I understand, certain extra work done upon the ship. The fact that those were payments of purchase-money under the contract is evidenced by a series of documents signed, as often as any of those payments were made, expressly stating that they were "to account of the purchase price" payable by the purchasers for the ship in question, and these documents are all subscribed by Roney, who was, on the face of the contract, the seller. It is said that those payments are not to be regarded as real payments, because, not for all of them, but for all except £120 in the whole, there were acceptances given at the same time by Roney, who received the money. But it seems to me to be perfectly clear that the object of those acceptances was simply to keep the purchasers out of cash advances until the period of time at which, if those payments had not been made, the purchase-money would have been payable under the contract. Looking to this appropriation of payments made by the receipts for the cheques, it appears to me to be an irresistible conclusion that as between Roney and the purchasers, the purchasers, and not Roney, were liable and bound to take up those bills, as in point of fact they did, although not, as far as I know, till after the sequestration. In that state of things, those bills having been taken up, the money has in fact been paid by the purchasers, and to the full amount.

My Lords, I cannot but observe that, whatever may have been the intentions of the parties with regard to any ulterior arrangements or settlements between them, I find nothing to lead me to the conclusion that those intentions extended so far as in any event whatever to pay, or repay, the £2550 to the purchasers, otherwise than by means of the realisation of the property purchased. Personal debt, independent of this contract, I do not find to have resulted from the transaction between the parties. What is alleged is this—and there is undoubtedly some evidence in support of it—that the parties contemplated that the purchasers should realise this ship by sale, but that having originally gone into the transaction in a certain sense with a view to their own security, and evidently not having fixed the £2500 as a price in the ordinary way of bargain where the motive is to become possessed of and to retain the article purchased, the purchasers would not, if the article when sold fetched more than that amount, and any interest, costs, and so on, which might be due, take advantage of any gain or profit, which, according to the letter of the contract, they might possibly be able to realize.

My Lords, I cannot say that I find in this evidence any very clear or satisfactory proof of a positive agreement having been at any time made for that purpose, although I do find something sufficient to shew that there was a sense of moral obligation, at all events on the part of the purchasers, so to act, and that it was their apparent intention so to act. It may be that what happened between them may raise that, beyond moral obligation, into a legal or equitable obligation, which the Courts would enforce; and that certainly, I think, appears to have been the opinion of the learned Judges in the Court below. I will assume for the present purpose, that there might be sufficient grounds for that conclusion, but at the most it can come to nothing more than this—that this being in in-

tention expressly a contract of sale, there is a bye-agreement, a collateral agreement, not in form of a regular back-bond, but of that nature, by reason of which, when the property purchased is realized by a subsequent sale, something will be done between the parties to adjust the mutual rights or equities which they have consented to establish between them. That appears to me not only not to destroy the sale as a sale, but really to proceed upon the contract as its foundation and basis, and to be something growing out of that contract which the parties, according to the hypothesis, agreed to do. Therefore, it appears to me that there is no ground whatever for treating this otherwise than as a sale.

I postpone the consideration of the correspondence which passed with a view to the subsequent sale or re-sale of this property, because that seems to connect itself naturally with another argument on the question of reputed ownership. Postponing that, I have first very lightly to pass over the argument founded upon the Scotch law as laid down in the case of *Simpson v. Duncanson*,¹ or supposed to be laid down in that case, independently of the Mercantile Law Amendment Act. I frankly confess that unless *Duncanson's* case is to be explained, as it was put at the bar, upon the footing of a constructive delivery, I do not very distinctly or clearly understand what the law is which that case decided: it is admitted to be exceptional. Upon the face of the decision itself, as reported by Lord Monboddo, it seems, it was not that the property in the ship had vested, but that there was an obligation on the part of the trustee or assignee in bankruptcy, taking the property, to repay the money which had been laid out upon it,—which is a very different thing. But, put it as you will, the case of *Simpson v. Duncanson* does not appear to me to be an authority on which it is so satisfactory to rest the decision of the question now before your Lordships as it is to rest it upon the terms of the Mercantile Law Amendment (Scotland) Act, which render a consideration of the difficulties which might have arisen in regard to *Duncanson's* case now immaterial.

By the general law of Scotland there must be tradition, or delivery, in order to give effect to a contract of sale; but by the Mercantile Law Amendment Act, for the express purpose of assimilating the law of Scotland, on such points, to the law of England, it is provided that where goods have been sold but have not been delivered to the purchaser, but have been allowed to remain in the custody of the seller, the mere want of delivery shall not enable the creditors in bankruptcy of the seller to defeat the sale. I have already said that, in my opinion, whether in some sense security was the object or not, there was here a sale in fact and in intent. The statute does not say that, there being a sale, that is to be taken out of the operation of the statute, because the parties may have some further contract or agreement, or understanding *inter se*, with regard to the subject of the sale. This is a case in which, if there was a sale at all, there was a sale unaccompanied with a delivery to the purchasers. The subject was allowed to remain in the custody of the seller. Every condition of this statute was fulfilled, and I cannot see any ground upon which your Lordships can qualify those conditions of the statute for the purpose of defeating a *bona fide* transaction which is otherwise lawful. It appears to me, therefore, that the statute removes all the difficulties and questions which might otherwise have arisen as to the doctrine of *Simpson v. Duncanson*, and that, having regard to that clause of the statute, the conclusion arrived at by the Court of Session is correct, the only difficulty upon that point being that the Court of Session have

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Case law
doubtless
founded on
§ 2 of
the Act
and also in
Simpson v
Duncanson
7 R

¹ Mor. Dict. 14,204; also Bell's Com. M'Laren's ed., vol. i. p. 189.

No. 12. not based their conclusion upon the statute as distinctly as I think your Lordships will be disposed to go.

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With regard to reputed ownership, I really think it is very far from necessary to say much, because beyond all question what Lord Justice Turner said in the case of *Holderness v. Rankin*¹ is true, that the fact of an unfinished ship being in a shipbuilder's yard is not enough by itself to raise a reputation of ownership on the part of the shipbuilder. I see nothing to distinguish this particular case from the ordinary one. If, in point of fact, this ship was not, after the sale, the property of the shipbuilders, the mere fact of its remaining in their yard unfinished could not create the reputation of its being so ; and whether or no it was left at their order and disposition for the purpose of creating a reputation of ownership, and to enable them to deal with it in a way which would bring it within the scope of the bankruptcy law, is a question to be determined upon the evidence ; and I can see no evidence whatever in support of that proposition. All that is referred to in support of it is a correspondence, shewing plainly enough that communications passed from time to time between the shipbuilder in whose yard this vessel was, and those whom I have called the purchasers, and also the brokers ; and latterly, with one intending purchaser. That correspondence, taken as a whole (and every part of it is consistent with the rest), shews plainly, that it was intended and desired to find a purchaser for this unfinished vessel. References were made in the correspondence to the builder, but that would happen in the ordinary course of things if the person to whom the vessel belonged desired that it should be sold, whether it belonged to the builder, and whether it could be sold without his concurrence or not. Nothing was done or said from which I should infer that there was any authority which would have enabled him to deal with it without the concurrence and consent of the respondents. Their interest is several times referred to, and referred to in a manner which appears to me to be perfectly consistent with the absence of any reputation of ownership in the builder, or any intention to create it. No doubt, my Lords, in those letters the ship is frequently spoken of as the builder's ship ; but the letters are not written to persons who are induced by their means to deal with the ship upon the footing of its being the property of the builder. They are not published to the world. Nothing appears to have happened with regard to these letters out of which a reputation of ownership could grow. Therefore, my Lords, it appears to me that there is nothing in that argument.

The last point that was mentioned, about the notice extending to the use of the building yard, may be said now to be at rest. It is admitted on all hands that such use as is necessary to enable the ship to be taken away is proper and not in dispute. On the other hand, any indefinite use of the building yard your Lordships do not understand to be claimed, and certainly if it were claimed it would receive no countenance from anything which your Lordships are likely to say.

There remains only the question whether any addition should be made to the interlocutor refusing the interdict. Now, the interdict is simply sought for to prevent those things from being done according to the notice which are authorised by the contract, and necessary to enable possession to be taken of the ship, and the ship to be sold, and such use, as I have already said, to be made of the building-yard as is absolutely necessary and indispensable. The interdict

¹ 29 L. J. (Ch.) 753.

seeks to prevent that, and the question is, is it according to contract or not? No. 12.
 If the contract is good, as I think your Lordships will hold it to be, those things appear to me to be authorised by the contract; and to refuse an interdict which would prohibit them appears to me to be a necessary consequence. July 27, 1881.
 If your Lordships are of that opinion, it appears to me that to go further, and to enter into the question of the ulterior rights of the parties under any collateral agreement which may exist between them, would not only not be necessary to protect any rights which may exist under such an agreement, but in the present state of the evidence I think your Lordships have not the materials upon which it would be possible or satisfactory to make any such declaration, or right to attempt it. M'Bain v. Wallace & Co. &c.

On the whole, my opinion is that the judgment under appeal is right, and I move your Lordships that the interlocutor be affirmed, and the appeal dismissed, with costs.

LORD BLACKBURN.—My Lords, I am entirely of the same opinion.

It seems to me that it will be most convenient to consider first the true effect and construction of the Mercantile Law Amendment (Scotland) Act, 19 and 20 Vict. c. 60, sec. 1. Now, there is a preamble to that Act explaining what the object of it is, and there is a similar preamble explaining the object of another Act, for there was one passed for England and one for Scotland in the same year. The object of the two Acts was this :—They were passed because there was a difference between the mercantile law of England and the mercantile law of Scotland which was found inconvenient in practice, and therefore it was desired to assimilate them in certain respects,—in some respects, doubtless, by making the English law similar to the Scotch, and in other respects by making the Scotch law similar to the English. It is therefore almost as important in construing that Act to know what was the English law as to know what was the Scotch law, and I believe that upon neither is there any real dispute.

By the English law when there was what civilians would call *emptio perfecta*, and what English lawyers call a bargain and sale,—a contract for good and valuable consideration to pass the property in particular chattels,—as soon as that was ascertained—the property did pass, and the purchaser, although he might not be entitled to delivery—for there might be a vendor's lien or something else to prevent delivery—was entitled nevertheless to the property in the goods, to the *jus in re* as well as to the *jus ad rem*. That made a very considerable practical difference between the law of England and the law of Scotland, for the law of Scotland was like the civil law upon which it was founded, the maxim of the civil law being *traditionibus et usucapionibus non nudis pactis transferuntur rerum dominia*. When there was not an actual delivery, however complete the contract might be,—although it was *emptio perfecta* to the fullest extent, amounting to all that in the great chapter of the Digest upon that subject has been considered to be *emptio perfecta*, and although every farthing of the price was paid,—yet the *dominium rei*, the *jus in re*, did not pass to the purchaser. Although he had the *jus ad rem*, and could, as long as the vendor was *sui juris*, compel the vendor to deliver to him the goods, he had not the *jus in re*. The practical result of that was that a creditor in Scotland might issue diligence and seize the goods, as still the goods of the vendor, that is to say, of the person who had sold them, although every farthing of the price had been paid; and further than that, if a sequestration had taken place, the

No. 12. vendor having become a bankrupt, the property passed to the trustee in the sequestration who was entitled to hold it, leaving the man who had perhaps paid every farthing of the price to prove against the estate. That was the state of the law in Scotland, and it is obvious that there was a very considerable difference in the practical working of the English law and the Scotch. If a man purchased a quantity of goods, one half of which lay at Greenock and the other half at Liverpool, the creditors of the vendor might seize the goods in Greenock, but no creditor could touch the goods in Liverpool. In the case of a sequestration in Scotland, the trustee could take the goods in Greenock, but in the case of a bankruptcy in England, the assignee in bankruptcy could not touch the goods in Liverpool.

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Those were the differences between the laws of the two countries.

Then comes the Act of Parliament for the purpose of assimilating the two laws, and it says this :—"Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing the delivery of the same." Now, I quite agree that that does not say that a contract of sale,—*emptio perfecta*,—in Scotland shall pass the property—shall pass the *jus in re*—and so far it does not assimilate it to the English law at all. The chief practical difference arising from the *jus in re* remaining in the vendor and the *jus ad rem* going to the purchaser was that the vendor's creditors by poinding and by sequestration could take the goods. There is a nominal difference still between the law of England and the law of Scotland, but for all practical purposes the law of Scotland, where there has been a contract of sale, though no delivery, is made identical with the law of England in the actual result.

Now, my Lords, an argument has been based upon the words of the Act "where goods have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller." An attempt has been made to give a meaning to those words with which I cannot agree. I think that when you take the existing law of England and Scotland, as I have mentioned, and see what was the object of the Legislature in using these words, it is plain that they could not have intended by such words as these: "been allowed to remain in the custody of the seller," to introduce a new and complicated difference between the law of England and the law of Scotland. It is perfectly true, I think, as regards the law of Scotland, and it is to some extent true also as regards the law of England, that, independent of bankruptcy and before there is bankruptcy at all, where one person has allowed another to have possession of goods under such circumstances, and in such a way as to accredit that other person, and entitle him to sell them, or to acquire credit upon them—if the true owner has allowed this to take place—he should be responsible for the consequences, and it would be unjust for him to take away the goods to the damage of those who may, in consequence of his having accredited the other person, have acquired a right over them, though before there has been bankruptcy. In England, when there has been bankruptcy this principle has been now for a very long time carried out by force of a statute which we need not now consider, because it is not under the English statute of bankruptcy at all that the question now arises. In Scotland, I understand that something very similar to the principle I have

mentioned exists, but it is not made by statute applicable to sequestration, or to a case where the party has failed, but it rests upon the grounds of common law. No. 12.
 A simple creditor who issues process and poinds the goods might at common law July 27, 1881.
 poind them as against the person who has sold the goods, if that person retained M'Bain v.
 the *jus in re*, though he had lost the *jus ad rem*; notwithstanding the statute Wallace & Co.
 he may poind them as a creditor where the possession of the vendor (to borrow &c.
 the phrase used by Lord Justice-Clerk Inglis in the case of *Sim v. Grant*,¹) has
 been allowed by the purchaser to be such as is quite inconsistent with his having
 the *jus ad rem* by virtue of his personal contract of sale. It is very true that
 inasmuch as the vendor had, by the common law of Scotland before this Act
 was passed, the legal right of property, you could not properly say that he
 was "the reputed owner" of goods of which he was himself the actual owner.
 But the same principle which would have made a third person become the re-
 puted owner, so as to give a creditor a right to seize them in his possession
 because the true owner had allowed them to be in his possession, appears to me
 to apply when you are applying the statute. If you can shew that the man who
 has acquired the *jus ad rem* has allowed the vendor to keep possession of the
 goods in such a way as is quite inconsistent with his *jus ad rem*, it seems very
 reasonable indeed to say that that shall be considered as analogous to a case of
 reputed ownership, and, that being so, the Mercantile Law (Scotland) Amend-
 ment Act does not take the goods out of it. It says that, without delivery, a
 contract of sale shall be good to pass the property as against creditors, but it
 does not say that, without delivery, the property shall pass, where, if there had
 been delivery, and the goods had been left in this particular way with the vendor
 afterwards, they would have been made liable to the diligence of his creditors.
 So far, I think, the argument is quite right, but it is inapplicable to the present
 case. The effect of the contract of sale upon the goods with reference to the
 diligence of creditors is made exactly the same as if there had been an actual
 delivery, and as it would be under the English law.

It has been endeavoured to be argued that if there was here, by the side of
 the contract of sale, a collateral agreement that the ship should be only held as
 security, that would prevent the contract of sale operating under the Mercantile
 Law Amendment Act so as to require no delivery to prevent any diligence or
 sequestration. I cannot agree with that argument at all. I do not think that
 the point exactly arises here. I listened to the observations of the noble and
 learned Lord on the woolsack, and I agreed in the reasons which he gave. It
 seems to me that in this case the contract of sale was agreed upon probably with
 the motive and intention that the party should thereby be able safely to make
 advances and have the security of the goods that had been sold to him; but,
 whatever the motive and intention might be, it was as clear a contract of sale as
 anything could possibly be in its inception. I think that is perfectly plain. The
 evidence also leaves no doubt upon my mind that there was in this case a feel-
 ing of moral obligation on the part of Messrs Wallace that, if this ship should
 turn out to be worth much more than the £2500, they would not keep the
 surplus. I think that that is repeatedly recognised in the different letters which
 passed. My present idea would be that, although there was that moral obliga-
 tion or honorary obligation, it never was reduced to a contract at all. The
 Solicitor-General says—If there was such a contract, when was it made, where

¹ 24 D. 1033.

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was it made? from which he concludes that it must have existed *ab initio*; I think, on the contrary, that it may be concluded that it never existed at all. That would be my impression, certainly, if I were going to decide it; but that was not the impression of the Court below, and it is not necessary to decide it. But supposing there was this completed collateral contract—not only an honorary contract, which I have no doubt that there was, but a binding, legal, and enforceable contract—that this should be a security, I do not see the slightest ground for saying that that undoes the effect of the Mercantile Law Amendment Act, which says that goods having been sold (as these were, although with a motive no doubt to produce this effect), as far as regards the rights of creditors of the vendor to prevent delivery of the goods either by sequestration or poinding, they shall have none, but the matter shall stand as it would under the English law. That, I think, is the point that will be decided here.

Upon the rest of the case, my Lords, I think I need hardly say anything more. Supposing it to be the fact that there was a collateral contract of that sort, doubtless in the possible event of the ship proving to be worth more than the advances which have been made, it may be that it will come into operation. I expect, however, and I fear, for the sake of both parties, that it will turn out that it never will come into operation, because the ship will never sell for so much as has been advanced in respect of it. But that we have nothing to do with. As to all the rest of the case, I think the interdict here is asked for against their fulfilling the very terms of the contract which they have made. The interdict would have the effect of preventing the purchaser from enforcing delivery of the ship. That is exactly what the Mercantile Law Amendment Act says shall not be done by the creditors of the seller by any process of law, including sequestration. It seems to me, therefore, that the interdict should be refused. And I do not see the slightest occasion for doing anything further; indeed, I think mischief would probably be done by declaring any rights or doing anything at all further. I quite agree in thinking that when there is a ship standing in a dockyard unfinished, as this was, the purchaser, if he has a right to the ship, must necessarily have a right to do what is necessary and proper for taking the ship out of that dockyard; and it is impossible to suppose that sequestration would prevent his doing it. I also agree that the parties neither claimed nor intended to claim any right to let the ship remain for two years in the dock, and to occupy the dock while it was being built. I do not think they claimed anything so unreasonable, and, consequently, I do not think it is necessary to say anything at all against their having such a claim. It seems to me that, if they do make such a claim, it must be left to the sequestrator, or the trustee, or the landlord of the dock (for I understand it is a leasehold) to take proper steps to eject them. It is not necessary now to say anything at all about it.

Therefore, my Lords, I quite agree that the interlocutor of the Court below is right, and that the appeal should be dismissed.

LORD WATSON.—My Lords, I entirely concur in the view that your Lordships take upon this case.

I cannot doubt that the contract between these parties is in terms a contract of sale and nothing else. It is a binding contract reduced to writing, and I think it must, so far as it is not legitimately controlled by the terms of some other collateral contract, take effect between the two parties to it in terms as a contract of sale. I must confess that I very greatly doubt the competency of

importing into the construction of that written contract a very great deal of the evidence that was taken in this case. It appears to me that a great deal of it consists of antecedent communings, which, according to the law of Scotland, can have no effect whatever in indicating what is to be the true construction of the concluded contract in which the parties embodied their stipulations in writing. The very purpose of reducing them to writing was to get rid of all the doubt and perplexity that would arise as to the terms of the contract, if it had been left to stand upon the antecedent negotiations which had taken place, whether orally or by letter. But, my Lords, there is evidence as to the actings of the parties under the contract, as to their writings when the contract was in course, I may say, of execution; and those might, according to my view of the law of evidence in Scotland, be legitimately referred to as clearing up any point which might be doubtful. I cannot say that I find anything doubtful in this contract requiring elucidation from those sources, and upon looking to the correspondence and to the oral evidence, I can find nothing there which in the least degree conflicts with the construction which the contract, according to its own terms, ought, in my opinion, to receive.

Now, the contention of the appellant was twofold. He first maintained, upon the evidence, that he controlled the contract and imported a new meaning into the contract by the evidence which he had led. The Lord Ordinary seems to have given effect to that view, and to have held that the contract did not set forth the true agreement between the parties, that their agreement in reality was one for a loan upon security and not for a sale and purchase; and if that view were well founded, the judgment of the Lord Ordinary undoubtedly is equally so. But, my Lords, I find it impossible to accept that view, and I therefore turn to the alternative view which was presented in argument at the bar. It was to this effect; that although in form this might be a contract of sale, it was in substance intended thereby to give a security only. That really resolves itself into an allegation that the motive of the parties in making the contract was to effect that which might more directly, had the circumstances of the case rendered it advisable, have been effected by a loan on the security of the vessel. But, my Lords, I cannot conceive that the contract is not to take effect according to its legal terms and legal meaning, simply because it was thereby intended by the purchasers to give to the seller the benefits which they found it impracticable, with safety to themselves, to give him as a loan.

My Lords, the question raised in this case which I come to next (and I take it in this order because it seems to me to be sufficient for the disposal of the case) is the question of the effect of the Mercantile Law Amendment (Scotland) Act, 1856. Now, my Lords, being of opinion that this is a pure contract of sale, I think it necessarily follows that, according to the law of Scotland as it stands, and as it stood, irrespective of the provisions of the Mercantile Law Amendment Act, it would have been valid as against the trustee in bankruptcy if it had been followed by actual tradition or delivery of the ship. I say nothing at present of constructive delivery as equivalent to actual, in a question with the trustee. That being so, what is the effect of the Act? It is necessary to consider for a moment in determining that question how the law stood at the date of the passing of that statute. At that time, by the law of Scotland, a purchaser who had merely a personal contract of sale, could not demand delivery from a trustee in a sequestration of the seller. It was in the option of the trustee to enforce the contract against him by tendering delivery of the vessel

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No. 12. and suing for the price. But the purchaser, on the other hand, who had not
 July 27, 1881. got delivery, had no right to compel implement in a question with the trustee.
 M'Bain v. Now, the statute was passed for the purpose of assimilating the law of Scotland
 Wallace & Co. to that of England. As I understand the law of England, a concluded contract
 &c. of sale—what in Scotland is termed a concluded personal contract of sale—has
 the effect of passing the property or interest in the property of the goods sold
 to the purchaser. In Scotland it undoubtedly had not that effect, and in order
 to place a purchaser in Scotland in the same position as a purchaser in England
 in questions with creditors of a bankrupt or the assignee or trustee in seques-
 tration of a bankrupt, the Legislature did not enact that in Scotland the com-
 pletion of a personal contract should pass the property, or have the effect of
 delivery, but it did enact, by the 1st section of the Statute of 1856, that as in a
 question with the creditors of the seller, or with the trustee in a sequestration
 of the seller, the purchaser under a personal contract of sale should have pre-
 cisely the same right to enforce delivery of the goods sold as he would have had
 against the bankrupt had he remained solvent. That statute appears to me, my
 Lords, to supply all that is wanting to the completeness and efficacy of the
 contract in this case. Practically the effect of that section of the statute is to
 dispense with the necessity for delivery in the case of a purchaser who has a
 personal contract of sale. You have here a personal contract of sale, and you
 have here a statute dispensing with the necessity of actual delivery under it.
 That being so, I think we have, as your Lordships have already indicated, a
 satisfactory ground for deciding this case apart from all questions as to what
 the law of Scotland was before the Act was passed.

Now, my Lords, I do not think it necessary to say much upon the question
 of what the law of Scotland formerly was, because, seeing that the Act of 1856
 is held by your Lordships to apply to this case, any question of what the law
 was before that statute was passed really possesses little more than an ante-
 quarian interest. I think the question raised is a very difficult and a very
 doubtful one. I rather think there are authorities in the law of Scotland which
 come nearer to the case presented by the respondents here, than the case of
 which we have heard so much, namely, *Simpson v. Duncanson*. Many cases
 might have been found which would have supported the argument on the part
 of the respondents with regard to the purchase of an article nearly completed,
 with instalments of the price paid up to a certain date, the article being left in the
 hands of the vendor for the purpose of completion, there remaining another
 instalment which would have to be paid for work at that time undone. I dis-
 miss that, however, because it appears to be unnecessary, for the purposes of this
 case, to determine anything in regard to it.

But it was said that the respondents in this case cannot have the benefit of
 the provisions of the Mercantile Law Amendment (Scotland) Act, because they
 have permitted Mr Roney, the bankrupt, to deal with this vessel as if he were
 the owner of it (I dismiss the word "reputed" as not being very applicable to
 the case of a person in whom the legal estate is vested), and so to raise credit
 upon the faith of his being the true owner. Now, my Lords, without examin-
 ing the doctrine of the law of Scotland, which certainly has rested, and was
 introduced, upon principles of equity, I think it is sufficiently clear that where
 a purchaser permits the seller to retain the goods and to deal with them as if
 they were his own, and as if no sale of them had actually taken place, he cannot
 have any claim to have those goods delivered to him, not as in a question with

the seller of the goods, but as in a question with onerous creditors of the seller. But, whilst I admit that the principle contended for exists, and I believe it to be a sound principle, I cannot find the slightest ground of fact for holding that there has been any such holding out of himself as owner on the part of Mr Roney in the present case, whether consented to by the respondents or not. I entirely concur with the observations that were made upon this part of the evidence by the noble and learned Lord on the woolsack.

My Lords, the learned Judges in the Court below have indicated that in this case it is their view that a collateral contract was constituted of a nature which undoubtedly may co-exist with the contract of sale in question. I forbear to offer any opinion upon that point, because I cannot find any such case raised upon this record, and I do not think it desirable to indicate any opinion either for or against the appellant upon that point. But if the appellant has any such right, if he can instruct any such contract, I do not think his interest will be prejudiced by the form of judgment pronounced in the Court below. No doubt the appellant came into Court complaining of the whole terms of the notice which had been served upon him by the respondents; but the mere fact of his complaining of the whole notice, and putting it all in his note of suspension and interdict, does not entitle him to object in this process to that notice upon all and every ground which he may discover. The very object of having a record is to limit the complainer (and especially in a summary proceeding like this) to those grounds of objection which are set forth upon the record. And here there is no allegation, as far as I can find, of any collateral contract, nor is there any allegation that he desires to have any reservation of his rights. He neither alleges that he has a right under a collateral contract, nor does he allege that that right has been invaded. It humbly appears to me, my Lords, that even under the notice it is quite possible for the respondents in this case to proceed without doing anything to prejudice that collateral contract, if it exists; and the form of the record is such as not to prevent the appellant, if he has good cause of complaint, from making that complaint and obtaining his appropriate remedy, in a new and separate proceeding.

I therefore think that the judgment, in the terms in which it was pronounced by the Lords of the Second Division, ought to stand, as your Lordships have already proposed, as the judgment of this House.

INTERLOCUTOR appealed from affirmed, and appeal dismissed, with costs.

A. BEVERIDGE, London—WILLIAM OFFICER, S.S.C.—THOMSON, SON, & BROOKS, London—WILLIAM ARCHIBALD, S.S.C.

JOHN PATERSON AND OTHERS (Pursuers), Appellants.—

Sol.-Gen. Sir F. Herschell—Webster, Q.C.

THE PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF ST ANDREWS

(Defenders), Respondents.—*Benjamin, Q.C.—R. V. Campbell.*

JAMES BAIN AND OTHERS (Defenders), Respondents.—

Sol.-Gen. Balfour—Haldane.

Burgh—Ground held by magistrates as golf links—Powers and duties of magistrates as administrators.—A piece of links ground was held by the magistrates and town-council of a burgh for behoof of the inhabitants, and subject to

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the obligation of preserving the same for the purposes of the game of golf. In 1820 the magistrates feued off a strip along the southern boundary of this piece of ground where it abutted on the high road. On this strip of ground houses were built facing the high road, and the actings of the magistrates not being timeously objected to, these feus came in course of time to be no longer in point of law part of the Links. Houses were afterwards built at the north end of these feus facing the part of the Links reserved by the magistrates, and access was obtained to them along the margin of the Links. This becoming cut up by traffic, the magistrates resolved to form a regular metalled road twenty-one feet wide on that part of the Links which adjoined these feus, for the general use of the public as well as of the feuars. This was objected to as an encroachment on the rights of the inhabitants.

Held (in *aff.* judgment of Second Division) that on the evidence adduced the formation of the ~~proposed road would not in the meantime interfere~~ with the use of the Links by the inhabitants as heretofore for the game of golf, and that therefore the magistrates were entitled in their administration of the burgh property to make the said road, but that they were bound to retain the road and the ground on which it was constructed subject to the same uses as any other portion of the Links, and to take such steps as might be necessary to prevent the acquisition by any person or persons of any rights over the same which might conflict with the right of the magistrates to take away or alter said road, or to restrict and regulate the traffic thereon should emerging circumstances render that necessary for the protection of the rights of the inhabitants.

Ld. Chancellor
(Selborne).
Lord Black-
burn.
Lord Watson.

(In the Court of Session Dec. 9, 1879, reported March 10, 1880, *ante*, vol. vii. p. 712.)

On 16th July 1879 the Lord Ordinary (Curriehill) pronounced this interlocutor:—"Finds that the two first declaratory conclusions of the summons are unnecessary, and dismisses the same: *Quoad ultra* assoilzies the defenders from the remaining conclusions of the action, and decerns."

On 9th December 1879 the Second Division pronounced the following interlocutor:—"Having heard counsel on the reclaiming note for the pursuers against Lord Curriehill's interlocutor of 16th July 1879, adhere to the said interlocutor, but with the declaration that the said defenders, the Provost, Magistrates, and Town-Council of St Andrews, have no right to ~~alienate the solum~~ of the ground in question, or the administration and control of the same, but are bound to retain the same in their own hands for behoof of the community of the burgh, and decern."

The pursuers appealed.

At delivering judgment,—

LORD CHANCELLOR.—My Lords, the object of this appeal, as it appears to me, is practically to limit the power of the Magistrates and Town-Council of St Andrews over the Links of St Andrews to a greater extent than that which has been thought necessary or right by the Court of Session. I take the material facts upon which the case is to depend as they are stated in the 3d and 4th paragraphs of the answers for the Provost, Magistrates, and Town-Council of St Andrews, who admit that the Links are held by them, "as by their predecessors from time immemorial, for behoof of the inhabitants, and, *inter alia*, subject to the obligation of preserving the same for the purposes of the game of golf, and for the recreation and amusement of the inhabitants;" but that "with due regard to these purposes, and acting for the public interest, the present defenders and their predecessors have always from time to time as occasion arose exercised powers of administration and management over the Links now in question."

One of the acts which they say they have been accustomed to perform in the course of that administration and management is the letting of the pasturage and the regulation of bleaching clothes on the Links; and another is the construction of a sloping walk or terrace, much insisted upon by the defenders, in conformity with the minute of council made in the year 1849; and further, the levelling, filling up, and terracing of the ground to the south of the club-house used by the golf club, in conformity with the minute of council of 1854. It appears by the evidence that these allegations are well-founded, and the question arose whether, consistently with the admitted obligation on the one hand, and the exercise of the asserted and proved powers of administration and management on the other, a certain metalled or macadamised road, which the corporation think it expedient to make along the outside boundary of the Links, where that boundary adjoins certain feus let off by them many years ago (which feus must be assumed to be no longer in point of law part of the Links) should be made by them.

My Lords, as far as the question is one of titles, I collect that the admitted obligation is proved by ancient and immemorial use, rather than by an express trust limiting the right of property which the corporation have by their titles. I assume, of course, that this usage is sufficient to establish an obligation, which, indeed, is admitted, as I have said; but the titles, being in themselves general, it would follow that not only the power of administration and management, but also any usufructuary interest which may be consistent with the admitted obligation, would remain to the corporation under these titles; and that, as it appears to me, casts upon the pursuers,—who asked for an interdict to restrain the corporation either from making the road in question or from permitting any road to be used in that place for traffic by carts and carriages,—the obligation of shewing that the making or permission of such a road or use would contravene the admitted or proved obligations. The first of those obligations is that of preserving the Links, I take it, as far as necessary for this part of the case, for the purpose of the game of golf. With regard to that, my Lords, the state of the evidence is this. The direct, ordinary, and proper course of the game of golf is not over the ground which would be occupied by the *solum* of this road, although in the course of the play balls may be struck from time to time so as to pass over or to lie upon this part of the ground, and in that sense it is not excluded from the golf course. But it is outside the course proper, and it would rather be a deviation from the course of the play, whether intentional or not I do not enter into, it would rather be by deviation than otherwise that the game might have to any extent to be actually played over this particular piece of ground. In that state of things there can be no better evidence to rely upon as to whether this alteration of the surface, and this permission of the use of carts and carriages, will substantially interfere with the obligation of preserving the ground for the purposes of the game of golf, than the consentient evidence of those witnesses who are most skilled in and best understand the game. Of such witnesses we have had the evidence before us of a very considerable number, and the general result of their evidence is, that the making of the road will certainly not interfere with the due prosecution of the game, and that such variation in the state of the ground as it would introduce, would, in the event of balls finding their way there, rather add to than detract from the interest of the game—giving fresh opportunities for skill rather than the contrary.

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My Lords, that is the consentient evidence, and I cannot but observe that, regarding the matter from that point of view, it does not seem to me to be probable that this interference with the ground would for the purpose of golf be more prejudicial or make a substantially greater difference than the acts which are admitted to have taken place upon former occasions, which were to some extent rather impressed into their service by the appellants; because that construction of the sloping walk or terrace instead of the rough ground with many holes in it, which took place under the provostship of Sir Hugh Lyon Playfair, in or after 1849, was at least as material an alteration as this can be; and the object with which that was done, when seats and barriers were placed for the accommodation of spectators, attracting a large number of people, would be at least as likely to interfere in some degree with the course of the game as the occasional traffic backwards and forwards over a macadamised road would be.

So far, therefore, as the obligation of preserving the ground for the purpose of the game of golf is concerned, I come to the same conclusion as that at which the Court of Session arrived, namely, that there is no substantial interference with that obligation, and that the road may be reconciled with its due observance.

Then, with regard to the recreation and the amusement of the inhabitants, it appears to me that convenient means of access, not interfering with the use of the ground for any necessary purposes of the game, are rather in aid of the recreation and amusement of the inhabitants than the contrary; nor can I admit that it makes in that respect any difference, if the fact be, as I have no doubt it is, that there are some particular inhabitants, namely, the feuars having houses upon the ground adjoining the road, to whom the making of this road would be in a special degree convenient. Therefore, my Lords, I agree substantially with the view which was laid down, both by the Lord Ordinary and unanimously by the Second Division of the Court of Session; but the question that remains is this, whether the manner in which the Second Division thought it right to guard their decision, so far in favour of the defenders, is sufficient for the purpose.

Now, as I understand the view of the Second Division, they were clearly of opinion that it would be contrary to the admitted obligations of the corporation for them to ~~alienate any part of the solum~~ of the ground in question, or to abdicate the administration and control of it, and so far they have expressed their intention on the face of the words which they introduced into the interlocutor of the 9th of December 1879. But I collect further, and I also think it follows from the principle which guided them upon that point, that they thought it would be inconsistent with the obligation under which the corporation lay, either to grant private easements, rights of way, or others, over this ground to particular individuals, or, which is a larger operation of the same kind, having made this road, to dedicate it to the public and so create a public easement, to that extent abdicating their existing power of administration and control.

Now, my Lords, that appears to me to be a matter of considerable importance, and in my judgment it goes some way to justify the present appeal; because, in the absence of words which would make that clear, and make it further clear that it is not only inconsistent with the duty of the corporation to grant such rights, but also part of their duty to prevent their being acquired from any neglect on their part. Taking that view, I am bound to say that I think the

interlocutor, as it stands, did not give to the public of St Andrews (here represented by the present pursuers, the appellants), that amount of protection and security which was necessary to give effect to the opinion of the Court, as far as it was in their favour.

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Taking that view, your Lordships have considered what variation of the interlocutor would be proper for the purpose of completely securing that object; and I propose to your Lordships to vary the interlocutor of the 9th of December 1879 by omitting from the declaration therein contained the words "but are bound to retain the same in their own hands for behoof of the community of the burgh," and substituting the words "but are bound to retain the portion of the Links in question in their own hands for behoof of the community of the burgh, so that any road which may be formed thereon shall remain in all time coming a portion of the said Links, held in the same way, subject to the same uses, and for the same purposes as any other portion of the said Links; and that the said provost, magistrates, and town-council are bound to take such steps as may be requisite to prevent either the Police Commissioners of St Andrews or any other person from acquiring any title thereto, or any right to interfere therewith, so that it may always be in the power of the said provost, magistrates, and town-council to take away or alter such road, and in the meantime to restrict and regulate the traffic thereon."

My Lords, it was suggested by the learned counsel for the respondents, the provost and magistrates, that there should be words introduced to prevent any encouragement being held out, by the form of the declaration which your Lordships proposed to introduce, to anything like a capricious or arbitrary exercise of their powers. My Lords, I cannot see that there would be any such encouragement; and, on the other hand, any words which might be introduced for the purpose of discouraging any particular exercise of the powers could hardly be reconciled with the opinion which your Lordships entertain, that it is necessary for the provost, magistrates, and town-council to retain in that respect their whole legal power, unimpaired and unprejudiced by any present exercise of their discretion.

Nothing now remains but to consider the question of costs. Upon that point I am bound to say that I think it is right for your Lordships to bear in mind, not only the fact that the alteration now proposed to be made in the interlocutor of the 9th of December 1879 was wanted to give complete security to the appellants and the interests which they represent, but also that before the action was brought the attitude of both sets of respondents was such as, in my opinion, to justify, I do not say the form of the action, but the institution of some action for the purpose of obtaining from the Court such declarations as will now have been obtained. It is evident to me that the Provost, Magistrates, and Town-Council of St Andrews, in what had previously passed, had been acting upon an assumption of their having larger powers than those which the Court of Session and your Lordships' House have recognised—powers, that is to say, whether upon a bargain with the individual feuars or otherwise, to dedicate to the public this particular part of the ground for the purpose of a public highway. That power, however, your Lordships think they have not; and it does appear to me that their whole proceedings, down to the time when the action was brought, were not only such as to justify the pursuers in thinking that they claimed and might exercise that power, but such as necessarily to justify your Lordships in the conclusion that they did intend to assert that

No. 13. power—that they had intended the use of it, and might revert to that intention afterwards—and even in their pleadings in this action I fail to perceive anything like a renunciation of that power. Under these circumstances it seems to me that the manner in which the Court below has dealt with the costs is at least sufficiently favourable to the respondents, and that the costs of this appeal ought not to be thrown upon the appellants; though, on the other hand, I do not propose that they should be given the other way.

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As to the costs, therefore, what I should propose is, that the variation which I have read being made, there should be no costs of this appeal.

LORD BLACKBURN.—My Lords, I have come to the same conclusion as that stated by my noble and learned friend. The Provost, Magistrates, and Town-Council of St Andrews hold as part of the common good of the town a portion of the Links. They once had a much more extensive estate, but, like a great many other municipal corporations in Scotland, they have got rid of a great part of their landed property; still they do hold a portion of the Links, some ten acres or so, in their own possession. Their title-deeds do not place any restriction upon the manner in which they are to hold them, but I take it to be the established law of Scotland that a municipal corporation may hold lands subject to an obligation to allow the inhabitants such use as use and wont over a prescriptive period have established that the inhabitants of the town are entitled to. I do not by any means think that this is an incident attached to the fact that the estate is held by the corporation as part of its common good. In old days, when corporations had extensive estates, there were many portions of these estates treated like any ordinary gentleman's estate, in which no one could dream there was any such right as a right to be established by prescriptive usage.

In the present case there is no controversy about it at all. It is admitted that the municipal corporation of St Andrews do in fact hold the lands subject to the rights of the inhabitants of St Andrews to use them, for golf principally, and for other objects of recreation; and I think that in modern times it is not going at all too far to say, as the Judges have done, that that is the primary and principal object for which they are held. Still, subject to that primary and principal object, the municipal corporation has held the lands with the right to make any use or, to quote from the words of Lord Gifford, "to do anything which does not destroy or injure the primary purposes for which the land is held, namely, its public enjoyment for golfing or otherwise." They have the right to do anything that does not injure or interfere with those primary purposes—they have not the right to do anything which does interfere with those primary purposes.

Now, the summons here asks (I pass over the two first conclusions, which are merely general statement) to have it declared that "the magistrates and town-council have no right to encroach, or authorise or permit any encroachment, upon the said Links or any part thereof which shall have the effect of diminishing the space available for the said game of golf, or for the recreation and amusement of the said inhabitants; 3d, that, in particular, the said magistrates and town-council have no right to construct, or authorise, or permit the construction by the other defenders, or any of them, of a road for carts and carriages along the southern boundary of the said Links;" "and 4th, that neither the said magistrates and town-council nor the said other defenders are entitled

to use, or authorise or permit the use of, the portion of the said Links adjoining the said northern boundary of the said parcels of ground as an access for carts and carriages." No. 13.

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Now, the proposition put forward in the third and fourth, that those two purposes are under all circumstances, and in every way, beyond the power of v. Magistrates of St Andrews, &c.

the provost, the magistrates, and the town-council, I think it is perfectly plain is a great deal too wide a proposition. Such things may be done in such a way as to interfere with the primary purposes for which the lands are held, namely, golfing and recreation, in which case I agree that they should not be done. On the other hand, such things may be done in such a way as not to interfere with this use, and though the motive may be a wish to give an advantage to a particular person who owns a house, or any other particular motive which the magistrates like, yet so long as it does not injure or interfere with the rights which the inhabitants possess to have those lands preserved for the public recreation and enjoyment, more particularly for the game of golf, I do not see that the appellants have any right to complain or to claim any interdict.

Now, it is upon that that the principal questions arise afterwards. The summons obviously claims too much; and I think, when the evidence is gone into, it will be seen that the making of such a road, that is to say, so far as macadamising the road and allowing carts and carriages to travel along it are concerned, would clearly not to that extent interfere with the game of golf at all; nor do I think it would interfere with the *jus spatiandi*. You cannot put a precise limit to it—it must depend a good deal upon the discretion of those who have the management of it; but even as regards allowing carts and carriages to carry traffic to houses alongside of it, I do not see that that would necessarily interfere with the enjoyment of the ground.

I can quite imagine there might come a change in course of time; if the town of St Andrews were to grow as great as the town of London, and if a traffic were to go along that road as heavy and as great as the traffic which now goes along the Strand, I can imagine that then it would interfere with the enjoyment of the Links; but that is a remote contingency not particularly likely to happen. At the present time, as things exist, the making of the road and throwing it open to be used by the inhabitants for the time being would not be a matter that would necessarily interfere with the primary purpose for which the magistrates hold the land.

Now, we come to the purpose which I think really was the more important purpose, though it was not very clearly kept in view by those who brought the summons and instituted the action originally. It does appear, I think (more from a confused notion about what their rights and powers were than from any intention to do wrong in any way), to have been the notion entertained by the town-council in 1874 or 1875, that they had the power under certain circumstances to make or allow another person to make the road and sell it to the feuars, or give them the right to use it in future—to part with their rights so that they would no longer have control over it at all. If they did that I certainly think that, whether at the present moment it would interfere with the public right of recreation or not, it is very likely that it would in time injure it. I think the Court below has very properly said that, that being so, they should express themselves in their verbal judgment in such a way as to make it clear that the provost and town-council should not do it, and that there should be some terms put into their interlocutor (that being the way in which they

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thought it would be best done), to secure that the provost and town-council, if they made this road, though they might allow traffic to go on it, were still to preserve the full control over it, and to hold it subject to all the rights which the inhabitants possess for recreation, not in particular but in general; and that the provost and town-council should keep to themselves the power of regulating the traffic, so as to keep the road whilst the traffic went on it in such a state as that it should not be a nuisance to those in pursuit of recreation. I can perfectly understand that they might make an order that carts carrying manure, for example, should not go along the road from one place to another, or possibly, that the more offensive descriptions of traffic generally should only be driven through it by night, and otherwise, as to many of the numerous purposes as to which bye-laws might properly enough be made; but they must preserve their powers and must take care that they do not part with the road so that anybody else acquires a right paramount to the corporation. I think that object is very clearly expressed in the verbal declarations, but when it came to be put into the interlocutor it was not so fully expressed; consequently, I think there was very considerable reason to doubt whether there might not be future litigation arising upon the subject of what was decided and what was meant. Upon that ground I think it most desirable to alter the declaration in such a way as to make it perfectly clear in future what are the limits of the powers of the Provost and Town-Council of St Andrews, in respect of these Links, and also to make it clear that the right of the inhabitants to object to their control is limited to the right to object to their doing something which would interfere with or injure the primary purposes for which the lands are held, namely, the enjoyment of the inhabitants.

Now, the only other question which arises is the question of costs. The general rule of your Lordships' House is that if the appeal be dismissed it should be dismissed with costs, but when it appears from the result of the appeal upon some subordinate, or, it may be, substantial part of the case that the appellants were justified in coming to this House, then it is generally said that although the costs go to the victor, in that case as in this, there would be no thorough victory to either side; and therefore the question would be, as regards the costs, how far that would apply to the present case. It is never very easy to be quite clear about such a point as this, but I think the interlocutor being varied as proposed, there is a sufficiently important object attained by the appellants in coming here to make it proper to say that the appellants should not pay the costs of the appeal, though it is not quite clear whether they should be entirely absolved. In every other respect I agree with the motion which has been made by the noble and learned Lord on the woolsack.

LORD WATSON.—The only questions which have been argued at your Lordships' bar relate to the powers of the Magistrates and Town-Council of St Andrews as proprietors and administrators of that part of the common good of the burgh which consists of the eastern portion of the Links. *Prima facie* the common good of a burgh, vested in the magistrates, generally under very ancient titles, is property which they can dispose of as freely, so long as they keep the interests of the burgh in view, as a private proprietor can deal with his own land. But in this case the part of the common good in question is subject to a special trust for behoof of the community, or, in other words, the inhabitants and burgesses of the burgh of St Andrews. That right in the burgesses does

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not require to be constituted by writing—it can be constituted, and generally is constituted, by immemorial usage,—that is to say, by a course of enjoyment for a prescriptive period of at least forty years. In the present case there are abundant indications that the inhabitants did possess that right at a somewhat distant period; but your Lordships are saved from making any inquiry into that question, which is one of fact merely, by the judicial admission given by the magistrates to the effect that they do hold that part of their property under trust to preserve it for the game of golf and the recreation of the inhabitants.

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Now, my Lords, although they hold it subject to these rights on the part of the inhabitants, the magistrates and council remain undivested to any further extent of their proprietary rights, and are therefore entitled either to make or to sanction any other uses to which the property is convertible so long as those uses are not inconsistent with the due enjoyment by the burgesses of the rights vested in them by law. What uses they may so sanction will depend to a very great extent upon the amount of population and the amount of the golf played or recreation taken. Uses which would be perfectly legitimate and proper in a thinly populated burgh may become very illegitimate and very improper, and may constitute invasions of the burgesses' rights, when practised where there is a large population.

My Lords, what the magistrates and town-council were proposing to do at the time when the action was raised appears to me to have been this, they were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to preserve for purposes consistent with the rights of the inhabitants; and they justified their position upon the ground that, as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time.

The appellants brought this action no doubt with a view to stop the threatened proceedings, but they did not limit the conclusions of their summons to the actual proceedings which the council were threatening to take, but made them so wide that, if given effect to, they would establish this proposition, that wherever a right of golfing or of recreation exists the magistrates cannot give a comfortable or convenient right of passage over the ground reserved for that purpose, although the so giving it may not interfere to the smallest extent with the rights of the burgesses. On the other hand, the defence set up in this case appears to me to amount, on the part of the magistrates and council, to a justification of that which they proposed to do as falling within their discretion; and beyond that a separate defence was set up by the feuars to which I shall not refer, because it has not been insisted upon at your Lordships' bar.

My Lords, I am of opinion, with your Lordships, that the Court of Session were quite right in holding that the appellants have failed to shew that the present use of a metalled road along the line proposed will have the slightest effect in interfering with the privileges of the golfing community. The evidence upon that point appears to me to be all one way. There is undoubtedly a proper golf course outside of which this line of road is, and that must not be interfered with; but no one proposes to interfere with it. Then it is said that you must leave untouched everything outside of that course which can be shewn to be a part of the Links to which a ball may be driven in playing the game of

No. 13. golf. I entirely demur to that proposition. The contention to which I am prepared to give effect really comes to this, that whatever is outside of the proper golfing course may be turned to various purposes so long as these are not inconsistent with the game of golf; and really the speculation as to whether it is better to have a road with ruts in it, or a metalled road, or a piece of rough grass with hollows and heaps, is, after all, rather a matter of fancy than a question having any substance in it.

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That being so, my Lords, the case is narrowed to the question of regulation. I do not think much is made of that question on the record, and still less is made of it in the evidence. I see nothing which can suggest to me that the present use of that road by vehicles as well as by pedestrians will in the least degree encroach upon the privileges which the community are entitled to exercise. It may very well be that upon special occasions it will be necessary for the magistrates to exercise some right of regulation over the traffic. There are kinds of traffic which are mentioned in the evidence, such as carting coals, and so on, which do not seem very consistent with recreation; but it is obvious that these might be regulated so as not to interfere with the use of the ground by the inhabitants at those times of the day when, ordinarily, people are in the habit of taking their recreation. And then it is a possible thing that some day or other, as has been suggested by my noble and learned friend opposite, such a change may come over St Andrews that it may become necessary in the due exercise of their administrative powers for the town-council to take away this right of road. One cannot anticipate that such a thing will immediately occur, but it may, and those who have the right to take recreation, and to play golf upon the Links, are quite entitled to have a judgment which will prevent the magistrates from making such an alienation at the present moment as may come at any future period into collision with their rights over this piece of land, which undoubtedly are of primary importance.

I therefore entirely approve of the declaration which has been proposed by my noble and learned friend on the woolsack, because it appears to me to settle as definitely as a Court can do by anticipation the limits within which the discretion of the magistrates must be exercised, and it lays upon them the imperative duty which they were at the time this action was raised about to neglect,—the duty not only of abstaining from doing any act or deed by which a right would be created in others, but of taking steps to prevent others from acquiring such right. Upon the matter of costs, I entirely agree with my noble and learned friend upon the woolsack.

JUDGMENT:—"Ordered and adjudged that the said interlocutor of the Lords of Session in Scotland, of the Second Division, of the 9th of December 1879, complained of in the said appeal, be, and the same is hereby varied, by omitting from the declaration therein contained the words, 'but are bound to retain the same in their own hands for behoof of the community of the burgh,' and substituting the words, 'but are bound to retain the portion of the Links in question in their own hands for behoof of the community of the burgh, so that any road which may be formed thereon shall remain in all time coming a portion of the said Links, held in the same way, subject to the same uses, and for the same purposes, as any other portion of the said Links; and that the said Provost, Magistrates, and Town-Council are bound to take such steps as may be requisite to prevent either the Police Commissioners of St

Andrews, or any other person, from acquiring any title thereto, or any right to interfere therewith, so that it may always be in the power of the said Provost, Magistrates, and Town-Council to take away or alter such road, and in the meantime to restrict and regulate the traffic thereon ;' and it is further ordered and adjudged, that in other respects the said interlocutors complained of in the said appeal be, and the same are hereby affirmed : And it is further ordered that the cause be, and the same is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and judgment."

No. 13.

July 27, 1881.

Paterson, &c.

v. Magistrates

of St Andrews,

&c.

SIMSON & WAKEFORD, London—MITCHELL & BAXTER, W.S.—CONNELL, HOPE, & SPENS, London—MAITLAND & LYON, W.S., and TODS, MURRAY, & JAMIESON, W.S.

MRS ELIZABETH FRASER OR ROBINSON (Complainer), Appellant.—

No. 14.

Sol.-Gen. Balfour—Moncreiff.

WILLIAM MURDOCH (Fraser's Trustee) (Respondent), Respondent.—

Aug. 3, 1881.

Robinson v.

Fraser's Trust-

tee.

Chitty, Q.C.—Benjamin, Q.C.—C. J. Pearson.

Trust—Liability of trustees—Discretion as to investment—Bank stock—Severing of interests of beneficiaries—Whether trustees' relief thereby restricted.— A testatrix directed her trustees, by the second purpose of her trust-deed, to pay to her daughter A "the interest or annual-rent of £2000" during her life, and on her death to pay the fee of that sum to her children. By the third purpose of her trust-deed she made a similar provision for her daughter B in life and her children in fee ; and she directed her trustees, after making provision for the payment of these legacies, to divide the residue of her estate. Power was conferred on the trustees "to continue to hold any or all of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so," without any personal responsibility for loss, if any, thereby sustained ; and power also "to lend or place out on such security or securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively, the said security or securities to be conceived in favour of my trustees, and that for the purposes of this trust, and not otherwise."

The trustees allocated various stocks belonging to the testatrix and sums of money to meet the legacies of £2000 to A and B respectively, and though the various investments stood without distinction in the names of the trustees, separate accounts were kept and regularly rendered to A and B respectively of the profits arising from the investments allocated to her, and of the expenses connected therewith. The residue was then divided. Among the stocks belonging to the testatrix was certain stock of the City of Glasgow Bank. A portion of this was realised, but the rest was on the request of A retained by the trustees as an investment of part of the legacy to her and her family. The City of Glasgow Bank afterwards suspended payment, and, being an unlimited company, the trustees were subjected to heavy calls. They claimed relief out of the trust-estate generally, which then consisted only of funds held for behoof of A and B and their respective families.

Held (rev. judgment of Second Division) that while the trustees were under the trust-deed empowered to retain the City of Glasgow Bank stock, being stock held by the truster, not only till the residue was realised and divided, but also as an investment of the special legacies bequeathed to A and B and their families, yet having appropriated certain investments for behoof of B and her family, they must be regarded as holding the same in trust for their behoof exclusively, and were not entitled to relief therefrom of liability arising from investments held for A and her family.

Observed that the liability incurred by the trustees in respect of the calls on the City of Glasgow Bank stock was in no sense a debt of the truster.

No. 13. golf. I entirely demur to that proposition. The contention to which I am prepared to give effect really comes to this, that whatever is outside of the proper golfing course may be turned to various purposes so long as these are not inconsistent with the game of golf; and really the speculation as to whether it is better to have a road with ruts in it, or a metalled road, or a piece of rough grass with hollows and heaps, is, after all, rather a matter of fancy than a question having any substance in it.

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That being so, my Lords, the case is narrowed to the question of regulation. I do not think much is made of that question on the record, and still less is made of it in the evidence. I see nothing which can suggest to me that the present use of that road by vehicles as well as by pedestrians will in the least degree encroach upon the privileges which the community are entitled to exercise. It may very well be that upon special occasions it will be necessary for the magistrates to exercise some right of regulation over the traffic. There are kinds of traffic which are mentioned in the evidence, such as carting coals, and so on, which do not seem very consistent with recreation; but it is obvious that these might be regulated so as not to interfere with the use of the ground by the inhabitants at those times of the day when, ordinarily, people are in the habit of taking their recreation. And then it is a possible thing that some day or other, as has been suggested by my noble and learned friend opposite, such a change may come over St Andrews that it may become necessary in the due exercise of their administrative powers for the town-council to take away this right of road. One cannot anticipate that such a thing will immediately occur, but it may, and those who have the right to take recreation, and to play golf upon the Links, are quite entitled to have a judgment which will prevent the magistrates from making such an alienation at the present moment as may come at any future period into collision with their rights over this piece of land, which undoubtedly are of primary importance.

I therefore entirely approve of the declaration which has been proposed by my noble and learned friend on the woolsack, because it appears to me to settle as definitely as a Court can do by anticipation the limits within which the discretion of the magistrates must be exercised, and it lays upon them the imperative duty which they were at the time this action was raised about to neglect,—the duty not only of abstaining from doing any act or deed by which a right would be created in others, but of taking steps to prevent others from acquiring such right. Upon the matter of costs, I entirely agree with my noble and learned friend upon the woolsack.

JUDGMENT:—"Ordered and adjudged that the said interlocutor of the Lords of Session in Scotland, of the Second Division, of the 9th of December 1879, complained of in the said appeal, be, and the same is hereby varied, by omitting from the declaration therein contained the words, 'but are bound to retain the same in their own hands for behoof of the community of the burgh,' and substituting the words, 'but are bound to retain the portion of the Links in question in their own hands for behoof of the community of the burgh, so that any road which may be formed thereon shall remain in all time coming a portion of the said Links, held in the same way, subject to the same uses, and for the same purposes, as any other portion of the said Links; and that the said Provost, Magistrates, and Town-Council are bound to take such steps as may be requisite to prevent either the Police Commissioners of St

Andrews, or any other person, from acquiring any title thereto, or any right to interfere therewith, so that it may always be in the power of the said Provost, Magistrates, and Town-Council to take away or alter such road, and in the meantime to restrict and regulate the traffic thereon ;' and it is further ordered and adjudged, that in other respects the said interlocutors complained of in the said appeal be, and the same are hereby affirmed : And it is further ordered that the cause be, and the same is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and judgment."

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SIMON & WAKEFORD, London—MITCHELL & BAXTER, W.S.—CONNELL, HOPE, & SPENS, London—MARTLAND & LYON, W.S., and TODD, MURRAY, & JAMIESON, W.S.

MRS ELIZABETH FRASER OR ROBINSON (Complainer), Appellant.—
Sol.-Gen. Balfour—Moncreiff.

No. 14.

WILLIAM MURDOCH (Fraser's Trustee) (Respondent), Respondent.—
Chitty, Q.C.—Benjamin, Q.C.—C. J. Pearson.

Aug. 8, 1881.
Robinson v.
Fraser's Trustee.

Trust—Liability of trustees—Discretion as to investment—Bank stock—Severing of interests of beneficiaries—Whether trustees' relief thereby restricted.—A testatrix directed her trustees, by the second purpose of her trust-deed, to pay to her daughter A "the interest or annual-rent of £2000" during her life, and on her death to pay the fee of that sum to her children. By the third purpose of her trust-deed she made a similar provision for her daughter B in life and her children in fee ; and she directed her trustees, after making provision for the payment of these legacies, to divide the residue of her estate. Power was conferred on the trustees "to continue to hold any or all of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so," without any personal responsibility for loss, if any, thereby sustained ; and power also "to lend or place out on such security or securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively, the said security or securities to be conceived in favour of my trustees, and that for the purposes of this trust, and not otherwise."

The trustees allocated various stocks belonging to the testatrix and sums of money to meet the legacies of £2000 to A and B respectively, and though the various investments stood without distinction in the names of the trustees, separate accounts were kept and regularly rendered to A and B respectively of the profits arising from the investments allocated to her, and of the expenses connected therewith. The residue was then divided. Among the stocks belonging to the testatrix was certain stock of the City of Glasgow Bank. A portion of this was realised, but the rest was on the request of A retained by the trustees as an investment of part of the legacy to her and her family. The City of Glasgow Bank afterwards suspended payment, and, being an unlimited company, the trustees were subjected to heavy calls. They claimed relief out of the trust-estate generally, which then consisted only of funds held for behoof of A and B and their respective families.

Held (rev. judgment of Second Division) that while the trustees were under the trust-deed empowered to retain the City of Glasgow Bank stock, being stock held by the truster, not only till the residue was realised and divided, but also as an investment of the special legacies bequeathed to A and B and their families, yet having appropriated certain investments for behoof of B and her family, they must be regarded as holding the same in trust for their behoof exclusively, and were not entitled to relief therefrom of liability arising from investments held for A and her family.

Observed that the liability incurred by the trustees in respect of the calls on the City of Glasgow Bank stock was in no sense a debt of the truster.

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Fraser's Trustee.

Ld. Chancellor
(Selborne).
Lord Blackburn.
Lord Watson.

(IN the Court of Session March 10, 1880, *ante*, vol. vii. p. 694.)

The complainer appealed.

At delivering judgment,—

LORD CHANCELLOR.—My Lords, the two first questions to be determined in this case are, whether the authority given by the trust-disposition and settlement of Mrs Fraser to her trustees to continue to hold any of her shares in public or other companies enabled them to set apart and appropriate, for the second and third purposes respectively of that settlement, the bank shares and other securities, which they did, in fact, retain for those purposes; and whether, if they had that authority, it was duly exercised?

Upon the first point it was argued that, because the power for the trustees “to continue to hold” the shares, &c., “should they consider it advisable or expedient to do so,” is followed, in the settlement, by a power also “to lend or place out” the two legacies of £2000 each “on such security or securities, heritable or moveable, as they shall consider advantageous,” the former power could not properly be used for the investments contemplated by the latter, but must be construed as merely authorising some delay, which might not otherwise have been proper, in the conversion of the truster's shares, &c., in public companies before the distribution of her residuary estate. I think that this is not a necessary, and that it would not be a reasonable, construction of the settlement. A power to “continue to hold” particular investments, made by the truster herself (without more) must, I think, be taken, *prima facie*, to refer to those trusts which were to continue; and the only continuing trusts in this case were those expressed in the second and third purposes of the settlement.

Upon the second point I cannot concur in the view which seems to have been taken by some of the learned Judges in the Court of Session, that, because the trustees, on the 20th of November 1876, stated it to be their view that bank stock was not a suitable class of stock for trustees to hold, their subsequent decision to hold £200 City of Glasgow Bank stock for the investment of part of the legacy of £2000 given to Mrs Sinclair and her children ought to be regarded as an abdication of their duty of judgment, and for that reason a breach of trust. When the truster had expressly authorised the retention, for the purposes of the trust which she created, of these investments made by herself, of which some were to her knowledge of a character not free from risk, and were, at the same time, productive of a variable amount of income, those facts alone could not make it a breach of trust for the trustees to act upon that authority, although their own preference might have been for securities unattended with any risk. The truster did not, indeed, direct them to take into consideration the wishes or the opinions of the liferenters, but I think it was proper and reasonable for them to do so, so long as they did not unduly favour the liferenters at the expense of their children, or either set of legatees at the expense of the other. In this case I find no indication of any improper purpose. It is true that some risk was necessarily incident to every such investment in bank stock, but there was no special reason for believing (and it is plain to me that neither the trustees nor Mrs Sinclair did believe) that this particular investment in stock of the City of Glasgow Bank was attended with any extraordinary risk which might not equally attach to shares or stock in any other well established bank in Scotland. This stock, at the time of the appropriation, bore, and was valued at a price sufficient to prove the credit in which the City of Glasgow Bank then stood, and to make the gain to the liferentrix in point of income very

inconsiderable. I am satisfied that the trustees acted in good faith, and that their decision to retain this stock was an honest exercise of the discretion given to them by the will. It would be extremely dangerous to hold that trustees, having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment, if they should disregard, in the end, objections to which they had thought it right, in the first instance, to direct attention.

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These investments, therefore, having been *bona fide* retained under sufficient authority, the next question is, whether the appropriations, as they were actually made, had the effect of severing the funds and securities set apart and appropriated for the second purpose of the will from those set apart and appropriated for the third purpose, so that the latter would not thenceforth be liable to make good any subsequent loss or deterioration of value sustained by the former, as between the two sets of beneficiaries? If such a severance was possible, it appears to me to be clear that the intent and the effect of the discharge of the 22d of March and 31st of May 1877 was to make it. And not only was such a severance legally possible, but it also appears to me to have been the most proper (if not the only proper) mode of fulfilling the directions of the will. Before the residue of the trustor's estate could be distributed, provision was to be made, by some authorised investment or appropriation, for these two legacies, given to different families under separate purposes of the will, and necessarily payable at different periods of time. If different sets of trustees had been nominated for them it would have been impossible to contend that, after the fund appropriated to each had been transferred to its proper trustees, there could be any subsequent community of loss or gain between them as to either income or capital, or that either fund was to be in any way responsible for the other. It cannot, in my opinion, make any difference, that the same persons were trustees for both, and were also trustees for the general purposes of the will. The English authorities, collected in the first volume of Mr White's (4th) edition of *Roper on Legacies*, p. 942, rest upon principles equally applicable on both sides of the Tweed.

From this conclusion it seems to me to be a necessary consequence that neither the beneficiaries under the third purpose of this will, nor the trustees, could have any right to be indemnified against a loss sustained on the City of Glasgow Bank stock, at the expense of the appellant, or of the funds and securities set apart for the appellant's legacy. So far as the trustees were concerned, the retention of this bank stock, as an investment of part of the legacy given to the Sinclair family under the second purpose of the will (together with the personal liability incident to it), was their own voluntary act. That liability was not undertaken for the general purposes of the will, which necessarily ceased when the residue was divided; but only for the purposes of this particular Sinclair trust. The retention of such stock necessarily involved risks of trade, and entitled the trustees to be indemnified from those risks out of the trust-funds of the legatees for whom it was held. But to employ other funds set apart for other legatees in the same or any other trade there was no authority. To do so would have been, in my opinion, a breach of trust. Here, again, the principles of well-known English authorities—*ex parte Garland*;¹ *ex parte Richard-*

¹ 10 Ves. at p. 119.

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son;¹ *Cutbush v. Cutbush*;² *M'Neillie v. Acton*³—are in point, and they appear to me to be as much applicable in Scotland as in England.

The result, therefore, is, that I am unable to concur in the interlocutors of the Court of Session now under appeal; and that I think those interlocutors ought to be reversed, and decree of suspension and interdict granted as prayed by the appellant, with expenses below, and with the costs of this appeal; and I so move your Lordships.

LORD BLACKBURN (having stated the purposes of the trust-deed, and, *inter alia*, the fact that Mrs Fraser died possessed of £850 stock of the City of Glasgow Bank, then valued at £1955, continued)—I do not think that it can be doubted that, in the absence of something in the trust-deed to the contrary, the duty of the trustees would have been to dispose of this stock, involving, as it did, a possible liability, which most people at that time thought would never come into operation, but which in fact did, within three years, come into operation in a very disastrous way. But Mrs Fraser had expressly provided that her trustees might continue to hold such stock or shares as might belong to her at the time of her death, should they consider it advisable or expedient to do so.

The Lord Ordinary came to the conclusion of fact that the trustees retained the £200, which they did retain, not because they deemed it advisable or expedient so to do, but because they surrendered their own judgment to that of Mrs Sinclair.

I do not differ from the propositions of law involved, though not expressed, in this opinion. I think that trustees who incur a liability which, having reference to the trust which they have accepted, they ought not to incur, cannot claim to be indemnified for so doing out of the trust-funds; on the contrary, they in general are liable personally to make good any loss which the trust-funds have sustained in consequence of their so acting contrary to their duty. And I further agree that trustees are to exercise their own discretion. But I think they may inquire as to what are the wishes and opinions of others, and especially of those who are interested, before they finally determine what, in the exercise of their own discretion, they think expedient, and I think that in this case there is no evidence that the trustees did more than they properly might. The Lord Ordinary seems to ground his opinion principally on a letter of the 28th of November 1876. Mr Murdoch was a member of a firm of writers, Murdoch & Macpherson, at Huntly, and that firm acted for the trust. In that letter, which, whether it was composed by Mr Murdoch or his partner Mr Macpherson, binds Mr Murdoch as a member of the firm, it is said that their brokers recommended that this stock should be realised, “and our own” (that is, the firm’s) “view is that bank stock is not a suitable class of stock for trustees to hold.” This was not, however, the view which Mrs Fraser, the framer of the trust, had entertained; and, though I suppose every one connected with the matter now regrets that this view of the firm was not acted upon, I can see nothing to justify the conclusion that the trustees did not, in the exercise of their own discretion, *bona fide*, though, as it turns out, unfortunately, come to the conclusion that it was expedient to continue to hold this £200. I therefore differ from the Lord Ordinary on the inference of fact to be drawn from the letters.

Lord Gifford say,—“It appears that Mrs Fraser, the truster, at the time of

¹ Buck. at p. 209.

² 1 Beav. at p. 187.

³ 4 D. M. & G. 750, *et seq.*

her death, held various stocks in railways and other companies, and, in particular, she held £850 of the consolidated stock of the City of Glasgow Bank. It was in reference to this condition of her estate, as I think, that she inserted in her trust-deed the following clause :—‘ With power also to my trustees to continue to hold any or all of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained.’ The question is, what is the true construction and what is the true effect of this clause? Now, it is contended that this is a general clause perfectly unlimited, which entitled the trustees not only to defer the winding up of the trust and the paying of the general residue for some indefinite but reasonable time, and until they found it expedient to sell or realise any shares in joint stock companies which might be temporarily depressed, but it is said it was a general power entitling the trustees to select and continue as the permanent investment of the two special legacies of £2000 each, all or any of the bank stocks or other stocks of which the testatrix might die possessed. After full and repeated consideration I am really unable to come to this conclusion. I think it contrary to the very explicit powers and directions which the testatrix had given in reference to the two legacies of £2000 each, and contrary to the very conception of these legacies themselves. The truster knew, or she had been told, and quite rightly and properly told, that it would be the duty of her trustees immediately after her death to sell out and realise all her shares in trading, joint stock, and other companies, and she knew, or she had been told, that this was their duty, even if at the time of realisation it should happen that the market was depressed or unfavourable for the realisation of high prices for such descriptions of property. I think she intended to provide for this contingency, and no other. She gave her trustees a certain latitude or discretion that they might abstain from selling for such reasonable time as they might consider expedient, and she exempted them from personal responsibility if they should deem it expedient to delay realisation. But all this had reference to her general trust. This discretionary power was granted to the trustees in order to save the estate from loss from forced realisation at an unfavourable time, to the disadvantage of the residuary legatees. It was for the benefit of the residuary legatees, who were interested only in the residue, that the realisation should not be hurriedly made, and made at a loss. The possible risk of loss from unfavourable realisation had really little or nothing to do with two specific legacies of £2000 each, which were quite fixed in amount, and the beneficiaries in which, as such, had no concern with how the residue might turn out, or whether the stocks in public companies were sold at a time of depression or not. So long as there was a residue at all—and the residue here was £1200—it did not matter to the special legatees, who, as such, had only fixed pecuniary legacies, what loss might occur in the realisation of the general estate, so long as the realisation was not so low as to destroy the residue altogether. That was the concern of the residuary legatees, and these were the whole three children of the testatrix. The continuing to hold stocks which formed part of the trust-estate, and the abstaining from selling or realising them, was, I think, all to be before the division of the general residue, and before the payment or the lending out of the pecuniary legacies. The clause, I think, was not intended to govern, and had no reference to the permanent management and investment of the special legacies of £2000 each—a

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management which might endure for many a long year, and for which the trust-deed makes separate and ample provision. This is the conclusion to which I have been forced to come, though not (as I have said, and especially after hearing your Lordships' opinions) without difficulty and hesitation. It leads to the result that it was *ultra vires* of the trustees to take £200 of the stock of the City of Glasgow Bank as part of the investment of the legacy of £2000 which Mrs Sinclair and her children are interested in."

If this was the true construction of the deed, I think that the trustees could not maintain any claim to be reimbursed from the trust-estate for a liability which they ought not to have incurred, whatever might be their claim against the personal interest of those at whose instance and for whose benefit they incurred the liability. But I cannot agree in this construction. I think that if Mrs Fraser had meant to give her trustees a discretion to continue to hold the stocks only until the residue was realised, and no longer, she would have said so in plain terms, which she certainly has not done. I need not inquire what would have been the case if the trustees had invested some of the money in the purchase of more City of Glasgow Bank stock; that is not what they did. But Mrs Fraser thought that she had invested her property well, and therefore allowed her trustees to continue to hold any of those stocks, though she did not direct them so to do. On this part of the case I agree with the Lord Justice-Clerk and Lord Ormidale, and need not repeat their reasons.

But this does not dispose of the case. The complainer's pleas in law below contain these,—“(2) Two separate and distinct trust-estates having been created as applicable to the complainer and Mrs Sinclair respectively, the respondents are not entitled to burden the complainer's estate with losses sustained through the investments made for Mrs Sinclair's trust-estate and behoof. (3) In any view, the trustees having made separate and distinct investments, the one set applicable to Mrs Sinclair, and the other to the complainer, there was thereby, and by the correspondence which preceded and the actings of parties which followed, an arrangement constituted whereby the risk of the investments made on behalf of Mrs Sinclair was left with her, and her share of the trust-funds in the trustees' hands, and in no respect with the complainer or her investments. (4) The respondents are barred, by the arrangements entered into with Mrs Sinclair condescended on, from claiming relief against the complainer or the investments made for her behoof.”

The pleas in law for William Murdoch are, amongst others,—“(2) The trustees having acted within their powers in continuing to hold the bank stock, are entitled to be indemnified out of the trust-estate in their hands for any loss incurred or to be incurred by them in consequence of holding the said stock. (3) The investments of the trust-funds having all along stood in the names of the trustees as such, and the trust being one and indivisible, the trustees' lien or right of indemnity subsists and extends over the whole trust-estate. (4) The trustees not having by their actings, or by acceptance of the discharge founded on, or in any other way, renounced or restricted their said right of indemnity as against the complainer, the interim interdict should be recalled, and the reasons of suspension repelled, with expenses.”

Which is right depends, in my opinion, mainly upon the true construction of the trust-instrument, which regulates what the trustees could do; but partly on the inference to be drawn by the Court from the documents as to what they did do.

This is, in my opinion, the most difficult part of the case; and I am here obliged to differ from the majority of the Court below, both as to the fact and as to the law, for I think the second and third pleas in law for the complainer below are well founded, and that it is not made out that the case is such that the three pleas of the respondent Murdoch apply to it. I do not think it necessary to form any opinion as to the fourth plea of the complainer.

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The trustees are by the trust-deed required, before paying over the residue, to make provision for payment of the legacies, and they are empowered "to lend or place on such securities, heritable or moveable, as they shall consider advantageous, the aforesaid legacies of £2000 and £2000 respectively, the said securities to be conceived in favour of my trustees, and that for the purposes of this trust, and not otherwise," and to vary the securities from time to time. I have already given my reasons for thinking that they might continue to hold any of the stocks belonging to Mrs Fraser at the time of her decease, though not such as trustees would generally be justified in holding, and were not bound to sell them, and invest the £2000 and £2000 in other securities. And, I think, therein agreeing with Lord Gifford, and differing from the Lord Justice-Clerk, and perhaps from Lord Ormidale, though of that I am not quite sure, that the true construction of the trust-deed is such that the trustees, if not required to sever the securities for the two sums of £2000 and £2000, and set aside certain securities for the one legacy and certain securities for the other, were at least empowered to do so; and I think that they have done so, the two being from the time they so did two distinct branches of the trust for two distinct parties. It certainly, where the trusts remaining to be fulfilled are for the benefit of different parties, and quite independent of each other, would be the ordinary and convenient course to do so; and I cannot resist the conclusion from the words of the trust-deed that Mrs Fraser, or rather those who drew up the deed for her, meant that ordinary and convenient course to be followed. It was argued at your Lordships' bar that if such was the intention it ought to have been provided that there should be, or at least might be, separate trustees for the Sinclair family and the Robinson family, and that in the trust-deed now under consideration not only are the same trustees originally appointed, but the power to assume fresh trustees is so worded as to shew that they must always be the same.

I quite agree that the intention, if it be what I think it is, could have been more clearly expressed. If it had been provided that the securities for the Sinclair £2000 should be invested in the names of the original trustees, and such persons as they might from time to time appoint as trustees for the Sinclair £2000, and a similar provision made as to the Robinson £2000, no one could have doubted that the trusts were intended to be severed. It is because this is not so clearly expressed that the question is one of difficulty. The Lord Justice-Clerk seems to have thought it not a question of any difficulty. He takes the opposite view from that which I do, but he hardly explains his reasons for that opinion. Lord Gifford gives his reasons for taking the view which I take. Lord Ormidale says,—“The separation and allotment of the trust-estate referred to consisted in nothing more than book entries and accounts made, so far as I can discover, for no other purpose than convenience in dealing with the interest of two separate individuals, Mrs Sinclair and Mrs Robinson. There was certainly no transference or investment, in any form, of the bank stock in the name of Mrs Sinclair. It was held at the last and throughout, as it was at the commence-

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ment of the trust, in the names of the trustees for the purpose of the trust. Supposing, however, that such a separation and allotment as that alleged by the suspender did take place, the bank stock still continued part of the trust-estate, as it had previously been. Nor can I find anything in the deed of discharge which was executed by the parties interested, after the trustees had laid aside what they at the time considered sufficient to meet the two legacies of £2000 each. On the contrary, I find that in the trust-deed it is expressly declared that the securities for these legacies 'shall be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise.' Keeping this in view, and that Mrs Sinclair and Mrs Robinson were respectively only entitled to the annual rent or interest arising out of the two legacies of £2000, the capital sum ultimately going on their deaths to others, it cannot admit of doubt, I think, that there were no new and separate trusts in reference to these legacies contemplated by the truster, or could have been created under the deed of settlement."

The inference I draw from the documents, more particularly the deed of discharge, and Messrs Murdoch and Macpherson's mode of stating it in their books, is that the trustees did (if they had power to do so) sever the investments, for the behoof of the Sinclairs from those for behoof of the Robinsons, and declare that the £2000, less legacy-duty, held for behoof of Mrs Robinson and her children, was invested in the stocks, which are now the subject of the interdict. I think this was done for convenience in dealing with the interest of two separate families, and it is principally because I think this so obviously convenient and usual in such cases that I put the construction on the words of the trust-deed that the intention was to authorise, if not require, this to be done, though I think that this intention might have been more clearly expressed.

If this is right, I think that the second plea of the complainer correctly states the law, and that the right which the trustees have to come upon the fund for indemnity is limited to the trust-funds, on account of which the £200 bank stock was retained, and so the liability was incurred.

The Lord Justice-Clerk says, that the amount of the calls which the trustees paid was "a direct debt of the maker of the trust, for which the whole of her trust-funds in the hands of the trustees must be liable." I think, if it was a direct debt of Mrs Fraser, the whole of her funds, whether included in the trust or not, would be liable; but I cannot agree that it ever was a debt of hers at all. It did not accrue till more than two years after her death, and the liability is incurred not because the shares had been hers at the time of her death, but because her trustees chose (justifiably, as I think, though most unfortunately) to continue to hold them till after the bank stopped, and that, according to the view I take, they did for the benefit of the Sinclair family, and not for the benefit of the maker of the trust or the trust generally.

It was argued that the maker of a trust is personally bound to indemnify the trustees for all costs and liabilities properly incurred in the execution of the trust, but I do not think this is the law. No doubt any one who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound, at law as well as in equity, to indemnify him. This principle applies to many cases, and where a trust is for the benefit of the maker of the trust it may apply to a trustee. *Balsh v. Hyam*¹ is a good example of a case where it did apply, and there are many others. In *Jervis v. Wolferstan*² the

¹ 2 P. Wms. 453.

² Law Rep. 18 Eq. at p. 24.

Master of the Rolls goes so far as to say,—“I take it to be a general rule that where persons accept, at the request of another, and that other is a *cestuique* trust, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust.” Perhaps this rule is too broadly stated, as something must depend on the nature of the trust, and of the interest of the *cestuique* trust, but it is not necessary now to say more than that this rule has no application to a case where the maker of the trust is not a *cestuique* trust. When he is not, I think he cannot merely as maker of a trust be so liable. The trustee voluntarily accepts the trust, and can only incur liability in consequence of his own act in so accepting; unless there be an express or implied bargain for indemnity from the maker of the trust, he must be taken to accept the trust, relying on the trust-funds. He has, no doubt, a right to charge the trust-funds with all just allowances.

Lord Cottenham, in *Attorney-General v. Mayor of Norwich*,¹ states the rule thus,—“I apprehend it to be quite clear, according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust.” But this, I think, does not extend so far as to enable them to apply all funds, part of the property which they took in trust, and of which they are not divested, in relief of expenses incurred on behalf of a separate branch of the trust, and not at all on behoof of the funds from which it is sought to obtain relief. In *Attorney-General v. Lawes*,² Wigram, V.-C., states it to be “a well settled rule that, where a legacy has been severed from the bulk of an estate, and become the subject of litigation, that particular fund, and not the general estate, is to bear the costs.” If this was merely a rule of practice as to costs, however well settled it might be in England, it could have no effect in a Scotch case; but it seems to me to be an application of a general principle, which, I should think, must be the same in every system of jurisprudence in which trusts exist. That principle is, I think, involved in the decision of Lord Eldon in *ex parte Garland*.³ There a miller made his will, dated the 17th of February 1798. He left all his personal property to three trustees, one of whom was his wife, Margaret Ballman. He also appointed them his executors, but that I think not material. By the will the testator directed that his trade of a miller, and the farming business then carried on by him, should be carried on by Margaret Ballman until his trustees should think proper to establish his sons, or either of them, therein; and he directed his trustees, upon so settling his sons, or either of them, in the business, to permit them to take the stock, crop, and other effects in the said business, at a fair valuation, and to take a bond or note from them for the amount. He also directed that, as long as the businesses should be carried on by his wife, the profits thereof should be applied for her own use, and for the maintenance and education of his children, and that an inventory and valuation of his stock, crop, and effects in his said businesses should be taken within six weeks after his decease, and that any sums not exceeding £300, which, by a codicil, he increased to £600, should be paid by his trustees to Margaret Ballman out of his personal estate, for the purpose of enabling her to carry on the businesses, and

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¹ 2 My. & Cr. at p. 424.² 8 Hare, at p. 43.³ 10 Ves. jun. 110.

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It is not stated when the testator died, probably it was not long after the date of his will. After his death Margaret Ballman carried on the trades till December 1801, when she became bankrupt. She had given notes of hand to the trustees for the sum of £1351, 5s., the amount of the valuation, and £600 which they had advanced to her in pursuance of the directions in the will. She also had received £768, 12s. 4d. of the testator's assets. The surviving trustee proved under the commission. The assignees presented a petition praying that the proof might be expunged, and that it might be declared that the whole of the personal estate of the testator was liable to all the debts contracted by the bankrupt in carrying on the trades under the directions of the will. The Lord Chancellor expressed a clear opinion that the surviving trustee, as a creditor on the notes, must be postponed to the creditors of the bankrupt, but directed a further argument as to the other point.

The counsel for the assignees argued that if a trustee is directed to carry on a trade, and does so, he makes himself personally liable to the whole of the debts contracted in that trade, which, hard as it may be, is clearly law. He then argued that it followed that he must have the right of resorting for his indemnity to the whole personal estate given to him with a direction to carry on the trade; and that it followed that the creditors must have it, at least by circuitry, to the same extent.

Lord Eldon, however, said that the case of the executor was no doubt very hard, as he might be proceeded against as a bankrupt, though he was but a trustee, "but he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation, and contract that sort of responsibility." He says that the creditors "have something very like a lien upon the estate embarked in the trade, they have not a lien upon anything else." No more is said as to the argument that the trustee had a personal right to indemnity, and that, consequently, her assignees had a similar right at least by circuitry.

The extent of the right which trustees have to be indemnified, and the manner in which creditors can by circuitry work it for their own benefit, were discussed by the Master of the Rolls in *in re Johnson*.¹ The Master of the Rolls there says what *ex parte Garland* decides is, "that the claim of the creditors is limited to the assets devoted to trade."

On the question whether the whole assets of the testator were directly liable to the debts incurred in the trade which the testator directed to be carried on, Lord Eldon proceeds very much on the general inconvenience that would be produced if the estate could not be wound up effectually so long as the trade was carried on, perhaps for a century. In the case before him the trade had not been carried on for more than two years, and at most a few months more, but in laying down the law he had to consider what might have happened. I think it clearly must have been the Lord Chancellor's opinion that the trustee who, of his own choice, placed himself in the situation of incurring liability for a trade which the framer of the trust directed to be carried on with a particular part of his assets, had no right to come for indemnity upon the rest of the assets. And this is, I think, the guiding principle to be applied in this case, as soon as

¹ L. R. 15 Ch. D. 548.

it is determined that the two branches of the trust, that for the Sinclair family and that for the Robinson family, were severed. On that subject I have already said what is my view. I think, therefore, that the interlocutor of the Lord Ordinary was right, though not for the reason given in his note ; and that the appeal should be allowed, with costs, and that interlocutor restored.

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LORD WATSON.—I am of opinion that the interlocutors under appeal ought to be reversed, and that the judgment of the Lord Ordinary, which was approved by Lord Gifford, one of the three Judges of the Second Division, ought to be restored. It is necessary to explain the grounds upon which I have come to that conclusion, because I concur in part only of the opinion of Lord Gifford, and am unable to assent to the reasons assigned by the Lord Ordinary for his judgment.

The trusts of the late Mrs Fraser's settlement are not complicated. After providing, in common form, for payment of her debts, deathbed and funeral expenses, the testatrix appoints her trustees to make payment of the interest or annualrent of £2000 to her daughter Mrs Sinclair during her lifetime, and of the capital to her children after her decease, and to make payment in like manner of the interest or annualrent and of the capital of another sum of £2000 to her daughter Mrs Robinson and her children. The testatrix then bequeaths £5 to each of her trustees, and directs them, after payment of debts, and after "making provision for payment of the legacies above-mentioned," to divide the free residue of the trust-estate equally between her son, James Robb, and her two daughters, Mrs Sinclair and Mrs Robinson.

The estate falling under the trust, amounting in value to £5000 or thereby, consisted chiefly of railway stocks, and of £850 consolidated stock of the City of Glasgow Bank, which was duly transferred to the respondent William Murdoch, and his co-trustee, James Fraser Robb. The trustees, in the course of their administration, sold bank stock to the extent of £650 ; and after paying debts, expenses, and minor bequests, they proceeded to make provision for payment of the two legacies of £2000 to the daughters of the testatrix and their issue, by appropriating to them severally the remaining stocks which had belonged to the testatrix, at their current value in the market. In this division the unsold balance of £200 City Bank stock was, with the knowledge and consent of Mrs Sinclair, appropriated to her and her children, as representing part of their £2000. The funds remaining in the hands of the trustees, after such appropriation, were equally divided among the three residuary legatees. These arrangements are narrated in detail in a deed of discharge executed by the residuary legatees in March and May 1877. It proceeds upon the recital that the trustees "have invested" each of the two legacies of £2000 upon the respective stocks therein specified ; and in respect that they had been paid or received credit for their several shares of the remainder the residuary legatees thereby exoner the trustees of their whole actings and management, and discharge all claims of residue competent to them under the provisions of the deed of trust. The books and accounts of the trust shew that, from the time the two legacies were thus severed, each of the daughters of the testatrix received the income of the stocks which had been assigned to herself and her family, under deduction of expenses applicable to her own stocks.

It appears to me that all these acts of administration were authorised by the terms of the trust-deed, and were, therefore, *intra vires* of the trustees.

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Lord Gifford was of opinion that, in assigning these stocks to the beneficiaries, the trustees acted in excess of their powers; and it would certainly have been their plain duty to realise, had not the testator given them express power "to continue to hold all or any of such shares or stocks, in public or other companies, as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained." His Lordship held that this was not a continuing power applicable to all the purposes of the trust, but merely a power to delay realisation, and consequently to postpone the distribution of the residue. I am unable to adopt that view. A general power to retain stocks in which the testatrix has already invested does not differ, in its scope, from a general power to invest in these stocks. What the trustees can do in the one case by making a new, they can effect in the other case by retaining an old investment; and in the present instance the terms of the power are wide enough to cover all purposes of the trust requiring investment. I therefore think that the trustees were entitled in their discretion to retain these stocks, as an investment of the £2000 legacies, instead of realising the stocks, and then investing £4000 upon moveable or heritable securities.

The Lord Ordinary decided against the respondent in this appeal, on the ground that, in retaining the £200 City Bank stock as part of Mrs Sinclair's legacy, the trustees did not act within the power entrusted to them by the testatrix, that they surrendered their independent judgment, and acted in accordance with the wishes of Mrs Sinclair, and against their own convictions. There does not appear to me to be any evidence sufficient to bring such a serious charge home to the trustees. No doubt they did consult the beneficiary most interested in the matter, and what they did had her approval; but I do not think there is ground for the inference that the trustees did not regard the retention of the bank stock as a proper act of administration, or that they thought it would be attended with any appreciable risk either to the beneficiaries or to themselves.

I am further of opinion that the trustees had power to sever these £2000 legacies, and to place them in separate investments for behoof of the respective beneficiaries. The trust-deed authorises them to lend out upon certain securities "the foresaid legacies of £2000 and £2000 respectively," and these words appear to me to confer upon the trustees, by plain implication, a right to make the severance if they choose. It may be doubted whether, in the due administration of the trust, the trustees could have declined to sever these legacies, but in the view which I take of the case it is unnecessary to decide that point.

If, instead of severing the two legacies, the trustees had been entitled and had thought fit to make provision for their payment by retaining in their hands an undivided fund of £4000, the present question could hardly have arisen, assuming always that the trustees had power to retain the £200 City Bank stock as a trust investment, after distribution of the residue. In that case the two families of Sinclair and Robinson would have been equally interested in the investment, they would have shared in any increment of the value of the stock, and would have borne alike any loss arising from its depreciation. I did not understand it to be disputed, and I think it clear that, had matters stood in that position, the trustees would have been entitled to recoup calls paid by them to the liquidators of the City Bank out of the remaining funds or stocks held by them for the purpose of paying the two legacies.

The real question in this case, according to my apprehension of it, comes to

be—What was the effect of the severance of the two legacies upon the right of indemnity competent to these trustees so long as they held, and were justified in holding, the trust-estate as an undivided whole? I cannot agree with the opinion expressed by the late Lord Ormisdale, one of the two Judges composing the majority of the Second Division, to the effect that the appropriation of the stocks held by the trustees consisted of mere book entries made for convenience in dealing with the interest of the liferenters, Mrs Sinclair and Mrs Robinson. The appropriation of these stocks, if authorised, as I hold it to have been, by the terms of the trust-deed, was an act of administration which the trustees of themselves had no power to undo. The immediate effect of that act was to alter the pecuniary interests of the two sets of beneficiaries concerned, and the relations subsisting between them and the trustees. The beneficial interests of Mrs Sinclair and her issue on the one hand, and of Mrs Robinson and her children on the other, were thenceforth limited to the stocks severally assigned to them, and the trustees ceased to be under any liability to account to either liferentrix and her children for the stocks appropriated to the others. Two trusts were created instead of one, with separate funds, and different beneficiaries having no community of interest. Such being the legal result of the appropriation, it is, in my opinion, immaterial whether the authority to constitute these two trusts was derived from one and the same deed, or whether each was constituted by virtue of a separate deed under the hand of the testatrix.

In that state of circumstances I am at a loss to conceive upon what principle of law or equity the respondent can claim to be indemnified for loss arising upon the £200 City Bank stock appropriated to Mrs Sinclair out of the funds assigned to the appellant and her children. There is no positive rule of law upon which such a claim can be supported, and I do not know of any equitable claim to indemnity, recognised by the law of Scotland, which does not rest upon the maxim of the civil law, "*Cujus est commodum ejus quoque debet esse incommodum*." Those authorities in the law of England to which your Lordships have referred lead to precisely the same result. It may be a hard thing that the respondent has personally to bear loss arising upon a trust investment in which he had no personal interest; but he voluntarily undertook the risk when he consented to hold City of Glasgow Bank stock as trustee for behoof of Mrs Sinclair and her children. In my opinion it would be a still harder thing to inflict that loss upon the appellant, who had as little personal interest in the matter as the respondent, but, unlike the respondent, had no power either to prevent such an investment of Mrs Sinclair's legacy, or to protect herself from its consequences.

In the Court below, the Lord Justice-Clerk decided in favour of the respondent, solely on the ground that the calls made by the liquidators of the City of Glasgow Bank constituted a debt of the truster, Mrs Fraser, and, if that assumption had been well founded, it appears to me that the judgment of the Second Division would have been right. But it seems clear that these calls were never, in any sense, a debt due by the truster or by her estate. The claim of the liquidators was a claim against the trustees personally, arising out of that course of administration by which they became and continued to be partners of the bank. But if any doubt could be raised on this point it is completely disposed of by the judgment of Lord Eldon in *ex parte Garland*.¹

I therefore concur in the judgment proposed by your Lordship.

¹ 10 Ves. at p. 119.

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JUDGMENT:—"Ordered and adjudged that the said interlocutors of the Lords of Session in Scotland, of the Second Division, of the 10th of March and 18th of May 1880, complained of in the said appeal, be, and the same are hereby reversed, and that the interlocutor of the Lord Ordinary, of the 6th of January 1880, be, and the same is hereby restored: And it is Ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this judgment: And it is further Ordered, that the respondents do pay, or cause to be paid, to the said appellant, the costs incurred by her in respect of the said appeal to this House, and also her expenses in the Court below."

HOLMES, ANTON, & GREG—ALEX. MORISON, S.S.C.—MARTIN & LESLIE—
DAVIDSON & SYME, W.S.

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THE MAGISTRATES AND TOWN-COUNCIL OF EDINBURGH, Appellants.—
Kay—M'Laren.

MARJORY M'LAREN AND THE LORD ADVOCATE, Respondents.—
Lord-Adv. Watson—Badenach Nicolson.

Trust—Separation of funds jointly administered.—Prior to 1695 the magistrates of a burgh held a fund as trustees for a hospital for poor and sick. In that year a person of the name of Alexander conveyed to the hospital two heritable bonds for sums amounting to £2270, stating that the revenue thereof was to be applied in supporting a certain number of pensioners in the hospital, and directing that any surplus revenue should be applied to increase the capital. He further directed that the patrons of the mortification (who were to be the magistrates and the ministers of the burgh) should prefer as beneficiaries (1) his own kindred, (2) those of the name of Alexander, and, failing these, should select beneficiaries. In 1696 the magistrates, as trustees of the hospital, obtained possession of the Alexander bonds, and subsequently, disregarding the special directions as to the application of the revenue, administered it along with the general revenue of the hospital, keeping no separate accounts of the two funds.

In 1734 the magistrates expended £4634 of the hospital funds in the purchase of lands. In 1744 and 1753 the two Alexander bonds were paid up and the funds mixed with the hospital funds. The whole funds not invested in land were subsequently lent by the magistrates to the burgh, which became bankrupt, and its debts were, by statute, converted into three per cent annuities.

In a question raised in 1873 as to the amount of the Alexander fund *held* (*aff.* judgment of First Division) that since the year 1700 the said fund had been immixed and dealt with as part of the funds of the hospital, and must be held to have participated proportionally with the hospital funds in the increase of value of the aggregate funds and property between the year 1700 and 1873; and that the purchase of lands in 1734 was to be regarded as a purchase on account of the joint funds, although the original Alexander bonds were not paid until a subsequent date.

Trust—Ex officio trustees.—*Held* that the fact of the ministers of the burgh taking no part in the management of the trust for upwards of a century was no bar to their successors exercising their rights.

Id. Hatherley.
Lord Blackburn.
Lord Gordon.

(PREVIOUS reports of this case, 22 D. 1222, 2 Macph. H. L. 7, 5 Macph. 115, 7 Macph. H. L. 7.)

In this action, raised by Clephane and others, beneficiaries of Trinity Hospital, against the Magistrates of Edinburgh, the House of Lords, besides deciding the point raised by the action and defences, directed the Court of Session, *inter alia*, to inquire and ascertain of what the property of the hospital consisted.

Under this remit various questions were subsequently raised and disposed of by the Court of Session. No. 15.

On 20th July 1875 an interlocutor was pronounced containing, *inter alia*, the following findings :—“ Find that the funds mortified by Master James Alexander in the year 1695 have been hitherto held, administered, and applied by the petitioners in the same way as the funds belonging to the Trinity Hospital, and have been immixed with and dealt with as part of the funds of the said hospital : Find that in terms of the said James Alexander’s mortification the funds mortified by him fall to be held and administered by the Lord Provost, Magistrates, and Council of the city of Edinburgh, and the ministers of the said city, present and to come, and to be applied, in the first place, in relief of poor persons of the founder’s kindred ; in the second place, in relief of poor persons of the name of Alexander ; and, lastly, in relief of other poor persons, all as directed by his deed of mortification, dated 23d October 1695 : Find that for this purpose it is necessary to ascertain the present amount of the capital of the said funds mortified by the said James Alexander, and to set apart the same to be administered and applied as aforesaid : Find that in the year 1700 the said funds amounted in all to £2270, and that the said funds to that amount have been immixed as aforesaid with the funds and property of the Trinity Hospital from an early period down to the present time, and must be held to have participated proportionally with the said funds and property in the increase of value of the aggregate funds and property between the year 1700 and the year 1873 : Remit of new to Professor Macpherson to ascertain the value of the whole funds and property of the said hospital, as in the year 1700, drawing back to the said date the value of all additional gifts and legacies received by the hospital after the year 1700, on such terms as may seem reasonable ; also to ascertain and fix the amount or value of the whole aggregate funds and property as in the year 1873, and to report what is the present amount of the said Alexander’s funds, taken in the same proportion to the present value of the whole aggregate funds as the sum of £2270 bears to the value of the whole hospital funds and property in 1700, ascertained as aforesaid.”

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On 30th November 1875 the Court appointed intimation to be made to the Lord Advocate in terms of section 16 of the Trusts (Scotland) Act, 1867.

A note for the Lord Advocate was thereafter lodged, stating that his Lordship had considered the process, and appears and intervenes for the interests of the charity, or any object of the trust or the public interest.

On 19th March 1878 the following interlocutor was pronounced :—“ Find that in ascertaining the value of the whole funds and property administered by the defenders, as governors of the hospital in 1700, no account is to be taken of the Trinity College Church or of the Trinity Hospital buildings, or of any lands held and possessed by the governors for the hospital in the year 1700, and thereafter retained by them *in forma specifica* ; and, on the other hand, find that, in ascertaining the value of said whole funds and property in the year 1873, no account is to be taken of the prices received by the defenders for the said church and for the said hospital buildings (including the price of a servitude in favour of the said hospital buildings mentioned in the said report), inasmuch as such prices are of known amount, and either have been kept separate, or are readily separable from the aggregate funds and property which comprehend the funds and property belonging to the Alexander mortification : Find that the price or prices of parts of the lands held and possessed by the defenders in 1700, but since sold, must be included in the account of the

No. 15. value of the said whole funds and property in the year 1873, inasmuch as the said price or prices have been immixed with the aggregate funds and property which comprehend the funds and property of the Alexander mortification; and, on the other hand, that in ascertaining the value of the said whole funds and property in the year 1700, the said price or prices must be drawn back to the said date on the same terms on which additional gifts and legacies received since 1700 are to be drawn back as hereinafter directed: Find that lands acquired by the defenders, as governors, since the year 1700, by purchase, and not by donation or mortification, must be taken into account in ascertaining the value of the said aggregate funds and property in the year 1873, and are to be valued at the price at which the same might reasonably be expected to sell, if publicly exposed for sale, in the year 1873: Approve of the valuation ascertained and reported by Professor Macpherson, and appoint the value of the said lands to be taken at £640 per acre in the year 1873: Find that the sum of £5730, 9s. 2d., which the defenders are appointed, by interlocutor of this date, to restore to the Trinity Hospital, but without interest, is to be reckoned as part of the said aggregate funds and property as existing in the year 1873: Find that the mode adopted by the accountant, and reported by Professor Macpherson,* of drawing back to the year 1700 the value of all additional gifts and legacies received by the governors of the hospital since 1700, and immixed with the said aggregate funds and property, is a reasonable and equitable mode, and approve thereof accordingly, as applicable not only to the said additional gifts and legacies, but also to the price or prices obtained for portions of the lands held and possessed by the governors in 1700, and subsequently sold."

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Subsequently a report was lodged by Professor Macpherson shewing that, giving effect to the principles fixed by the foregoing interlocutor, the amount of the Alexander fund as at 1700 was £2270, 8s., and as at 1873 £30,537, 19s.

The Magistrates appealed, for the following reasons:—“(1) Because the finding that the Alexander fund, amounting to £2270 or thereby, has been immixed with the funds and property of the Trinity Hospital from an early period down to the present time, and must be held to have participated proportionally with the said funds and property in the increase of value of the aggregate funds and property between the year 1700 and the year 1873, is without foundation in fact. (2) Because the lands of Dean and Blinkbonny were purchased and paid for prior to 1739 out of moneys of Trinity Hospital, and not out of moneys of the Alexander fund, which was at that date wholly invested in the original bonds over the Annandale and Westerhall estates, and consequently the Alexander fund is not entitled to any share in the increase in the value of the lands of Dean and Blinkbonny. (3) Because the moneys belonging to the Alexander fund were not at any time invested in the purchase of land, but, on the contrary, were, after they were paid up by the original debtors, invested, along with certain other funds of the Trinity Hospital, in securities or investments which can be traced, and therefore the Alexander fund is not entitled to any increase in value of any of the lands now held by the hospital, and purchased out of the hospital funds, but is entitled only to a proportionate share of the investments actually made with the moneys of the Alexander fund. (4) Because the ministers of Edinburgh are not now entitled, after the long contrary usage, to claim a right to be joined as trustees in the administration of the Alexander fund; and it is not expedient that they should be so found.”

* See Appendix, p. 152.

The facts sufficiently appear from the opinions of Lord Blackburn and Lord Hatherley. No. 15.

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LORD BLACKBURN.—My Lords, the Town-Council of Edinburgh were the administrators of Trinity Hospital, and as such held considerable funds before the year 1696. In that year Mr James Alexander died, having previously made a mortification to the Lord Provost and Town-Council of Edinburgh and their successors in office, and the ministers of the said burgh present and to come. The ministers at that time did not take any steps to assert their right to join in administering this mortification. The council got possession of the funds, and from the time they did so down to the making of the interlocutor appealed against administered those funds as if they had been mortified to them as administrators of the funds of Trinity Hospital.

In a suit for the proper administration of the funds of Trinity Hospital the Court of Session had to decide a great many questions. Two, and two only, of their decisions are now by this appeal brought before this House—1st, The Court of Session decided that the funds of the Alexander mortification ought to have been from the beginning administered by the council and the ministers, and not by the council alone, and that notwithstanding the length of time during which a contrary practice had prevailed they could not sanction it in future; and that the funds of that mortification must be in future administered, in terms of the mortifier's trust, by the council and the ministers.

This was the first decision appealed against. I think none of your Lordships who heard the argument doubted that the Court of Session could not have decided otherwise, and the counsel for the appellants were not able to urge anything substantial against this decision.

But then, having determined that the Alexander fund was to be administered separately in future, there arose a question, what was the fund which was to be so administered? I do not think that I can state the point more briefly than is done by the Lord President. He says—"The funds left by Mr Alexander were invested in particular securities, and those securities were not called up or changed until about the middle of the last century, and we have distinct evidence of what the amount of the fund was at that time. Now, if we proceeded upon the principle of a strict accounting against the Magistrates here as trustees, of course the way of bringing out the balance would be to charge them with this capital as at the date when we find it in their hands, and then charge them with the income as it accrued, and let them discharge themselves the best way they could. But it rather appears to me that in a case of this kind, and looking to the nature of the trust and the way in which it was necessarily administered, that would be too strict a principle of accounting; and while I think it is our undoubted duty to separate this Alexander fund, and secure that it shall be administered as a separate trust in all time coming, we may deal with bygones in a way more favourable for the administrators of Trinity Hospital. The income of the fund has apparently been spent, and it has not been spent, so far as we can see, upon purposes alien to the intentions and wishes of the founder. His wishes and intentions have only been to a certain extent disregarded—that is to say, the fund has not been in the right hands for administration, and there has not been in the selection of the objects of the bounty that order of preference which he desired. But still the fair result of the evidence appears to be that, at all events for a very long period, the income of the Alexander fund was be-

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stowed upon poor and indigent persons of the kind generally here contemplated. It was employed along with the income of the other funds of the hospital generally for such purposes, and therefore I cannot see that there can be, especially against a shifting body of trustees like the Magistrates and Town-Council of Edinburgh, any responsibility for the expenditure of that income. It is not alleged that they appropriated this fund to their own purposes as individuals, or that they appropriated it to the uses of the corporation of the city of Edinburgh. If that had been so, it would have raised a question of a very different kind. But that does not appear to have been so, and therefore I incline to the opinion that in so far as regards the past income of this fund there is no room for any accounting at all.

“ But then the next question comes to be—How are we to ascertain what sum now in the hands of those trustees will adequately and fairly represent the capital of the Alexander fund? Now, that is a question of some difficulty, but at the same time I think it admits of a solution. We know that the Alexander fund was invested upon two bonds, as it was originally settled by the donor himself—the one upon the Annandale estates for £1725, 17s. 8½d., and the other upon the Westerhall estates for £544, 13s. of sterling money, for I am speaking now of the amount as converted into sterling money and actually paid up in the course of last century. These two sums amount together to £2270. Now, the mortification was in the year 1695, and it may certainly be assumed, without any great stretch, that that money came into the hands of the hospital trustees by the beginning of the last century, say in the year 1700. Therefore they were possessed in 1700 of this capital sum as representing the Alexander mortification. They were at the same time possessed of a very considerable estate belonging to the hospital, and it is not at all difficult to ascertain what the amount of that estate was. In that way we discover what was the relative or comparative value of those two estates in the year 1700. But it is very apparent upon the face of the report before us, and the abundant information which we have on the subject, that this joint mixed estate, consisting to a large extent of the funds and estate of the hospital proper, but also to a more limited extent of Alexander's fund, has largely increased in amount and value between the year 1700 and the present day. Now, it seems to me that this estate so jointly administered having greatly increased in value between these two dates, the Alexander fund must be entitled to participate in that prosperity. Thus, supposing that in 1700 the estate of the hospital proper amounted to £10,000 in value, and the Alexander fund to £2000 in value, making together £12,000, but that at the present day the joint estate as it appears in the hands of the administrators amounts to £50,000 in value, then that £50,000 must be apportioned between the same funds in the same proportion that they bore to each other in the year 1700—that is, as two to ten. I am taking the figures I have mentioned as entirely suppositious, not supposing they represent the entire value by any means. On the contrary, the value, as we see, is very much greater. Now, there may be some little difficulty in adjusting the precise way in which this result is to be brought about.” He then proceeds to give various directions as to what was to be done in ascertaining the amount, which I need not further notice.

No other way was suggested at the bar in which the fund, if the two were inextricably mixed up, could be apportioned except that of taking the proportion which the two funds bore to each other, and dividing the mixed fund in

that proportion, and I cannot myself see any other way. But it was argued that the two funds were not inextricably mixed up, and the point which the appellants' counsel made was fairly raised by the facts as to the purchase of the Dean estate. It appears that the town-council in 1734-39 purchased this estate for £3675. In course of time that estate has become part of the town of Edinburgh, and is now worth a very large sum of money, and this has been a profitable investment. At dates subsequent to 1734 they invested funds in city bonds, and the city having become insolvent, and compounded with its creditors, this has been a losing investment.

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The decision of the Court of Session is that the investments are to be taken as made for the mixed funds, and that on the figures supposed by the Lord President the Alexander fund is entitled to two-twelfths of the profit made by the profitable investment in the Dean estate, and is to bear two-twelfths of the loss on the unprofitable investments in city bonds. And the result of that will be that in administering the Alexander fund the administrators will have the management of a very considerably larger sum than what the testator Alexander had and mortified in 1695. The contention of the appellants is that the investment in the Dean estate is to be considered as made exclusively for the benefit of Trinity Hospital, and that the Alexander fund will have no share in the profitable investment, but will have to bear a share of the loss in the subsequent investments, so that the fund now to be administered as the Alexander fund will be less than what the mortifier left in 1696. This is a result which does not at the first view seem so fair and just as that produced by the decision of the Court of Session.

In order to understand the grounds on which their argument is based it is necessary to examine what the facts were. The testator Alexander left in 1696 the funds available for his mortification invested in two bonds. The administrators of Trinity Hospital by usurpation became possessed of the control of both those bonds before 1734, and they in fact received the interest on those bonds and mixed the interest thus received with the revenue which they received from the property of Trinity Hospital, and from that mixed revenue defrayed the expenses which they incurred for the whole charity without making any distinction whatever as to whether those expenses were incurred for objects under the terms of the Alexander mortification or for purposes proper under the Trinity Hospital charity only. This is clearly proved by the account for the year 1722, which was in process though not printed, and which was produced at the bar during the argument. No doubt this was wrong, but, as pointed out by the Lord President in the passage I have read, these purposes were not alien to each other, and though wrong, this was not a wrong like what it would have been if they had appropriated the funds to their own purposes. But though they treated the funds as one, the two bonds remained in specie just as Alexander left them, not called up.

When the council bought the Dean estate in 1739, they gave directions to their treasurer to pay for it, and for that purpose to uplift some securities, including the bond over Westerhall for £544, 13s., which was one of the bonds left by Alexander. Nothing could more clearly prove that in making the investment the council were (as far as intention went) intending to make an investment for the behoof of the whole mixed fund which they, improperly it is true, treated as one fund. But the treasurer did not follow their instructions. In his account, after shewing what the whole disbursements in paying for the

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Dean estate and improvements on it had been, and that there remained a balance of £465, 18s. 5d. unpaid, he adds this—"Tho' the accomptant was authorised by the council to uplift £544, 13s. st. contd. in Sir James Johnston's hereble. bond to the hospital to replace the above charge, which, as it was well secured and the interest duly paid, he judged it more for the interest of the hospital to uplift only the sum due by Mr John and Mr Charles Cockburn, their bond being £200 st., and the meantime to advance the rest himself—£200. Balance due to him on acct. of the enclosing, £265, 18s. 5d." Consequently the two bonds remained in specie not called up for some years later.

The argument founded on this was, that as the bonds remained in specie, and earmarked as it were, and as it appeared that the estate of Dean was in fact paid for out of funds originally belonging to Trinity Hospital, and uplifted for that purpose, it followed as a matter of law that, whatever the council intended, the funds must be followed, and that the Dean estate belonged exclusively to Trinity Hospital. According to this reasoning, if the treasurer had obeyed his instructions the Alexander fund would have been entitled to share in the Dean estate in the proportion which £544, 13s. bore to the whole cost. As he did not, they are to have no share in it.

This makes the question depend entirely on an accident, and is not a satisfactory result; still if the law was settled that it was so we must follow it. But I do not think there is any case, either in England or Scotland, in which such a question has been raised. No doubt when the question has been whether those who represented the trust could claim property on the ground that it was procured by trust-funds which they had a right to follow, the identity of the fund is all important. But such a case as the present as to an investment has never that I can find been raised.

In *Pennell v. Duffell* (4 De Jex, Macnaghton, and Gordon, 372) it might have been raised, but those entitled to the different estates which then were proved to be jointly entitled to the fund very sensibly settled the proportions in which they were entitled without going to law about it.

Being, therefore, as I think it is, a new question, it must be settled on principles of justice. Speaking for myself alone, I should have had great difficulty in deciding this case if it had come before me as sitting in the Court of Session. I doubt whether I should have had acuteness enough to discover the mode in which the Court of Session have solved the difficulty. But they have solved it in a way perfectly consistent with justice and good sense, and not inconsistent with any technical rule of law, and no other solution has been suggested which would be so satisfactory. I certainly, therefore, am not prepared to advise your Lordships to reverse the judgment below, especially seeing that I am not prepared to advise your Lordships to adopt any other rule.

I move, therefore, that the interlocutors below should be affirmed, and the appeal dismissed, with costs.

LORD HATHERLEY.—My Lords, I have had the advantage of seeing in print the opinion of the noble and learned Lord who has just addressed your Lordships, and I have nothing to add to the statement of facts therein contained.

It appears that the first unfortunate step which was taken in this matter, erroneously, although no doubt in perfect good faith, was the exclusion of the ministers who were particularly pointed out in Alexander's mortification to be joint trustees with the corporation of Edinburgh of the fund that he left for the

purposes, under certain limitations, of Trinity Hospital. The ministers being shut out from it, the fund was administered entirely by the Provost and Council of Edinburgh. This circumstance no doubt led to the confusion which afterwards took place in the accounts. The Provost and Council of Edinburgh were properly trustees of Trinity Hospital, and they had several other mortifications also which were made over to them for Trinity Hospital, and this Alexander mortification appears in a sense to have been one also for the benefit of Trinity Hospital, or rather for the benefit of the persons who were to be received therein, that being a charity. It was limited, however, in its operation by certain rules with reference to the kindred of the founder. He was particularly anxious that those kindred should be admitted to it, and that until they failed the fund should be used for that purpose. However, the Provost and Council of Edinburgh placed all those funds which they held in any way for the benefit of Trinity Hospital in one common stock, as it were, and kept one common book of accounts with relation to them.

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I asked once or twice during the argument whether there was any separate account kept anywhere of the Alexander mortification, and was answered that the report of Mr Macpherson was in this respect perfectly correct—that the funds of the Alexander mortification had been “immixed” with the other funds held by the corporation in trust for the hospital. The consequence of that was that all the funds, including the Alexander mortification, have been dealt with as one common fund to be administered as the Provost and Council might think proper for the benefit of the hospital. This is not a case, as was remarked in the Court below, and as has been remarked again just now by my noble and learned friend, in which any improper motives have actuated the corporation—that is to say, the Provost and Council of Edinburgh—as trustees. They no doubt thought that they were performing their duty in doing that which they did; but at the same time the consequence has been unfortunate, because it has become necessary to separate these funds which are held on separate and distinct trusts; and it being necessary to separate them, the question is, how is that to be done now, when, according to the report of the referee, Mr Macpherson, the funds have become inextricably immixed?

My Lords, a very hard struggle was made, by Mr Kay I think, upon that part of the case, namely, with reference to the funds being capable of being still pointed out as separate and distinct. Now up to a certain time there was truth in this. The corporation became masters of the fund, as it is stated, somewhere about the year 1700. As far as appears from the report or the evidence, they were at that time masters of the fund, which consisted of two heritable debts due from the Annandale estates and another estate connected with them, the separate sums amounting together to the sum which was mentioned in my noble and learned friend's statement. Those debts were not gathered in until certainly after the year 1734 or 1735, in fact not until after 1740, and the purchase of the Dean estate was made at a period anterior to their being so called in, but the interest on those bonds was received and was credited to the common fund before that time. We have had an opportunity of seeing the accounts for one year, and it appears that the payments were made entirely in a mixed and un-separated form, indifferently from the interest of one fund or the other, or from the interest of one or of all the funds which were held by the Provost and Council of Edinburgh. My Lords, that being the case, it became impossible from that time to separate the interest, as Mr Macpherson tells us, and of course

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we looked to the counsel for the appellants to make out if they could that Mr Macpherson was wrong in that respect, and that the interests could in fact be separated. No attempt, however, has really been made, or if it has been made it has not been successful, to show that the interests of these funds was at any time kept separate and distinct. In due time afterwards the capital was gathered in, and what became of it? It may partly be traced to the debts which pressed upon the corporation, I apprehend, and it may partly be traced for a certain time to certain other payments, but after a time the funds became so inextricably immixed that there is no mode of separating them.

The appellants say, at all events, the corporation did not take the funds of the Alexander mortification for the purchase of the Dean estate, which is a source of profit to the corporation—they did not use them for re-investment in this Dean estate, which has turned out well for those who engaged in it, and we must keep these funds entirely separate from that advantageous purchase, inasmuch as we can show you that the identical funds which might be followed out as being what you were entitled to could not possibly have been laid out in the purchase of the Dean estate. In the events which have happened it would certainly be very much worse for them if they were taken to be left in the general body of the fund and so lost. What the Court seems to have regarded the corporation as having done may be described thus—if I may use an expression which bears more analogy to this than any other expression one could use—A sort of partnership was formed by these trustees between the various trust-funds which they held. They considered that they were justified in acting in the manner they did for the benefit of the hospital. They said, we will carry all these into one joint stock concern for better and for worse; and accordingly although there have been some alternations, the investment which was made by these trustees, improperly constituted in a sense, but still trustees of this particular fund, has turned out to be a beneficial investment.

Now, my Lords, I apprehend that what the Court below has done is only that which is commonly done in this country with reference to partnerships. The question came more frequently before our Courts at one time than it does now, because the principle is better understood. At one time, a long time ago, if a partner died leaving assets in the partnership, and the other members remaining in the partnership after his death carried on the business with his assets, there was felt to be a difficulty in coming to any arrangement as to what would be the correct mode of dealing with that fund. It was a recognised rule at all times that a *cestuique* trust whose property has been improperly dealt with has the choice of accepting the dealings with his property or repudiating it, that is, either of taking all the profit (he would not choose it if there had been loss) resulting from the dealing with his property, or requiring the payment back of his money with such interest as the Court thought right under the circumstances. There was found to be a difficulty about applying that to partnerships for some little time, but the principles of partnerships were discussed in the cases of *Brown v. De Tastet*, Jacob's Reps. 284, and in a case of which I do not just now remember the name, reported in the second volume of Mylne and Craig (*Wedderburn v. Wedderburn*, 1836, 2 Keen's Reps. 722, affirmed 4 Mylne and Craig, 41). When the principles were discussed in those cases it was said that the difficulty having arisen in this way, inasmuch as something must be allowed for labour and attention and activity in the business—such remuneration, for instance, as the managing partner or a person somewhat

in that position might be entitled to—the Court did not see its way to direct a simple account of the profits without more. However, in those cases it came to be settled at last that the proper course is to allow an account of all profit made since the death of the partner, and to give his estate a share of that profit according to the capital on the one side, and to debit his estate on the other side with “just allowances,” which of course includes everything which the Court might think just and proper. The principle was that the trust-money having been used in the partnership concern, and profits having resulted from that use of trust-money, no attempt should be made to separate all the different funds out of which money might have been paid, but the share of profits upon the trust-money so used was to be ascertained according to the capital employed.

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That, my Lords, is exactly what has been done here. It is a kind of partnership concern which has been carried on by the Provost and Council with their various trust-funds. The whole of the trust has made a profit; that profit the Court below has held ought to accrue for the benefit of that charity, the fund of which came into the hands of these trustees about the year 1700 as far as can be made out upon the evidence, as well as of the other trust-funds held by the same trustees. That is the principle upon which the Court has directed that the apportionment should be made.

Now, my Lords, in the case of a partnership, supposing it were necessary to lay out any money for the purpose of increasing the business during the time when the business was carried on with the aid of the deceased partner's assets in conjunction with other assets of the partnership—supposing it were necessary for the erection of a new building (take a brewery for example), or the like, to make payments—and profits were so earned, the Court would not be very strict to inquire out of which particular fund the money which was laid out arose, because when funds are employed jointly in this way you can hardly say that payments are made out of one fund rather than out of another fund. Here curiously enough there is a strong illustration of that in the entry which has been read by my noble and learned friend near me, from which it appears that it was actually intended at one time to apply these very funds to the particular purchase which was made of the Dean estate. But really that does not in substance make a difference if the whole concern has been carried on in a joint and mixed manner, and if the whole funds have been invested for the purposes of the whole concern if I may so term it. Believing as the corporation did that the whole was one concern, it was upon the faith and confidence of their having certain assets in hand, of which the heritable bonds in question formed part, that they made the purchase which otherwise they would not have ventured to make for the benefit of the trust, any more than if it had been an actual partnership the partners would have ventured to make such a purchase for the benefit of the partnership unless they had funds in hand.

Now, my Lords, from about the year 1700 the Provost and Council have had these funds amounting to £2000 odd of the Alexander mortification, and the interest upon them was at first very punctually paid, as the entry which has been read shows, although afterwards the state of things was different. The question arises after a long series of years in which this mistake has been made—for a mistake it has been held by the Court below to be, and that can hardly be disputed. The result of this long mistake is that happily, as things have turned out, the whole concern of this trust administered as one concern has been fortunate; the Alexander mortification partook in a speculation for which

No. 15. the funds of the concern were used, and it has been held by the Court below to be entitled to an equitable share of the profits so realised—that is what it comes to. I have taken the Dean estate as the principal instance, because that appears to be the principal instance of profit; but that is not the only instance, or the only instance of profit—it is a salient instance. A *cestuique* trust has a right, when his fund has been dealt with in an illegitimate manner as regards the true legal construction of the bequest, to say at his option whether he will have a decree for the restoration of the fund with or without interest in the meantime, or whether he will take the result of the employment of that fund, when it has been employed together with other funds in a payment resulting in an acquisition of profits, by taking a share of those profits. The remedy is given to him in either case, on account of the impossibility when funds have been mixed of attributing to each a particular property and earmarking it as belonging to the one rather than the other. And although you may say at such and such a time the Dean estate in particular could not have been bought with this particular fund because these bonds were not then gathered in and collected, still the interest had been gathered in and the interest had been applied as in case of the other funds. It was one common fund, and the *cestuique* trust does not now ask to have his part of that fund followed and pursued, and to have his trust-moneys divided from the rest, but he asks what common justice seems to require, namely, that he should have a right to participate in that which has followed from the use of his money—together with the other moneys—taking his share out of that joint and common stock. I think the *cestuique* trust has a right to do that.

My Lords, I will only add to what my noble and learned friend has said, that in this decision I think we are in no way departing from—on the contrary, it approves itself to my mind as a way of carrying into full effect—the rule which is common in cases of this kind, namely, that a *cestuique* trust whose funds have been dealt with without his consent has a right to take the result of that dealing in the manner most favourable to himself. I think, therefore, my Lords, that the order suggested by my noble and learned friend is the correct order for us to make.

LORD GORDON.—My Lords, in regard to the first question raised under this appeal, viz., Whether the ministers of Edinburgh are entitled to participate in the administration of the Alexander mortification, I entertain no doubt at all. The terms of the deed of mortification are quite distinct and unambiguous. It nominates and appoints the “Right Honourable the Lord Provost and Bailies and Council of Edinburgh, and their successors in office, for the community thereof, and ministers of the said burgh, present and to come,” to be the sole and undoubted patrons of the mortification. The ministers of the burgh “present and to come” are appointed equally with the Lord Provost, Bailies, and Council, and their successors in office, patrons of the mortification, and I entertain no doubt that the ministers were entitled from the institution of the mortification to participate in its administration.

But it is said, that as the ministers have not taken part in the administration of the mortification from its institution in or prior to the year 1700 they have now lost their right to participate in the management. I think this is a mistake. I agree with the Lord President that “the circumstance that the ministers of Edinburgh have never claimed to be conjoined in this administration is of no consequence. No persons of an official character can give away the rights of

their successors in office under a trust of this kind, and therefore the trust must be constituted and administered now as provided by the truster in his deed of mortification."

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I think that the cases of *Baird and Others v. The Magistrates of Dundee* and *Leslie v. Black*, which were relied on by the appellants, are inapplicable to the circumstances of the present case. In *Baird v. The Magistrates of Dundee*, March 3, 1863, 1 Macph. (H. L.) 6, the mortification was in favour of the Provost and Bailies of Dundee, but from the institution of the trust in 1645 the affairs of the mortification were managed not by the Provost and Bailies alone, but by the Provost, Bailies, and Town-Council. And it was decided by this House in 1863 (2 Paterson's Appeals, 1156), when the question was raised, "that having regard to the length of time during which the Provost, Bailies, and Town-Council of Dundee *per se* administered the charity, they ought to be considered as the lawful trustees of the interest represented by Johnstone's legacy." The case of *Leslie v. Black*, 6th June 1814, F. C., did not come to your Lordships' House. But the point decided by that case was that where a minister and members of a kirk-session, who were appointed along with others as patrons of a mortification, had for more than a century voted collectively as one person in the administration of the trust affairs, they were not entitled to vote *per capita*, but must continue to vote as they had formerly done. In both of these cases the question was in regard to the intention of the testator, and the usage was only important as shewing the contemporaneous interpretation put on the terms of the deed of mortification accepted and acted on for long periods of time. But there is nothing in these cases to indicate that in a case such as the present, where there is a clear and distinct nomination of certain official persons to act as patrons, the failure for a length of time of these officials to perform their functions would deprive their successors of the right so distinctly conferred upon them.

The remaining part of the case in regard to the mixing of the funds of the Alexander mortification with those of the Trinity Hospital, and the proper mode of the separation of these funds, is attended with more difficulty. But on a careful consideration of the whole matter I have come to be of opinion that the result arrived at by the Court of Session is right. I have had an opportunity of perusing and considering the judgment which has just been delivered by my noble and learned friend Lord Blackburn, and as his Lordship has gone fully into that part of the case, and as I concur in the views which he has expressed, I shall not detain the House by entering on details.

I am of opinion on the whole matter that the judgments of the Court below are right, and that they should be affirmed.

INTERLOCUTOR appealed from affirmed, and appeal dismissed with costs.

J. & J. GRAHAM, Solicitors, Westminster—WM. WHITE MILLAR, S.S.C.—
T. B. SIMSON, Crown Agent.

Extract from Professor MACPHERSON'S REPORT referred to.

"(5) The mode of dealing with the various donations since 1700, so as to prevent the Alexander fund being affected by them, favourably or unfavourably, has been a subject of much anxiety.

"The instruction given by the Court is to 'draw them back to the year 1700

No. 15. on such terms as may seem reasonable.' The increase in value of the aggregate estate, at least up to 1845, was not due to any accumulation of interest, but to rental increased, whether owing to improvement of the subjects, or to change in the value of money, or both. After that date it is to a large extent accounted for by non-expenditure of the increase of revenue arising from the price of the hospital, and of the land sold to the railway company, both at Blinkbonny and Quarryholes.

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"But much more important than the increase from accumulation of income since 1845 is the increase depending upon feuing value, which has been enormously augmented of late years.

"After repeated consideration of the whole circumstances, the accountant states,—'He came to the conclusion that no arbitrary rate of five or four per cent, or any other rate of interest, can with propriety be adopted as the measure of the rate of discount or accumulation to be applied to any part of the fund.' The accountant, however, after making numerous tentative calculations, ascertained that if the funds and estate at 1700, and the various donations subsequently made to the hospital from the dates when these sums were respectively received, are brought down to 1873, and compounded annually at certain small percentages, the sums so found are equivalent to the amounts of the fund and estate at that date, and that therefore these small percentages are the true rates at which the fund and estate have increased on an average of the whole period. It is no doubt true that the rate of increase in value may have varied during the period, but the accountant believes that no data are in existence by which any certain judgment could be given on the point, and he believes that the approximations made are as close an approach to the truth as can be arrived at, the calculation at compound rates causing the increment to accumulate to a larger extent during the later period. He has therefore drawn the gifts and donations back to 1700 at the rates so found, and adding the sum thereof to the estate at that date, he has calculated that as the amount thereof then was to the Alexander fund, so is the estate in 1873 to the amount of the Alexander fund in 1873.'"

CASES

DECIDED IN

THE COURT OF JUSTICIARY,

1880-81.

DAVID JACK, Appellant.—*Mackintosh.*
 THOMAS CAMPBELL, Respondent.—*J. Reid.*

No. 1.

Oct. 29, 1880
 Jack v. Campbell.

Statute 13 and 14 Vict., c. 92, sec. 1, Prevention of Cruelty to Animals (Scotland) Act, 1850—Wanton cruelty—Shooting at a dog trespassing and disturbing game in a field.—A dog trespassing in a field chased a rabbit therein. A coachman in the employment of the proprietor of the field followed the dog, and, when within five yards, shot at and hit it, the gun being loaded with No. 4 or 5 shot. The dog ultimately recovered, but suffered much pain for a considerable time. The coachman was convicted on a charge of “wanton cruelty,” under the Prevention of Cruelty to Animals (Scotland) Act, 1850.*

On appeal, the Court *quashed* the conviction.

DAVID JACK, coachman, Chapelhouse, Barrhead, was charged before the Justice of Peace Court, Paisley, at the instance of Thomas Campbell, procurator-fiscal of that Court, with an offence against the Prevention of Cruelty to Animals (Scotland) Act, 13 and 14 Vict. c. 92, sec. 1, “in so far as on or about the 14th of July 1880, in a field at Chapelhouse, he did cruelly ill-treat, abuse, or torture . . . a dog, by discharging at it from a gun a quantity of small shot, which took effect in its hind quarters, causing it severe pain and suffering.”

After evidence was heard in support of the charge, the complaint was found proven, and the accused was sentenced to pay a fine of 10s. 6d., with the sum of £4, 4s. 6d. of expenses.

Jack appealed to the High Court of Justiciary.

The facts as stated in the case were:—On 14th July certain persons were bathing in a burn bounded on one side by the grounds of Chapelhouse. A valuable collie dog belonging to one of them followed him into the burn, and after running about for some time jumped out on the said

* Section 1 provides—“Whereas it is expedient to prevent wanton cruelty in the treatment of horses, cattle, and other domestic animals in Scotland, be it therefore enacted that any person who shall, from and after the passing of this Act, cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, shall be guilty of an offence, and shall, for every such offence, be liable to a penalty not exceeding £5.”

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Chapelhouse lands, and ran about shaking and drying itself. A rabbit started, and the dog gave chase. The rabbit got into a hole, and the dog stood and scraped at the mouth of the hole. The dog's master repeatedly called it back, but it did not come. In a short time the appellant Jack, who was coachman at Chapelhouse, came down the field towards the dog with a gun, and when about five yards from the dog he took aim and fired at it. The dog then went to the burn and crossed it with evident pain. It then lay down near the burn, and the witnesses took it home with difficulty, and it tried to lie down repeatedly on the way.

Further, it was stated that the dog was still in great pain when the case came on for trial—a considerable time after it was shot; that the shot used was ordinary No. 4 or 5 shot; and that at the place where the dog was shot there were brambles and other covert for game.

The question of law for the Court was,—“In the circumstances proved, was the defender liable to conviction under the Act founded on?”

Argued for appellant;—The accused evidently wished to kill outright the dog, which was trespassing, and to do so with as little pain as possible. The case of *Cornelius v. Grant*, ante, vol. vii., June 8, 1880, settled that cruelty, to come under this Act, must be cruelty without cause, and for the purpose of making the animal suffer.

Argued for the respondent;—The shooting of the dog was wanton and unnecessary. The same end would have been effected by frightening the dog with stones.

LORD ADAM.—This is an appeal against a conviction under the Cruelty to Animals Act. I am far from saying that what the accused did was justifiable or proper in the circumstances. If he had wished to scare the dog away he might have done so by throwing stones at it, or in a like way. But, instead, he fired at it, and, contrary to what we would expect from its proximity when he fired, the result was not the death, but the serious wounding of the dog. The question is if this was wanton cruelty in the sense of the Act. I do not think it was. The Act refers, I think, to the mode in which the thing was done. Now, to say that an act caused pain to an animal does not necessarily mean that it was an act of wanton cruelty. Here there is nothing cruel in the way the thing was done. The only probable result was the immediate death of the dog. That only illustrates the nature of the act. If the dog had been killed it would have been difficult to see the wanton cruelty. I am for quashing the conviction.

LORD YOUNG and LORD CRAIGHILL concurred.

THE COURT sustained the appeal, and quashed the conviction.

J. MARTIN, W.S.—JOHN MACPHERSON, W.S.—Agents.

No. 2.

Oct. 29, 1880.
Laurie, &c. v.
M'Arthur.

A. C. LAWRIE AND OTHERS, Appellants.—*Mackintosh*.
CHARLES M'ARTHUR, Respondent.—*A. J. Young*.

Trespass—Day Trespass Act, 2 and 3 Will. IV. c. 68, sec. 1—Farm servant—Killing hare taken from snare—Permission to snare rabbits.—A tenant had power under his lease to snare rabbits, and employed A, one of his farm-servants, to set and attend to his snares. A entered a field on the farm, and took a hare, apparently dead, out of a rabbit-snare. The hare recovered, and ran away. A set his dog after it, and killed it when the dog had retrieved it. A was charged with a contravention of the Day Trespass Act by entering or

being in a hay field in search of or in pursuit of game. The Sheriff assoilzied the accused. On appeal, the Court (*diss.* Lord Adam) affirmed the Sheriff's judgment.

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HIGH COURT.

Lord Young.

Ld. Craighill.

Lord Adam.

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Clerk.

CHARLES M'ARTHUR, farm-servant on the farm of Carston, in the parish of Killearn, and county of Stirling, was charged, on 23d July 1880, before the Sheriff-substitute of Stirling, at the instance of A. C. Lawrie and others, proprietors of the estate on which the farm of Carston is situated, with having contravened the Day Trespass Act, 2 and 3 Will. IV. cap. 68, and particularly the first section, "in so far as on the 11th day of July 1880 (Sunday) he did in the day-time . . . commit a trespass by entering or being in a hay field, known by the name of Harry's Moss, on the farm of Carston aforesaid, belonging to the complainer, . . . in search or pursuit of game or conies."

After hearing evidence the Sheriff (Buntine) assoilzied the accused.

The complainer appealed to the High Court of Justiciary.

The facts, as stated in the case, were:—On the day libelled the accused, who was a farm-servant on the said farm, was in the said field. He had a young child in his arms. He had a dog with him. He went to a snare set in the field and took a hare out of it, and the hare being apparently dead, he laid it on the ground near the snare. He then went about fifteen yards from the snare, and repaired another snare in the same field, and then returned and lifted up the hare from the ground. It jumped out of his arms and ran into a wood adjoining the field in question. The respondent set his dog after the hare, and it was caught by the dog in the wood, and the respondent then killed the hare, which was thereafter taken from him by a police constable, who had up to this time been lying concealed, watching the accused.

The respondent had right to be in the field in question for purposes connected with the farm. It was further proved that the tenant, Mr Buchanan, was in use to set snares regularly in the field in question, and that the respondent was in use to examine them and remove any rabbits which they might contain. The tenant had a right to snare rabbits, but the landlord had reserved the right to kill hares, and the accused was employed by the tenant for the purpose of snaring rabbits.

The question of law for the decision of the High Court was, Whether or not, on the facts proved, the accused was guilty of trespass in pursuit of game in the hay field libelled?

LORD CRAIGHILL.—This is a case under section 1 of the Day Trespass Act, and the question is, whether, as matter of law, the respondent should have been found guilty of a contravention of that section. I think that there was no legal obligation on the Sheriff to find him guilty in respect of what had been proved. He had the facts before him, and some were favourable, some adverse to a conviction, and this being so, I cannot think that the decision of the Sheriff acquitting the respondent ought to be disturbed. I think it a pity that this appeal was presented, especially as, even though we had been dissatisfied with the judgment of the Sheriff, the respondent could not have been found guilty by us, or subjected to a second trial before the Sheriff.

LORD ADAM.—The question of law is, whether, on the facts found proved by the Sheriff, the respondent was guilty of an offence under the Day Trespass Act. On the facts, as stated, it is no defence that the respondent was entitled to be in the field in question. It has been decided that it is no answer for a farm-servant, if he pursues game, to plead that he was entitled to be on the land for certain purposes. That, therefore, is no specialty. Now, I can only

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interpret the Sheriff's language in one way. He says the respondent "set his dog after the hare." He encouraged it to pursue the hare, and he killed the hare after the dog had caught it. It appears to me that from the time he so set on the dog he was as much in pursuit of the hare as he could possibly be. The case is the same as if he had had a gun and had shot the hare. He was then on the land in pursuit of game without leave of the proprietor. We can only decide on these facts, and on these facts, when I am asked if in law there was a contravention of the Day Trespass Act, I cannot do anything but answer in the affirmative. I think this judgment ought not to stand.

LORD YOUNG.—I agree with Lord Craighill, and I go even further. I am of opinion not only that on the facts stated the Sheriff had liberty to acquit without any violation of law, but also that he acted rightly in doing so, and would not have acted rightly in my view of the law if he had convicted. This statute is entitled "An Act for the more effectual prevention of trespass in pursuit of game." The charge is—(His Lordship read the charge). So far as the pursuit of conies or rabbits goes he was entitled to be there and see that the traps were in order. On the facts stated I think there is no evidence that he was on the lands for the purpose of pursuing or taking game, and though it has been decided that a farm-servant who is on lands where he is entitled to go for a lawful purpose, may yet be on these lands with another and unlawful purpose, it has not been decided, and it is contrary to my opinion, that a servant, who did not enter the lands with an unlawful purpose, committed any trespass by picking up or setting a dog at a wounded hare. The statute was not directed against such a case as that. This man was not a trespasser at all; he was not on the lands for an unlawful purpose.

THE COURT dismissed the appeal, with expenses.

J. CHRYSTAL, Writer—H. BUCHAN, S.S.C.—Agents.

No. 3.

Oct. 30, 1880.
Kirtton v.
Cadenhead.

WILLIAM KIRTON, Appellant.—*Strachan*.
GEORGE CADENHEAD, Respondent.—*J. P. B. Robertson*.

Public-house—Public-house Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. c. 35)—Breach of certificate—"Notoriously bad fame"—Assembling and meeting.—Circumstances which held not sufficient to support a charge against a public-house keeper of "allowing women of notoriously bad fame to assemble or meet together in his house."

Opinion (per Lord Young) that to support a charge of allowing men or women of notoriously bad fame to assemble or meet in a public-house it is necessary to prove that the assembling or meeting had reference to the bad character referred to.

Opinions contra (per Lord Craighill and Lord Adam).

HIGH COURT.
Lord Young.
Ld. Craighill.
Lord Adam.
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Clerk.

WILLIAM KIRTON, spirit-dealer, The Green, Aberdeen, was charged before the magistrates of the burgh of Aberdeen, on a complaint at the instance of George Cadenhead, advocate in Aberdeen, procurator-fiscal in the Burgh Police Court, with having been guilty of an offence against the laws for the regulation of public-houses in Scotland, "in so far as upon the 21st day of September 1880, and on the 24th day of that month, or on one or other of those days, he did permit or suffer several women to assemble or meet in his licensed public-house in the Green aforesaid, they being women of notoriously bad fame." The appellant held a cer-

tificate in the form of schedule A, No. 2, of "The Public Houses Acts Amendment (Scotland) Act, 1862."* No. 3.

After evidence had been led in support of the complaint the magistrate found the accused guilty "of the offence charged," and sentenced him to pay a fine of £1, 5s., or in default of payment to be imprisoned for eight days. Oct. 30, 1880.
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Kirton appealed to the High Court of Justiciary.

The facts as stated in the case were:—About half-past ten o'clock on the night of the 21st September Inspector Ewan, with a constable and two detectives, visited the appellant's public-house. They found in one compartment of the shop two women sitting in the company of two men, in another compartment two women and one man, and in a back room two women and three men. The three groups of men and women came into the public-house shortly before the police entered the premises. Each group entered separately, and was, to all appearance, a separate party. The compartments in the shop have no doors, but are draped with curtains. The back room communicates with the shop by means of a door, which was shut when the police visited the premises. Any person going through the shop towards the back room could see the occupants of the compartments, as the curtains were not drawn close. The police had no suspicion that the women went there with any immoral purpose. The whole of the six women who were found by the police were known to them as women of notoriously bad character. Their notoriety was proved by various police-officers, by whom it was also proved, on cross-examination, that they did not know that such notoriety extended beyond the police force. There was nothing in the dress or appearance of the women to indicate their character. When the inspector on that occasion charged the appellant with the offence the latter replied that he was entitled to serve any one at the open bar. On the night of 24th September the two detectives again visited the premises, and saw three of the same women go in and come out of the public-house. The women remained on the premises only a few minutes. One of the detectives spoke to the appellant's wife about continuing to admit women of bad character, when she told him she had been advised that she was entitled to sell drink to them at the bar.

The question of law stated was, "Whether the facts found proved are sufficient in law to warrant a conviction under the charge libelled?"

Argued for the appellant;—The notoriety was not sufficiently proved. It was not sufficient to prove that the bad characters of the women were known to a class of persons such as the police. The notoriety must be notoriety in the place or district where the public-house is situated.¹ The assembling proved here was not such assembling as was struck at in the licence. To bring the case under the prohibition it must be proved that thieves or prostitutes assembled there to carry on, or for the purposes of, their trade. It had been so held in England in interpreting words almost precisely similar.²

Argued for respondent;—The knowledge of the character of these women by the police, the appellant and his wife, was sufficient notoriety. The publican's personal knowledge is not required under his license. The object of the statute was simply to prevent public-houses being

* Schedule A, No. 2, contains a condition that the holder shall not "permit or suffer men or women of notoriously bad fame to assemble or meet" in his public-house.

¹ Maxwell v. Malcolm, Nov. 12, 1879, *ante*, vol. vii., Just. Ca. 5.

² Greig v. Bendeno, 24 Ap. 1858, 27 L. J. (Mag. Cases), 294; Belasco v. Hannant, June 28, 1862, 31 L. J. (Mag. Cases), 225, 3 Best & Smith's Rep. 13.

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resorted to by bad characters, and the magistrate was justified in coming to the conclusion to which he did, looking at the number of women of bad fame found there on the 21st September.

LORD YOUNG.—I think this a bad conviction. I am of opinion—and I think that I am not now expressing it for the first time—that the mere bad character of the men and women going to a public-house for the purpose of refreshment is not enough to justify the conviction of the person who keeps that public-house of contravention of the clause of his certificate which forbids him to permit or suffer men or women of notoriously bad fame to assemble or meet in his house. The clause is substantially and almost literally in the same words as are used in the English statutes referred to in the English cases quoted to us, and the opinion which I held before, and which I adhere to now, is in accordance with the opinions of the Judges in these cases. It is that the assembling of such persons to the number of two or more together in a public-house for the mere purpose of refreshment is not sufficient. The assembling must appear to have reference to the bad character referred to. The evidence which justifies the magistrates in holding the people to be of bad character may be of various kinds, but to warrant a conviction of the publican the magistrate must be satisfied in fact that the assembling had reference to the bad character. The provision is one intended to prevent licensed public-houses being converted into places for prostitution, or places in which thieves may plan their designs. I think that on the evidence there was here nothing of that kind. It is quite possible to suspect that the women were persons of known bad character, but the evidence of it is confined to that of the police. They knew them, but it appears that the magistrate was not satisfied that the publican did. What he tells us is entirely against that supposition, for he says that the women were respectably dressed, conducted themselves properly while in the house, and were all the time under the eye of the publican and his assistants. All this the magistrate certifies, and also that all the publican did was to provide them with refreshments, as he was entitled to do, in my opinion, for the only alternative would be that a publican is bound to refuse refreshment to people of bad character. When the publican said, therefore, “I am advised that I am entitled to allow these people to refresh themselves at the bar,” that is the opinion he would have got from all the English Judges, and it is my opinion. Mr Robertson candidly admitted that they were entitled to refreshments, if that was all they went for. I think there is nothing in the case to shew that they went for anything more. I therefore am of opinion that the conviction is erroneous, and should be quashed.

LORD CRAIGHILL.—I concur with Lord Young in thinking that the conviction of the appellant cannot be sustained, but I differ from him as to the grounds of judgment. My view of the matter is that the magistrate, upon the facts set forth in the special case, was right in holding that the first charge had been proved, but that he was not right in holding that the second charge also had been established. From the facts found it appears (1) that on the first occasion libelled eight women, who were common prostitutes, were in the public-house of the appellant; (2) that there were men in the company of several of these women; (3) that on the second occasion there were three women, also common prostitutes, who were seen to enter, and soon after to leave, the appellant's pre-

mises ; (4) that these eight and these three women were known to the police as of notoriously bad fame ; (5) that the police were not aware that this notoriety extended beyond the police force ; (6) that, when challenged for admitting such women into his house, the appellant on the first occasion, and his wife on the second occasion, justified themselves, not upon the ground that the women were not women of bad fame, but upon the ground that even such women might be furnished with refreshments at the bar.

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Two questions have been presented for our decision. The first question is, whether the facts found relative to notoriety were such as legally warranted the magistrate in coming to the conclusion that the women who were in the appellant's house on both occasions were women of notoriously bad fame? My opinion is that it did. There is no definition in the statute of the notoriety which is required, and women who are notorious to the police as women of bad fame appear to me to be women to whom that appellation may be applied. There is, however, more evidence on the subject than the evidence of the police, because the appellant and his wife must, I think, be held to have by implication admitted that the women were women of bad fame, which is of importance not merely with reference to the point of notoriety, but also with reference to the point of the appellant's knowledge of the character of the women whom he had permitted to assemble in his house.

The second question is whether, supposing the women to be women of notoriously bad fame, the appellant in permitting them to meet in his house contravened the conditions of his license? It is said, and I think truly said, that on neither occasion was there any immorality committed ; but it appears to me that this test is not decisive, for were it to be otherwise held there could be no contravention of the condition unless the publican allowed his house to be converted into a brothel. Something less than this appears to me to be all that is required.

Now, on the first occasion there were men with the women permitted to assemble, and it appears to me that, having the character of the women in view, the magistrate was entitled to consider whether he was not justified in holding that in going into the public-house the women accompanied by men were not in truth in the prosecution of their vocation. The public-house might be used by women as a means for the furtherance of the ultimate purpose which was in their contemplation.

These things being so, I am of opinion that the conviction upon the first charge was right, but I think that on the second charge there was no warrant for a conviction. The three women were unaccompanied by men, and as it was admitted in the argument for the respondents that a publican might furnish refreshment even to women of bad character without a contravention of the conditions of his license, there is, I think, nothing in the facts found upon which this conviction can be sustained.

Thinking that the judgment of the magistrate is in part erroneous, I concur in the view that it must be suspended. The conviction was a general conviction, and the fine was imposed in respect of the two alleged contraventions. We have no power to limit the conviction or to apportion the fine, and hence both must be suspended.

LORD ADAM.—This is a difficult case, and I confess that my opinion has more than once wavered during the argument, but it has ultimately come back to what it was at first. I think it is of the last importance that it should be

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clearly proved that the parties who assembled in the public-house were of notoriously bad character, not only known as such to a class of the community, but also to this extent, that the law will presume that the publican must have known that their character was such. I do not find anything in the case to shew that they were in this sense notoriously of bad character. All that is said is that the six women who were in the house on the 21st September were known to the police to be of notoriously bad character, and there was nothing in their appearance or conduct on the occasions libelled to lead to that inference. I am not satisfied, therefore, that it is proved that these women were so notoriously bad as to come under the description in the statute. On that ground I am of opinion that this conviction should be quashed.

Further, on the words "assemble and meet," I am of opinion that the mere fact of such persons being assembled in a public-house for refreshment is no ground for a conviction, but I concur with Lord Craighill that something less may be sufficient than that their meeting there should be proved to be for improper purposes. If it were the character of a public-house that women of bad fame resorted there as a rule, I think that might be enough to justify a conviction. I think that the mischief aimed at by the Legislature, and which they desired to prevent, was the making the house a house of call by such persons, and their meeting and assembling in it without any legitimate reason.

THE COURT sustained the appeal, and quashed the conviction, with expenses.

D. MILNE, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 4.

Oct. 30, 1880.
O'Brien v.
M'Phee.

JOHN O'BRIEN, Appellant.—*Asher—Baxter.*
DONALD M'PHEE, Respondent.—*Sol.-Gen. Balfour—Mackintosh.*

Suspension—Glasgow Police Act, 1866 (29 and 30 Vict., cap. 273), sections 131, 132—Relevancy—Prevention of Crimes Act, 1871 (34 and 35 Vict., cap. 112), sec. 12—Libel.—The Prevention of Crimes Act, 1871, sec. 12, enacts that "where any person is convicted of an assault on any constable when in the execution of his duty such person shall be guilty of an offence under this Act."

In the Police Court of Glasgow the relevancy of a complaint charging an offence under section 12 was objected to, on the ground that it did not set forth knowledge on the part of the accused that the persons assaulted were constables in discharge of their duty. The magistrate repelled the objection, and the accused was convicted and sentenced.

In a suspension brought on the ground that no offence under the statute had been relevantly charged, and that the conviction and sentence being outwith the statute might be set aside by the High Court, *held* (1) that the complaint set forth a good charge in substance, and that the magistrate had jurisdiction to decide on the question of relevancy; and therefore (2) that the jurisdiction of the High Court was excluded by sections 131 and 132 of the Glasgow Police Act.

Opinions, that the objection to the relevancy of the complaint had been rightly repelled.

ON 18th August 1880 John O'Brien was charged under the Summary Procedure Act, 1864, with an offence within the meaning of the Prevention of Crimes Act, 1871, sec. 12,* in so far as he did "on Saturday, the

* The Prevention of Crimes Act, 1871 (34 and 35 Vict.), cap. 112, sec. 2, provides,—“Where any person is convicted of an assault on any constable, when in the execution of his duty, such person shall be guilty of an offence under this Act, and shall in the discretion of the Court be liable either to pay

14th day of August, in or near Garscube Road, Cedar Street, and Mattheson Street, all in Glasgow, . . . wickedly and feloniously attack and assault Henry Douglas, constable of police in the City of Glasgow police force, and Alexander M'Leod, constable of police in the City of Glasgow police force, while engaged in the execution of their duty, and did violently strike on the body and kick on the legs the said Henry Douglas and the said Alexander M'Leod, and otherwise abuse them to the serious injury of their persons."

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The case was tried before the magistrate officiating under the provisions of the Glasgow Police Act, 1866, in the Northern Police Court of Glasgow, a Court of summary jurisdiction within the meaning of the Summary Procedure Act, 1864.

When the case came on for hearing the agent for the accused objected to the relevancy of the complaint, on the ground that it was not set forth therein that the accused knew at the time that the assault was alleged to have taken place that the persons assaulted were constables in the execution of their duty.

On 20th August the magistrate repelled the objection, "leaving it to be brought out in the course of the proof whether the accused must have known from the assaulted person's dress, and other circumstances, that he was an officer of police. The trial then proceeded, and O'Brien was convicted, the evidence shewing that the persons assaulted were police constables in plain clothes. A sentence of sixty days' imprisonment was pronounced.

By sec. 132 of the Glasgow Police Act, 1866, under which, along with the Summary Procedure Act, 1864, the proceedings were taken, it is provided that appeals against the decisions of magistrates shall be taken within fourteen days from the date of the sentence, and shall be heard at the next Circuit Court to be held at Glasgow.*

The sentence was pronounced in this case on Friday, August 20th, and the next Circuit Court was opened on the following Monday, August 23d. As appeals are not heard at the Glasgow Christmas Circuit, the first Circuit Court available was that held in spring, more than seven months after the date of the offence. In these circumstances O'Brien and a number of other persons who had been tried in another Police Court and sentenced to six months' imprisonment presented notes of suspension and liberation to the High Court of Justiciary.

On 2d October, warrant for interim liberation, on caution being found,

a penalty not exceeding £20, and in default of payment, to be imprisoned, with or without hard labour, for a term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour."

* Sec. 131 provides,—“No charge or complaint and no proceeding or trial before the magistrate, and no order or sentence of the magistrate thereon, or the extract thereof, shall be quashed or vacated for any misnomer or informality, or be subject to suspension, reduction, advocacy, or appeal, or to any other form of review or stay of execution, unless in manner and on some one or other of the grounds hereinafter mentioned.

Section 132 provides,—“Any person who feels aggrieved by any order or sentence of the magistrate may, within fourteen days after its date, appeal to the Court of Justiciary at the next Circuit Court to be held at Glasgow, in the manner and under the rules, limitations, and conditions contained in ‘The Heritable Jurisdiction Act (20 Geo. II. cap. 43),’ on the ground of corruption, malice, or oppression on the part of the magistrate, wilful deviations in point of form from the statutory enactments, incompetency or defect of jurisdiction, but on no other ground.”

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was granted. On 29th October this note of suspension, along with the other similar, came on for hearing, the case of O'Brien being taken as a test case.

Argued for the suspender;—(1) On the competency of the note of suspension: The convenience of bringing these cases before the High Court was obvious, in view of the circumstance that the next Circuit Court would not be held till spring. There was nothing to prevent the High Court quashing this conviction, though the case should properly have gone before the Circuit Court, as it was a conviction of what was not really a crime at all.¹ The fact that a person assaulting a constable should know that he was a constable in the execution of his duty was of the essence of the crime, and, that knowledge not having been libelled, the accused had been convicted of a statutory offence which was not relevantly charged. If the prosecutor had charged an assault at common law the objection would not have held good, but he charged a statutory offence, and had not done so relevantly. This distinguished the case from that of *Mackenzie v. Lang*.² In this case the magistrate had done what was absolutely null and void, though he had jurisdiction to try the case if it had been relevantly stated. (2) On the relevancy of the libel: Knowledge that the assaulted were constables in the execution of their duty was of the essence of the crime, and must therefore be averred in the libel. Where assault, with the aggravation of being against a police constable in the execution of his duty, was charged at common law, it had been held that knowledge of that fact on the part of the panel must be alleged in the minor proposition.³ In the English Courts, in convictions under various statutes, such as continuing in charge of a vessel in a certain estuary after a licensed pilot had offered his services, the principle here contended for had been laid down.⁴ This case was not one to be libelled under the Prevention of Crimes Act, 1871, as all the sections of that Act, other than sec. 12, were directed against the criminal classes, and that section, evidently, was not meant to provide for ordinary street disturbances. There was, further, no specification of the duty that was being performed by the person assaulted.

Argued for respondent;—(1) On the competency: The case was ruled by that of *Mackenzie v. Lang* (*supra*). The magistrate had jurisdiction to try this offence, and the terms of the Glasgow Police Act clearly excluded review in the High Court. (2) On the relevancy: The objection as to specification of the duty in which the assaulted persons were employed was not stated in the inferior Court. If it had been, an adjournment would have been granted under the Summary Procedure Act, and the want remedied. As to the objection that knowledge on the part of the accused was not libelled, the case quoted by the appellant, *Lord Advocate v. Alexander*, was one in which the Court was equally divided, and its authority had been doubted. The Court had since refused to apply the principle here contended for. In libelling a statutory offence the prosecutor was not bound to put in words which were not in the statute, and here the statute said nothing about knowledge on the part of the accused.

The judgment of the Court was pronounced by

LORD YOUNG.—The complaint against the prisoners—I call them prisoners,

¹ *Marr v. M'Arthur*, May 28, 1878, *ante*, vol. v. (Just. Cas.) 38.

² *Mackenzie v. Lang*, Nov. 9, 1874, *ante*, vol. ii. (Just. Cas.), 1.

³ *Lord Advocate v. Alexander*, Jan. 22, 1842, 1 Broun, 28; *Lord Advocate v. Maclellan*, Dec. 26, 1842, 1 Broun, 478; *Lord Advocate v. Yuill*, Dec. 28, 1842, 1 Broun, 480.

⁴ *Chaney v. Payne*, May 22, 1841, 1 Ad. and Ell., Q. B. 712; *Fletcher v. Calthorpe*, Feb. 12, 1845, 6 Ad. and Ell., Q. B. 880; *Paley on Summary Convictions*, 6th ed., pp. 213, 214.

because although they have been liberated in the meantime, they are now at the bar of the Court, and substantially in custody—is at the instance of the Procurator-fiscal of the Police Court of Glasgow, and charges them with assaulting certain constables while in the discharge of their duty. An objection was taken in this particular case, which we have heard as presenting the matter in the most favourable light for all parties to the charge, on the ground that while it accused the prisoner of assaulting the police constables in the discharge of their duty, it did not aver that he was aware that they were in discharge of their duty, and did not specify the particular duty in which they were engaged. That objection the magistrate who tried the case disallowed, and the trial proceeded. The accused party was convicted and sentenced to be imprisoned for sixty days, while the other accused parties were sentenced to imprisonment for six months. The judgment of the magistrates convicting the accused and sentencing them individually is brought here by suspension and liberation, and the accused—the suspenders—have obtained liberation in the meantime; and we are now to say whether the grounds of objection to the conviction and sentence under which the parties are suffering were or were not well founded. I have noticed in the course of the argument that the trial proceeded in the Police Court of Glasgow, which has jurisdiction by the 29th and 30th Vict. c. 273, and that by the provisions of the statute no sentence of the magistrate officiating in that Court can be quashed for any misnomer or informality, or be subject to suspension and reduction, or to any other form of review or stay of execution, except in the mode or manner and upon one or more of the grounds mentioned. The mode and manner are by appeal to the next Circuit Court of Justiciary in Glasgow, and the grounds upon which any such plea may be taken are corruption, malice, or oppression on the part of the magistrate, wilful deviations in point of form from the statutory enactments, incompetency, or defect of jurisdiction, but on no other ground can the decision be reviewed. The result, therefore, is, that so far as this was a conviction and sentence of a magistrate sitting in the Police Court of Glasgow, it is not subject to any form of review whatsoever, unless by appeal to the Circuit Court of Justiciary in Glasgow, and it can only be upon the grounds of corruption, malice, or oppression, incompetency, or want of jurisdiction on the part of the magistrate. But it was said, that although that be so *prima facie*, nevertheless it appeared, looking at the complaint on which the conviction and sentence proceeded, and the conviction and sentence themselves, conviction and sentence or punishment proceeded upon what was really no offence at all, or at least there was no conviction of anything but an assault, punishable at the utmost with sixty days' imprisonment—the feature that the assault was upon officers of law in the execution of their duty not being so stated as to amount to an offence of the nature for which punishment had been awarded; that, therefore, so far as the sentence of six months' imprisonment was pronounced, it was apparently, upon the face of the proceedings, for an offence not charged—that is to say, not well charged—and there was and could be no good conviction; and that that being the true legal view of the case, there is no protection to be derived from the finality clauses in the Police Act to which I have referred, but that the sentence might be quashed as in truth a lawless proceeding on the part of the magistrate, and quashed in this Court, as what is truly a lawless proceeding before any magistrate or tribunal undoubtedly could be.

It is the opinion of the Court that there was here a good charge in substance.

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I say so without reference to any criticism upon the language of the complaint in which the charge was set out. There was a good charge in substance at the instance of a prosecutor having a title to prosecute—that is to say, a good charge in substance with a good instance, brought regularly before a Court competent to convict, and that Court the Police Court of Glasgow; and the magistrate in the Police Court, when the case was brought before him, having jurisdiction to deal with the charge, was entitled and bound to deal with it according to his judgment. An objection was taken to the relevancy, and, in my opinion, and, I think, in the opinion of the Court, that objection was not well founded. The magistrate had jurisdiction to decide upon the objection so taken; and if the magistrate committed an error—which I am inclined to think the magistrate did not—the remedy was, not by appeal to this Court, or by suspension in this Court, but by appeal to the Circuit Court in Glasgow. That appeal was not taken; and the time may now have gone by, which, if there was any substantial grievance to complain of, would be a misfortune we should all regret.

But although our opinion is that this Court has no jurisdiction to entertain the suspension in respect of the judgment which we are asked to review, it was a judgment of the Police Court having jurisdiction in the subject-matter of the complaint submitted to it, and is protected against review by this Court—we think it right to indicate, as indeed I have already indicated, that if we had jurisdiction we should have concurred in the view of the magistrate that there was no substantial objection to this complaint. That decision is without any prejudice to the necessity of the prosecutor establishing—the accused party being at liberty, on the other hand to establish—what was the true state of the fact, or the reasonable inference to be drawn as to the knowledge of the party who committed the assault of the condition and the proceedings at the time of the persons whom he assaulted. *Prima facie* the prosecutor could prove no more than that the constables were engaged in the discharge of their duty. Their duty might be of various kinds, looking to this case as it is presented to us by the suspenders. The duty apparently was in repressing what was regarded by the magistrates as a proceeding—a demonstration by a large number of people—which was dangerous to the public peace. The prosecutor could prove no more, *prima facie*, than that the police constables were there, and were there not as volunteers, but really according to their duty, and were engaged according to their duty, and that the accused parties assaulted them. It was open for the accused to shew by positive evidence, or that the probability from the whole facts and circumstances disclosed was, that although the persons to whom they offered and used violence were in truth police constables in the execution of their duty, they had no suspicion of that, and that therefore they ought not to be visited by punishment as if they had known. All this, we think, was entirely open to the accused parties, but we think that this Police Court complaint was a good and unobjectionable charge—that they assaulted these constables at the time and place specified when they were engaged in the execution of their duty. We indicate this as our opinion, not as assuming jurisdiction which, on the grounds I have indicated, the statute does not give, but as it may be satisfactory to the parties to know that they have not lost, by the accident of referring the matter to the wrong tribunal, any advantage or benefit they would have been likely to obtain at the proper tribunal. I do not think it necessary for us to enter either upon the case of *Mackenzie v. Lang* or on the case of *Marr v. M'Arthur*. They were stated to be in contrast. I do

not think so. The case of *Marr v. M'Arthur* was a case in which, rightly or wrongly—and I assume rightly, for it is not *hujus loci* to inquire,—the Court were of opinion that the thing charged was no offence at all. It had not the aspect of an offence. It was as if a man had been taken up and tried and sentenced to imprisonment for whistling in the street, or walking at the rate of five miles an hour on the street, or doing anything that appeared to be perfectly innocent. The Court thought there was no offence set out, and that upon ground altogether distinct from criticism of a libel for murder or robbery or assault. Criticisms upon the style of a charge, or the omission of particulars which ought to have been given, are totally different from a case where there was no charge at all. Again, rightly or wrongly—for into that we have no occasion to inquire here,—the Court in the case of *Marr v. M'Arthur* were of opinion that there was no charge presented to the magistrates at all. It was not a case of objection to the relevancy of the indictment. They said there was no offence at all, and the Court determined that it had jurisdiction to set aside a sentence for what, in their judgment, was no offence by common or statute law at all. Here the most that could be made of the case was a criticism upon the mode of libelling a substantial charge—that of assaulting constables in the execution of their duty. The libel may be more or less subject to criticism, but that there is a substantial charge—a charge of a crime more or less serious—nobody doubts; it was criticism upon the libel and the mode of libelling. Therefore the case of *Marr* does not interfere with the present case, and the conclusion at which we have arrived makes no reflection on the case of *Marr v. M'Arthur*. That conclusion is that we have under the statute regulating this matter no jurisdiction to entertain this suspension; but feeling it proper for the satisfaction of parties to indicate the opinions which we entertain, we are of opinion that if we had had jurisdiction we should not have been favourable to the objection which had been stated against this conviction and sentence. It was a sharp sentence, in this sense, that it went to the extreme penalty that was allowed, but we have no reason to form or express any opinion—and certainly formed and expressed none—that the sentence was at all severe; but, at all events, we have no jurisdiction to interfere with that. The result is that this suspension—and all the others, we were told, must follow this one—must be dismissed.

THE COURT refused the note of suspension.

A. FLEMING, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

HER MAJESTY'S ADVOCATE.—*Moncreiff, A.-D.*

BARBARA GRAY or M'INTOSH.—*Macdonald—Brown Douglas.*

No. 5.

Feb. 1, 1881.

Indictment—Competency of striking out words from an indictment.—*Held* Her Majesty's Advocate v. M'Intosh.
that the Court has power at a pleading diet to allow words to be struck out of an indictment if the alteration does not vary the crime with which the panel is charged.

Relevancy—Bad treatment of child—Leaving child in charge of young girl.—A panel was charged with "culpable and wilful neglect and bad treatment of a child of tender age, by a person who has the custody and keeping of it, whereby such child is injured in its health." The minor proposition set forth that the panel "did culpably and wilfully neglect to supply the said child with wholesome and sufficient food and clothing, and did feed her with improper and dele-

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terious food." Objection of want of specification, on the ground that administering deleterious substances was charged, and that the panel was entitled to be told what those substances were, *repelled*, but the words, "and did feed her with improper and deleterious food," *allowed* to be deleted as superfluous, on the motion of the public prosecutor.

HIGH COURT.
Lord Justice-
Clerk.
Justiciary
Clerk.

BARBARA GRAY or M'INTOSH was, on 31st January 1881, charged in the High Court of Justiciary with "culpable homicide; as also the culpable and wilful neglect and bad treatment of a child of tender age, by a person who has the custody or keeping of it, whereby such child is injured in its health," in so far as (1) a woman named and designated, having, on or about the 8th day of August 1876, been delivered of an illegitimate female child, in the Royal Maternity Hospital, Edinburgh, "you, the said Barbara Gray or M'Intosh having, on or about the 10th day of August 1876, or within a few days thereafter, at the said Royal Maternity Hospital, agreed to nurse and upbring the said child, in consideration of the sum of £22 sterling or thereby, which was then and there paid to you, to enable you to do so in a proper and sufficient manner, and having, time and place last above libelled, received the said child, and thus become her custodier and guardian, and it being your duty accordingly to maintain, upbring, and keep the said child in a proper, sufficient, and careful manner, and the said child being in a sound state of health when so received by you; you, the said Barbara Gray or M'Intosh, did, in breach of your duty as custodier and guardian aforesaid, in or near the house or premises at or near Firth, in the parish of Lasswade, and county of Mid-Lothian, in which you then resided, or at some other place or places to the prosecutor unknown, during the whole of the period from on or about the 10th day of August 1876 to the 29th day of November 1876, or part thereof, culpably and wilfully neglect to supply the said child with wholesome and sufficient food and clothing, and did feed her with improper and deleterious food, and keep, or allow her to be kept, in a dirty and damp condition, and expose her, or allow her to be exposed, to cold, and otherwise fail to give her such care and attention as were necessary to preserve the health of a child of such tender age; by all which, or part thereof, the said child was seriously injured in her health, and her constitution and vital powers were gradually destroyed; and in consequence thereof the said child, while being taken by you, on or about the 29th day of November 1876, from Firth, aforesaid, to Edinburgh, died in the train or other conveyance by which you made the journey, or elsewhere to the prosecutor unknown, from exhaustion, or other cause or causes, produced by your culpable and wilful neglect and bad treatment aforesaid, and was thus culpably killed by you, the said Barbara Gray or M'Intosh."

Then followed (2) and (3) charges relating to the death of two other children, and (4) a charge relating to the culpable neglect of a male illegitimate child, "whereby the said child was injured in his health, and his constitution and vital powers were gradually impaired." This charge then proceeded:—"Further, on or about the 30th day of July 1880, you, the said Barbara Gray or M'Intosh, being conscious of the condition to which the said child last above libelled had been reduced by your said culpable and wilful neglect and bad treatment, and anxious to avert suspicion from yourself, or otherwise being desirous to free yourself of the custody of the said child, did, culpably and wilfully, and in breach of your duty aforesaid, take the said child to the house or premises in or near Nottingham Place, Edinburgh, then, and now or lately, occupied by John Spears, labourer, residing there, and deliver it to and leave it with Mary Kerr Spears, . . . a girl of fifteen years, or thereby, of age, who from

her age and means was not qualified or able, and who did not undertake, to keep it, on the false pretence that her mother, the said Isabella Ross or Spears or Mitchelhill, had agreed to nurse the said child for you, and did culpably and wilfully neglect to furnish the said Mary Kerr Spears with money wherewith to support the said child, and with proper and necessary clothing for him; and in order to prevent the said Mary Kerr Spears from bringing the child back to you, did conceal from her, or fail to give her, your name and address, through which culpable and wilful neglect on your part last libelled the said child, although he received as much attention and care as the said Mary Kerr Spears was able to give him, was, during the time it remained with her in the said house or premises in Nottingham Place, viz., from on or about the 30th day of July to the 4th day of August 1880, both days inclusive, further injured in his health from want of proper and necessary treatment, food, and clothing; and the said child having been removed to the poorhouse of the parish of South Leith, on or about the 4th day of August 1880, died there, on or about the 6th day of August 1880, from general debility or other cause or causes induced by your culpable and wilful neglect and bad treatment of him, all as set forth in the present charge, and was thus culpably killed by you, the said Barbara Gray or M'Intosh."

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At a pleading diet, counsel for the panel took the following objections to the relevancy of the libel:—(1) The words "bad treatment" in the major proposition were ambiguous, and did not constitute a relevant charge. In all previous cases in which such a crime had been libelled such words as "cruel, barbarous, and unnatural," had been used.¹ The word "bad" might mean merely injudicious. (2) The words "culpably and wilfully neglect to supply the child with wholesome and sufficient food and clothing, and did feed her with improper and deleterious food," in the minor proposition of the first three charges were not sufficient to support the major. The words were ambiguous, and the charge of administering "improper" food could be read in a sense other than a relevant one. It was necessary that it should be stated what the improper food administered was, in order that the panel might meet the case. Further, it was not stated that the cold to which the child was exposed was excessive, or that such exposure was habitual.² (3) The minor of the fourth charge was similar to a charge of exposure, but it was not said that the child was left in a deserted place. There was some one to whose care the child was given, and to make the charge relevant the child must have been left alone. It could not be said that the desertion put the child in danger of its life.³

The Court required the counsel for the Crown to speak to the second objection.

Argued for the Crown;—It had never been required of the Crown to state in an indictment of this nature what was the improper food alleged to have been administered.⁴ To do so would be to overload the indictment. The words "and did feed the said child with improper and deleterious food" were superfluous, being merely the complement of the preceding words. The prosecutor was willing to strike them out, and the charge would not be varied by their deletion.

Answered for the panel;—The words could only be struck out at this stage with consent of the accused.⁵

¹ M'Manimy, June 28, 1847, Arkley, 321; Bell's notes to Hume, 81, 82.

² M'Gavin, May 11, 1846, Arkley, 67; Gemmell, June 5, 1841, 2 Swin., 552.

³ Gibson, Jan. 8, 1845, 2 Broun, 366, Hume, 1, 299.

⁴ Gemmell, *supra*; Craw, Nov. 8, 1839, 2 Swin., 449.

⁵ Jardine, July 19, 1858, 3 Irv., 173; Dudley, Feb. 15, 1864, 4 Irv., 468.

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LORD JUSTICE-CLERK.—I have considered the objections, which were ably stated, to this indictment. I think that only one is of serious moment. The others I think go more to the mere phraseology of the indictment than to its substance. The question whether the words "wholesome and sufficient food and clothing" are altogether accurate is merely a matter of phraseology. The meaning is clear, and that is, did the prisoner wilfully neglect to provide wholesome food and sufficient clothing? And though a syntactical objection may be made to that expression it is not an objection of any substance. An objection was also taken to the rest of that paragraph, or rather sentence, to the effect that while the charge made is neglect to supply a child with wholesome and sufficient food and clothing, what is really alleged is that the food supplied (for some food was supplied) was improper and deleterious, and it was said that these words contained a specific charge of administering some unwholesome and deleterious substances as food, and that the panel was entitled to know what those substances were. My impression is, that as the indictment stands it is relevant, though there is a good deal of force and substance in the objection. The meaning of the words as they stand is not that what was given was improper and deleterious in itself, but the words are merely the complement of the *gravamen* of the charge—the neglect to supply wholesome and sufficient food and clothing. The child had some food given to it, and what the prosecutor intends to charge is not the giving of anything deleterious in itself, but that that which was given was not proper and wholesome in the circumstances. I should hesitate to say that this necessarily means a specific charge of administering anything improper. At the same time I must fairly own that I should have much preferred that the words should not have been in the indictment. They add nothing to the strength or substance of the charge. The Advocate-Depute proposed to strike out the words objected to; and I am disposed, if he makes that motion, to allow them to be struck out, and that having been done, to sustain the relevancy. As to the matter of practice raised by the counsel for the prisoner, I have looked into the authorities, and I think it clear that the Court has power to allow words to be struck out of an indictment if the alteration does not vary the crime with which the panel is charged. There was a difficulty, no doubt, in former days, when the alteration took place at the same diet at which the trial was to proceed, and it might be said to be hardly fair to expect a prisoner who was to be tried at the same diet at which the alteration was made to make up his mind on the alteration. But it is quite different in the present altered circumstances, and that view certainly does not apply where, as in the present case, the proposal to make the alteration is made in a pleading diet. I think I may fairly say, looking to the authorities, that the law on this matter is well fixed, and although there are *obiter dicta* to the contrary effect, I am of opinion that the Court has power to allow the words to be struck out.

The Advocate-Depute moved the Court to strike out from each of the three first charges the words "and did feed the child with improper and deleterious food."

THE COURT thereupon allowed the words to be struck out, and found the indictment relevant.

CHARLES MORTON, W.S., Crown Agent.—AULD & MACDONALD, W.S.—Agents.

ROBERT RIDDELL, Suspenders.—*Darling.*

No. 6.

JAMES STEVENSON AND ANOTHER, Respondents.—*Rutherford, A.-D.*

Feb. 3, 1881.

Riddell v.

Stevenson, &c.

Error in date of minute recording sentence and in warrant of imprisonment.

—In a suspension the suspender averred that he was tried before a Sheriff and sentenced to imprisonment on 24th November 1880; that the minute of the Court in which the sentence was recorded was by mistake dated 23d November 1880, and was only corrected after the suspender had been removed from the bar. It was also alleged by the suspender, and not denied by the respondent, that the extract of conviction which formed the warrant of imprisonment bore the erroneous date 23d November 1880. The Court (*diss.* Lord Young) suspended the sentence.

ON 24th November 1880 sentence of six months' imprisonment was pronounced by the Sheriff of Roxburgh (Pattison), under a criminal libel for perjury at the instance of the respondents, James and James Charles Stevenson, procurators-fiscal for Roxburghshire, against Robert Riddell. Riddell brought a note of suspension of this sentence and liberation before the High Court of Justiciary on, *inter alia*, the grounds (1) that the extract of conviction was null and void, being dated the day before the trial was held; (2) that a corresponding error in the record of the proceedings had been corrected ex intervallo subsequent to the removal of the panel from the bar.

HIGH COURT.
Lord Justice-Clerk.
Lord Young.
Ld. Craighill.
Justiciary Clerk.

From the statements in the note of suspension and from admissions at the bar it appeared that the facts were as follows:—At the first diet, held at Jedburgh on Monday 15th November, the libel was found relevant. The second diet was held on Wednesday, November 24th, when the trial proceeded before the Sheriff and a jury. After evidence was heard the jury returned a unanimous verdict of "guilty of the crime of perjury."

The verdict having been recorded, the Sheriff pronounced sentence of imprisonment for six months.

The suspender averred,—"In virtue of the said sentence the complainer was forthwith imprisoned in the prison of Jedburgh, and was thereafter transferred to the General Prison at Perth, where he still remains. The record of the proceedings and the extract of conviction both bear date November 23d 1880 as the date when the said sentence was pronounced."

Counsel for the suspender stated that the record of the sentence had been altered by changing the date from the 23d to the 24th, and that the alteration had been made after the prisoner was removed from the bar. Counsel for the respondents stated that they were not aware when the alteration was made.

Argued for the suspender;—The fact that the record and the extract of conviction bore a wrong date vitiated the said sentence.¹

Argued for respondents;—It was not proved that the alteration was made subsequent to the removal of the prisoner. The prisoner had not suffered any injury by the mistake, and could not do so.²

LORD CRAIGHILL.—The appellant was tried in the Sheriff Court of Roxburgh at Jedburgh on the 24th November 1880, and convicted by a jury of the crime of perjury. The sentence passed upon him subjected him, amongst other things, to six months' imprisonment. The regularity and legality of this sentence have been submitted for the decision of the High Court by the present bill of suspension and liberation. There are four grounds upon which the com-

¹ *M'Allister v. Cowan*, July 16, 1869, 1 Coup. 302; *M'Donagh v. Ross*, May 29, 1869, 1 Coup. 299; *Clarkson v. Muir*, July 19, 1871, 2 Coup. 125.

² *Henry v. Young*, July 21, 1846, Arkley, 105.

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plainer submits that the sentence should be quashed ; but with reference to the three first, as the argument has not been exhausted, I do not feel called upon to express any opinion. Moreover, as I am of opinion that the fourth ground of suspension must be sustained, it is not necessary that the others should be dealt with. The ground of suspension last mentioned is to the effect that the record of the proceedings and the extract of the conviction both bear date 23d November 1880, whereas the true date was the 24th of that month. The facts have not been exactly ascertained, but they are, I think, in such a situation as not only entitles us, but calls upon us, to give judgment. The suspender alleges that the extract of the sentence, which is now in the hands of the keeper of the prison at Perth, bears date the 23d November. This is not denied, nor is it admitted, by the prosecutor. He must, however, know the reality, and at any rate, as he does not ask that judgment should be delayed till a proof be led upon the subject I think we must proceed upon the assumption that the fact is as the appellant has averred. This being so, can the warrant upon which the appellant was incarcerated, and is now kept in prison, be sustained as a good warrant? The difference betwixt the erroneous date set forth in the warrant and the true date of the sentence is only a day, but it might have been a week or a month, and the question would have been the same in the one case as in the other. The date of a sentence or a warrant is an essential particular, because it affects the measure of the punishment. In the present case the appellant, in consequence of the error in the date, would have suffered one day's imprisonment less than if the warrant had been truly dated ; but the error might have been in the other direction, and, had it been so, the length of his imprisonment would have been increased. Even if the warrant had been granted in a merely civil proceeding I think the course of diligence upon it might have been suspended. Poindings have again and again been found to be illegal in consequence of such an error as that by which the warrant in question is vitiated. Upon this ground alone I am of opinion that the sentence complained of ought to be suspended.

The second part of this ground of suspension is that the record of the proceedings before the Sheriff was erroneous at the beginning, and had been altered and vitiated by changing the date from 23d to 24th November 1880 since the date of the appellant's trial. Here, again, the facts have not been satisfactorily ascertained, but, as before, the prosecutor does not deny, though he does not admit, that the date on the record has been changed since the proceedings terminated. The importance of this objection on the present occasion is comparatively small, because the error in the warrant upon which the appellant was imprisoned and is kept in prison is of itself sufficient, in my opinion, to obtain his liberation. I may say, however, that even if the warrant delivered to the keeper of the jail had been accurate in point of date, yet I would have been disposed to hold that the original error and the unauthorised change upon the record would have invalidated the sentence. The record is the only authentic evidence of what was done, and if it be erroneous, or if it has been altered unauthorisedly after proceedings have terminated, there is nothing trustworthy upon which the warrant can be supported. I think it of the utmost importance that we should discountenance irregularity in the records of a criminal, or indeed of any, Court ; and I think we should not do so were we in the circumstances of this case to repel this ground of suspension, and to sustain the sentence upon which the appellant has been imprisoned.

LORD YOUNG.—I confine my observations to the objection on which Lord Craighill proposes, I understand with your Lordship's concurrence, to rest the judgment. That objection is, that whereas the trial and conviction in fact took place on 24th November the sentence bears date 23d November. It is not doubtful, being admitted and indeed averred by both parties, that the suspender was tried, convicted, and sentenced on 24th November, and the objection rests on this, that an inspection of the minutes of procedure shews that in noting the date of the sederunt of the Court the clerk had erroneously written twenty-third, and corrected the error by striking out the confessedly wrong word "third," and substituting for it the confessedly right one "fourth." Neither party could inform us when the correction was made, and there is no averment on the subject in the note of suspension. The suspender's counsel, however, said that he desired an opportunity of proving, if he could, that it was made after the trial, and outwith the prisoner's presence, and also, although the state of the fact was unknown to him, that the extract or certificate of the conviction sent to the jailor bears date 23d November.

In Roxburghshire the minutes of procedure in each case seem to be written separately and appended to the criminal letters. In this Court, and in Sheriff Courts where there is a considerable amount of business, so that several cases are tried on the same day, the minutes are written in a book—each day's sederunt being entered and dated, and then, without any further dating, the cases tried being minuted consecutively in the order of trial. The first proposition we have to consider is that a corrected error in the date of the sederunt—the error and the correction of it being manifest on the face of the writing—will vitiate the whole procedure of the day, and entitle all the prisoners who have on that day and in the course of that sederunt been convicted and sentenced in open Court to be set at liberty. I cannot assent to that proposition, and even go the length of saying that I think it extravagant. The second proposition is, that there ought in the case of such apparent correction (although of an admitted error) to be an inquiry as to when the correction was made, and those prisoners set at liberty whose trials happened to be over before that, the fate of each depending on the result of the inquiry—whether it shewed that the correction was made before or after his removal from the dock. I must reject this proposition also as, in my opinion, quite untenable.

The minutes of procedure of a Court of criminal justice may be, and frequently are, corrected by striking out words and sentences, and writing in others, and being a record written by a public officer of proceedings in an open Court there is no presumption or room for suspicion of impropriety. No impropriety in this department has, so far as I remember, occurred in my time, although I do not doubt that if it ever should occur a remedy would be afforded to anyone thereby prejudiced. The minute-books of the Circuit Courts are full of large and important corrections, quite patent on the face of them. Nor is there, as in the case of probative deeds, any record of the corrections made. Now, what, I should like to know, would a Judge on Circuit or in this High Court say to the Clerk of Court who told him that he had omitted to write in the date of the sederunt of that day or of the day before, or had written 23d by mistake for 24th? I can only say that I should tell him to write it if omitted, or correct it if erroneous, and should be much surprised by a suggestion that the prisoners had all been improperly convicted, and were legally entitled to be set at liberty if the truth were known or should be discovered. If I held such an opinion I

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I am of opinion that the correction here was properly made, on the instant if instantly detected, or otherwise so soon as it was discovered, and affords no ground whatever for setting the prisoner at liberty. I should indeed authorise the correction even had it not been already made—as merely bringing the minute of the fact into conformity with the fact as admitted by both parties, and that without prejudice to any interest whatever.

But reliance was placed on the suggestion—for it is no more—that the certificate of the conviction in the jailor's hands may bear that it took place on 23d November. The proposition here is that a lawful conviction and sentence will be invalidated by an error in the date of the clerk's certificate of it sent to the jailor with the prisoner. I should have thought that on an error being discovered in such certificate (whether in the date or anything else) the proper course was to correct the error, or make out a new certificate, and the notion that the conviction and sentence were thereby vitiated would not have occurred to me. The conviction takes place in open Court, and the sentence is there publicly pronounced; and it seems strange that this solemn public procedure should be destroyed, beyond remedy, by an error—it may be, as here, a mere clerical error in the clerk's certificate of it to the jailor. Would this consequence follow an omission to send any certificate at all? or might the omission be remedied on being discovered by making out and sending one? I can attach no importance whatever to the suggested possible error in the certificate. It is in the jailor's hands, and if the error alleged shall be found to exist in it it will be the jailor's duty to take or send it to the clerk for correction, just as it would have been had it erroneously borne a longer or shorter period of imprisonment than was imposed by the actual sentence. The clerk's certificate is not the conviction or the sentence, and it is, to my mind, a very startling proposition indeed that an error in it is incurable and a ground for quashing the conviction. The most serious case is of course that of a capital conviction and sentence, the certificate of which is in fact the warrant given out for the execution of the sentence. If made out erroneously in any particular, it may, I should think, of course, be corrected, or a new one substituted, and the idea that an error in it would annul the conviction is, I am clearly of opinion, altogether groundless. The same considerations are, I apprehend, applicable to civil procedure. An error in the extract or certificate of decree will not affect the decree as pronounced by the Court, and may be corrected, or a new and proper extract or certificate given out.

LORD JUSTICE-CLERK.—I have only a vote in this Court where there is an equal division of opinion on the bench, and having heard the very different and conflicting views advanced by your Lordships I have some difficulty in coming to a decision on this point.

The question is one of some consequence, nicety, and difficulty. The first matter to decide is, on what state of facts are we asked for our opinion and judgment, and in that matter we are somewhat in the dark. This man was undoubtedly tried on 24th November for the serious crime of perjury, and it is allowed that the only record of the sentence which was passed on him does not bear that date. It is admitted on the part of the prosecutor that the minute did not bear that date when it was first written out, and further that the warrant for imprisonment bore date the 23d, not the 24th. I understand that

these facts are admitted by the prosecutor, and that it is not denied that the alteration of the date on the record was made *ex intervallo*. I assume that; but if it is disputed I shall not give any judgment until every inquiry has been made. If that is the fact, I cannot think that the alteration is a matter of indifference. I think that more injustice would be done by giving any encouragement to laxity in criminal proceedings, as the prosecutor asks us to do here, than by granting this suspension. It may be that, as Mr Rutherford argued, the prisoner in this case suffered no injustice by the error, but we are here dealing with criminal proceedings and a criminal sentence, where accuracy is absolutely essential. Lord Young has said that the record bears to be dated on the 24th, but on looking at it we find that it has been altered since the original manuscript was made, and it is admitted that that alteration was not made till after the prisoner left the bar. I am of opinion that the sentence is thereby vitiated; and I am prepared to give effect to that opinion by sustaining the suspension. It may happen here that the carelessness of an official has frustrated the object of justice; but I think that more good will be done by giving effect to the objection, and not allowing slovenly proceedings in Criminal Courts, than by repelling it.

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THE COURT sustained the note of suspension, and granted warrant for liberation.

DOVE & LOCKHART, S.S.C.—CHARLES MORTON, W.S., Crown Agent—Agents.

JOHN MARR, JAMES BEGBIE, AND PATRICK HOARE, Complainers.—

J. C. Smith—McKechnie—Kennedy.

ROBERT LAIDLAW STUART, Procurator-Fiscal of Midlothian, Respondent.

—Trayner—Moncreiff.

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Marr, &c. v.

Procurator-

Fiscal of

Midlothian.

Crime—Perjury—Competency of trying two or more panels on the same indictment—Relevancy—Separation of trials—Sheriff—Jurisdiction—Administration of justice.—In a suspension of a conviction for perjury before a Sheriff and jury, held (1) that it was competent to charge two or more panels on the same indictment with perjury, where the alleged perjury related to the same matter, and was committed to compass the same defeat of justice; (2) that a motion for separation of trials must be supported by special grounds other than that the charge was one of perjury; (3) that where an indictment charged, in the major proposition, conspiracy to defeat the ends of justice by means of perjury, as also perjury, it was not necessary, where the facts inferring perjury were sufficiently set forth in connection with the conspiracy, that the minor should set forth a separate *species facti* applicable to the charge of perjury apart from conspiracy; (4) that the Sheriff had jurisdiction to try a charge of perjury though he could not pronounce the declaration of infamy which is generally in use to be included in the sentence of the High Court by virtue of the Act 1555, c. 47; and (5) that a person acting as Sheriff-substitute *ad interim* was not bound to produce evidence of his authority.

Question, whether the declaration of infamy, generally included in the sentences for perjury, of the High Court, should not now be discontinued in the majority of cases.

JOHN MARR, James Begbie, and Patrick Hoare were charged, before the Sheriff of Midlothian and a jury at the instance of the Procurator-fiscal of Court with the crimes of "conspiring to defeat or obstruct the administration of justice and to secure the acquittal of a person charged with a criminal offence by means of perjury; as also perjury."

The *species facti* set forth in the minor of the indictment was that

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Clerk.

Lord Young.

Ld. Craighill.

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William Bain, carter and contractor, Edinburgh, having been charged on a criminal complaint before the Sheriff of Midlothian for resetting certain cart harness stolen from William Paterson, builder, Edinburgh "and the said John Marr having been duly cited to appear at the said trial as a witness for the prosecution, the said John Marr, James Begbie, and Patrick Hoare all and each or one or more of them, did, in concert with the said William Bain, or by themselves, at some time or times between the 28th day of July and 5th day of August 1880, . . . and at some place or places in the city or county of Edinburgh to the complainer unknown, form a wicked and felonious conspiracy to defeat or obstruct the administration of justice at the trial of the said William Bain, and to secure his acquittal from the said charge of reset of theft, and did, in pursuance of said wicked and felonious conspiracy, arrange that the said James Begbie and Patrick Hoare should be adduced as witnesses in exculpation of the said William Bain at his trial, and that they, and the said John Marr, when examined as a witness for the prosecution at the trial of the said William Bain, should swear that the harness, consisting of a horse collar a pair of hames, a cart saddle, a bretchin, and a horse bridle, which the said William Bain was accused of resetting, knowing the same to have been stolen, or part thereof, was a set or part of a set of harness which had been purchased by the said John Marr at a sale by auction at the premises of Scott, Croall, & Sons, job and postmasters, at or near Castle Terrace, Edinburgh, on or about the 18th day of February 1880, and afterwards sold or handed over by the said John Marr to the said William Bain, the said John Marr, James Begbie, and Patrick Hoare, all and each, or one or more of them, well knowing that the said harness which the said William Bain was charged with resetting, or any part thereof, was not the set or any part of the set of harness purchased at Scott, Croall, & Sons' said sale by the said John Marr, and afterwards handed over or sold by him to the said William Bain."

There was further set forth how at the trial of the said William Bain, which took place on 4th August 1880 "before Francis Gebbie, Esquire, advocate, then acting Sheriff-substitute of Midlothian and Judge officiating in the Sheriff Court of Edinburgh," the said John Marr having been adduced as a witness for the prosecution did, "in pursuance of the said wicked and felonious conspiracy, then and there, wickedly and feloniously, wilfully and falsely, swear and depone, contrary to the truth, and to what he well knew to be the truth, that the said horse collar, cart saddle, and bretchin, then produced in Court, and put in evidence as aforesaid, were parts of a set of harness which had been purchased by him, the said John Marr, at a sale at Scott, Croall, & Sons, about the month of February 1880 (meaning thereby the said sale by auction at the said Scott, Croall, & Sons' premises aforesaid on or about 18th February 1880) and afterwards sold by him, about the said month of February, to the said William Bain; whereas the truth is, and it will be proved, that the statements so sworn to by the said John Marr were false, and were known by him to be false at the time of his swearing and deponing thereto, inasmuch as the truth is, and the said John Marr well knew, that the said horse collar, cart saddle, and bretchin produced in Court, and put in evidence at the trial of the said William Bain as aforesaid, were not parts of the set of harness purchased by him, the said John Marr at the said sale at Scott, Croall, and Sons' premises before mentioned, and afterwards sold or handed over by him to the said William Bain."

There followed a similar detail of the evidence given by James Begbie and Patrick Hoare respectively when adduced as witnesses in exculpation at the said trial, and of the circumstances wherein it was alleged to be false.

There was no part of the minor premiss specially applicable to the separate charge of perjury unaccompanied by conspiracy contained in the major.

The jury found the panels "not guilty of conspiracy, but guilty of perjury as libelled." And in respect of this verdict the Sheriff sentenced Marr and Begbie to ten months' and Hoare to seven months' imprisonment.

The prisoners brought a suspension of this sentence on the following grounds—(1) That it was not competent to indict two or more panels for perjury in the same criminal libel, and that the charge of conspiracy had been groundlessly and oppressively introduced into the indictment to enable the procurator-fiscal to include all the panels in the same libel and merely to give himself a foundation for objecting to the separation of their trials, no evidence of conspiracy having been led.¹ (2) Oppression, in respect that a motion for separation of trials had been refused.² (3) That the Sheriff had no jurisdiction to try the complainers for the crime of perjury, and, in particular, could not competently pronounce the sentence which the law awarded for the crime of perjury.³ (4) That the libel was irrelevant except as a charge of conspiracy, there being no minor applicable to the major proposition of perjury, and that the verdict was either a verdict of acquittal, or void from uncertainty, or a null verdict in respect that it negatived the only charge of perjury made in the minor premiss of the indictment. (5) That the appointment of Francis Gebbie as Sheriff-substitute of Midlothian, before whom the alleged perjury had been committed, and who was a material witness for the prosecution, had not been competently proved, the Sheriff having accepted his own parole evidence and refused production of the books of Court; and (6) That the said Francis Gebbie did, in fact, hold no valid commission in terms of the statutes regulating the office of Sheriff-substitute, in respect he did not hold the requisite certificate in terms of 6 Geo. IV. c. 23, sec. 9, at the date of the said trial 4th August 1880, he not being a regular Sheriff-substitute, but merely a *locum tenens* appointed *ad interim* during the pleasure of the Sheriff of Midlothian.

Lord Justice-Clerk.—Some of the points raised by the suspenders are fairly subject to controversy, but I am quite satisfied that the grounds on which the exceptions have been taken are none of them well founded.

The first question of importance is, whether three panels can competently be combined in an indictment such as we have here? That indictment contains two major propositions—the one a charge of conspiracy to defeat the ends of justice by means of perjury, the other a simple charge of perjury itself. (1)

The question therefore substantially is, whether it is competent to charge in the same indictment three persons on the same charge of conspiracy, and whether, if no conspiracy is brought home to them, it is competent to charge them in the same indictment with perjury? As to the first, there can be no difficulty. By its very nature conspiracy is a joint offence, and can only be committed by two or more persons in concert. And no averment that each is dependent on the evidence of the others will warrant the separation of their trials. Such a motion is never allowed, except in a very special case. (X)

But then it is said that perjury by itself would not have entitled the procurator-

¹ Ersk. iv. 4, 74; Russel on Crime, vol. iii., p. 36; Rex v. Phillips, 2 Strange, 921.

² Hume, ii., 173.

³ 1551, c. 19 and 22, and 1555, c. 47; Maxwell, Jan. 31, 1865, 5 Irv. 65, 37 Scot. Jur., 211; Hume, i. 379, and ii. 59.

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fiscal to place these three men at the bar on the same charge. But it being our constant practice, when there are three persons who have committed one offence, though they may have had separate parts in the commission of that offence, to try them together on the same libel, I see no reason why the same course should not be followed in the present case, whether there was conspiracy or not—the perjury, if committed, was committed on one and the same trial, and necessarily for the purpose of defeating the ends of justice, and was all about one and the same matter. For aught we know the case to which we were referred in Strange's Reports—*Rex v. Phillips*, 2 Strange, 921—may have been a case of several panels committing perjury about separate matters, and not even directed to obtain the same defeat of justice. I am therefore of opinion that these three men were competently charged in the same indictment with the crime of perjury, the perjury though separately committed being about the same matter.

Nor can I see any oppression in refusing to separate their trials; there does not appear to me to have been any special ground for such motion, and without a very special ground it is never granted. I have no doubt, moreover, that the jury gave the accused the benefit of their own evidence, to this effect at least, that they assumed they would have repeated on oath the same statement which they formerly made, otherwise they would have assisted to convict themselves of perjury.

The second question is, whether the Sheriff had any jurisdiction to entertain this charge of perjury? So far as the history of the Sheriff Courts in this country can be traced the Sheriff appears always to have had jurisdiction in all cases except in the pleas of the Crown. Perjury is not one of the pleas of the Crown, and therefore I am of opinion that the Sheriff has jurisdiction in it. The institutional writers indicate no doubt on the matter, and it only remains to deal with the argument raised on the old Scotch statutes of 1551, c. 19 and c. 22, and more particularly 1555, c. 47. The latter enacts that persons guilty of perjury, or subornation of perjury, shall be punished “by piercing of their tongues and escheating of all their goods to our Sovereign Lady's use, and declared never to be able to bruik honour, office, or dignity from thenceforth, and further punishment to be made in their persons at the sight and discretion of the Lords, according to the quality of the fault.” Whether that means of the Lords of Session, or Lords of Justiciary, I cannot tell. But it in no way affects my mind. There is nothing in these statutes either to confer or take away jurisdiction. They confer merely a power of punishment. And it is impossible to read them without seeing that time and practice have relaxed, or even obliterated, these punishments. Sentence of infamy is certainly never now-a-days pronounced in cases of bigamy, and I imagine it is a long time since the punishment of piercing the tongue was inflicted on a person condemned for perjury. I am not prepared to say that the last clause of the Act 1555, c. 47, does not leave the punishment for perjury entirely to the discretion of the Court, and makes it optional whether even the sentence of infamy should be pronounced. I look with great respect on the judgment of the five Judges who sat in *Maxwell's* case (5 Irv. 65), to which we were referred. But the question of the form of sentence was not raised or argued at the bar; the point was taken up by the court *ex proprio motu*, and they thought that the proper form of sentence included a declaration of infamy. I hardly think that conclusive as a judgment, and I certainly have not followed it in my own practice. I think it admits of question whether the declaration of infamy should not be discontinued,

at least in the majority of cases. Though I have my own opinion on that question, and have acted upon it, in deference to my brethren I reserve that opinion till the matter is seriously contested. In the meantime I have no doubt that the Sheriff cannot competently pronounce such declaration of infamy, and he has not attempted to do so in the present case.

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The third objection is that there is no *species facti* in the minor applicable to the major charge of perjury by itself, and that the verdict "not guilty of conspiracy but guilty of perjury as libelled" was not warranted by the terms of the indictment, inasmuch as the charges of conspiracy and perjury are treated as one, and supported by the same minor. When, however, the structure of this indictment is examined the objection vanishes. It is no more essential to the conviction for perjury that conspiracy should be proved than to a conviction for theft on an indictment for housebreaking as also theft that the housebreaking should be proved. I quite admit that if these parties could not have been tried on the same libel for the crime of perjury this would probably have been a good objection. But that not being so, it must be repelled.

As to the last point, that Mr Gebbie, who was sitting as Sheriff-substitute when the perjury was alleged to have been committed, had no valid commission, the statement is, I think, wholly irrelevant, for there is no intelligible ground stated for impugning Mr Gebbie's authority. Mr Gebbie was not bound to produce evidence of his appointment, nor was the procurator-fiscal. If Mr Gebbie was acting without authority he laid himself open to punishment for such usurpation of authority. But so far as Mr Gebbie was acting in the ostensible exercise of the functions of a Judge, his acts must be sustained as valid till such usurpation of authority is proved, and that even though there may turn out to be some flaw in his appointment.

On the whole, therefore, though the case is not without some interest, I am of opinion that all the objections urged are without substance, and that the sentence must stand.

LORD YOUNG and LORD CRAIGHILL concurred.

THE COURT refused the suspension.

THOMAS McNAUGHT, S.S.C.—STUART & CHEYNE, W.S.—Agents.

ROBERT WEMYSS, Suspender.—*Nevay*.

ROGER BLACK, Respondent.—*Rettie*.

No. 8.

Mar. 19, 1881.
Wemyss v.
Black.

Obstruction—Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), sec. 251.—The above section enacts—"Every person who, in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction," be liable to certain penalties—(that is to say), "every person who, by means of any cart, carriage, sledge, truck, or barrow, or any animal or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath or other public thoroughfare. . . Every person who shall jostle or annoy any person passing thereon."

A complaint set forth that three men were guilty of a contravention of the Police and Improvement Act, 1862, sec. 251, in so far as they did, on the High Street of Kirkcaldy, "to the obstruction or annoyance of the residents or passengers, wilfully cause an obstruction in the public footpath of said street, by means of congregating."

In a suspension of a conviction obtained on this complaint, *held* that the com-

No. 8. *plaint did not set forth any offence under the section libelled, and that the conviction being outwith the statute was not protected by the finality clauses from suspension, and conviction quashed.*
 Mar. 19, 1881. *Wemyss v. Black.*
Opinion, per Lord Justice-Clerk, that the conviction was valid.

HIGH COURT.
 Lord Justice-Clerk.
 Lord Young.
 Ld. Craighill.
 Justiciary Clerk.

ROBERT WEMYSS, George Barnes, and James Farmer, were charged under the Summary Procedure Act, 1864, at the instance of Roger Black, burgh procurator-fiscal of Kirkcaldy, before the magistrates of that burgh, with a contravention of the Police and Improvement (Scotland) Act, 1862, sec. 251, in so far as on the 17th day of February 1881 they did, within the meaning of the said section of the statute, on the High Street of Kirkcaldy, "to the obstruction or annoyance of the residents or passengers, wilfully cause an obstruction in the public footpath of said street, by means of congregating."*

On 25th February 1881, the magistrate officiating in the Burgh Court on that day convicted the accused of the contravention charged in the complaint, and sentenced them to a fine of 2s. 6d. each, or, in default of payment, to imprisonment for three days.

Wemyss presented this bill of suspension of the said sentence to the High Court of Justiciary.

The respondent, Black, took objection to the competency of the suspension, on the ground that such suspension was excluded by sections 430 and 437 of the Police Act, 1862.†

Argued for respondent;—The statute expressly enacted that any person who, to the obstruction or annoyance of passengers, wilfully causes any obstruction in any public footpath, shall be guilty of an offence. It was for the magistrate to decide whether the complaint set forth the offence, and to decide whether it had been proved. If the magistrate had committed an error in judgment, a remedy was given by appeal to the Circuit Court, and the jurisdiction of this Court was excluded.

Argued for the appellant;—There was no offence libelled here. The first subsection quoted was the subsection relied on by the prosecutor, and that evidently did not apply to the case of obstruction by the person alone. The "jostling" subsection was not founded on in the Burgh Court, and it was nowhere stated that the appellant had jostled anybody. Under the circumstances, the Court had jurisdiction to consider the bill.

* Sec. 251 enacts—"Every person who, in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction," be liable to certain penalties—(that is to say), "every person who, by means of any cart, carriage, sledge, truck, or barrow, or any animal or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath or other public thoroughfare. . . . Every person who shall jostle or annoy any person passing thereon."

† Sec. 430 enacts—"No order, judgment, record of conviction, or other proceeding whatsoever, concerning any prosecution instituted before the magistrate in virtue of this Act, shall be quashed or vacated for any misnomer or informality; and all judgments and sentences pronounced by the magistrate shall be final and conclusive, and not subject to suspension or advocacy or appeal, or any other form of review or stay of execution, unless on the ground of corruption, malice, or oppression on the part of the magistrate, or of such deviation in point of form from the statutory enactments as the Court of review shall think took place wilfully, or of incompetency, including defect of jurisdiction of the magistrate; and such suspension, or advocacy, or appeal, or review, or stay of execution, must be presented before the next Circuit Court of Justiciary." &c.

Sec. 437 enacts—"Wherever any act, decision, determination, declaration, or deliverance of any Sheriff or magistrate, . . . is by this act declared to be final, the same shall not be subject to be set aside or reviewed or affected by any Court or judicature upon any ground, or in any manner of way whatever."

LORD YOUNG.—The only difficulty I feel in this case is whether we should not send it to be tried at the Circuit Court, but, as it is here, it would only be putting the parties to obvious expense if we sent it elsewhere. That being so, I am disposed to consider it on the merits.

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The suspension is brought on the ground that the conviction shews on its face no offence. It sets forth nothing at all but by reference to the complaint, and that being so we must go to it. It is, I have always thought, established law that the conviction must set forth an offence not only by its generic name, but with a statement of the facts on which it depends. We must look at what the party did, in order to see whether the magistrate has not erroneously imputed an offence to him. Now, what is charged in the complaint? The charge against these three men is that, being on a certain day in the High Street of Kirkcaldy, they did, "to the obstruction or annoyance of the residents or passengers, wilfully cause an obstruction in the public footpaths of said street by means of congregating." That is all. It would not have occurred to me that this was intended as a charge under the subsection relating to "jostling or annoying," but it is probably sufficient for the case that it did not occur to either party that such was the case, and it was not presented in that light. The leading idea of the offence is obstruction, and obstruction is provided for under another subsection altogether, which all the parties had in view. I refer to the section under which the offence is charged, to see whether the facts amount to an offence under it. It is in these terms—(reads). It is within these terms that the magistrate thinks the offence fell. Now, I do not think that what these men did was at all within the conception of that. It was simply a case of two or three people meeting and stopping in the street. You cannot go along any street which has a narrow footpath without meeting with an obstruction from people standing talking to one another. If they do it wilfully and pertinaciously, if there is anything exceptional in the circumstances which imports a different character into the act, then that should be set forth. But it is not set forth here, and I am not going to exercise my ingenuity to imagine how people set about creating an obstruction with their persons only. If such a thing does occur then set it forth clearly, but, annoying as it is when people will stand in the way when other passengers wish to pass, I do not think, unless anything specific is charged, that such conduct amounts to an offence. I say that I do not think such conduct is within the conception of the subsection alone relied on by the prosecutor. Even the words, "or other means," cannot, I think, be held to apply to three persons, or even nine, standing talking in the street. No doubt there are provisions against collecting a crowd, but that also is not within the case. I am of opinion, then, that the case as stated is not within the "jostling" clause, and that it is not within the "obstruction" clause, and on that ground I think the conviction ought to be quashed.

LORD CRAIGHILL.—The question here depends on whether what was done was an offence under the General Police Act of 1862. If the complaint was well brought, then the magistrate's decision is protected by the sections referred to. But if no charge is libelled then it can never be so protected. That leads us to a consideration of the merits of the case, and I am of opinion that we cannot read that which is set forth as constituting an offence, for if it were so, it would come to nothing more nor less than this, that three persons meeting by accident

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on the street, and stopping to talk to one another, are guilty of a contravention of the Act. On this point I adopt so fully the reasoning of Lord Young that I need say no more about it. I think the conviction should be quashed.

LORD JUSTICE-CLERK.—As I have often had occasion to remark, the Judge presiding in this Court has no voice but in cases where your Lordships are equally divided in opinion; but I am entitled to express my views, though not to vote. Now, until five minutes ago my opinion would have been that this was one of the clearest cases I ever saw. Your Lordships say that there is no offence charged here but I must say I think that there is. If the obstruction caused by the congregating of persons is innocent and accidental, then there could be no ground for a charge; but if the obstruction be wilful, then I think there undoubtedly is. It is nothing to us to say that friends may meet and stand talking to one another—that is as far from wilful obstruction as anything possibly can be; but here the offence charged is wilfully causing an obstruction by means of congregating. Is that no offence? I should be very sorry to say that it is not. What clause or subsection such an act falls under may be matter of question. My own impression is, that it does not fall under the special obstruction subsection; but obstruction being the special object of the clause, such an act as this is certainly within the section as a whole, and the jostling subsection seems to me to cover it. For, when a man so stands that he will not allow anyone else to pass him without jostling, he is, to my mind, clearly within the clause. I must enter my protest against the notion that persons may wilfully stand in the middle of the footpath and obstruct the passers-by without being liable to a penalty under the statute.

THE COURT quashed the conviction.

R. BROATCH, L.A.—PARTY—Agents.

No. 9.

HER MAJESTY'S ADVOCATE.—*Taylor Innes, A.-D.—Guthrie.*

JOHN HALL.—*Jameson.*

Mar. 25, 1881.
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Falsehood, fraud, and wilful imposition—Relevancy—Ordering goods without intending to pay therefor.—The minor proposition of an indictment, under which a panel was charged with falsehood, fraud, and wilful imposition, set forth that the panel “having formed a fraudulent and felonious scheme for the purpose of obtaining the goods of others on false pretences, and applying the same” to his “own uses and purposes, without paying or intending to pay therefor,” ordered goods by letters, in which he did “represent and pretend” to the owners of the goods, and induce them “to believe that” he “intended to become a *bona fide* purchaser” of “these goods,” and would pay the price thereof weekly . . . or on delivery, or on demand of payment, or shortly thereafter, and that the said “goods” were fraudulently received and appropriated by him to his own uses and purposes, and that he had not paid and did not intend to pay therefor. *Held* that the facts set forth in the minor did not relevantly support the charge in the major, as the statement that the accused falsely represented that he intended to become a *bona fide* purchaser, and to pay the price, was not a relevant averment of false pretences, it being necessary to set forth a false statement relating to a past or present fact.

Question, whether a domiciled Englishman, resident in England, who addresses letters to persons in Scotland containing false and fraudulent statements, is subject to the jurisdiction of the criminal Courts in Scotland?

JUSTICIARY
PERTH
CIRCUIT.
Lord Young.

ON 25th March 1881 John Hall was charged at the Perth Circuit Court, before Lord Young, with the crime of falsehood, fraud, and wilful imposition.

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The minor proposition of the indictment was in the following terms:—
 “In so far as, you having formed a fraudulent and felonious scheme for the purpose of obtaining the goods of others on false pretences, and appropriating and applying the same to your own uses and purposes, without paying or intending to pay therefor, you, the said John Hall, did, in pursuance of the said fraudulent and felonious scheme (1), on or about the 16th day of November 1880 (Tuesday), in or near Four Lane Ends, or in or near Gregson Lane, in or near Blackburn, Lancashire wickedly and feloniously, falsely and fraudulently, write and transmit, or cause or procure to be written and transmitted by post, a letter or memorandum, with a printed heading containing, *inter alia*, your description and address, and bearing the subscription ‘John Hall,’ or a similar subscription, addressed to ‘the station-master, Largo, Fife,’ all in the following or similar terms:—‘Memorandum—16th Nov. 1880.—From John Hall, merchant and commission salesman. Office, Gregson Lane, Blackburn. Residence, 34 Four Lane Ends. Established 1847. To the station-master, Largo, Fife.—Sir, Will you have the kindness to favour me with the names and addresses of your principal potato merchants and growers, also game and rabbit dealers. I am largely engaged in this branch of business, and anxious to open a trade in your neighbourhood. Trusting to be favoured with your reply by return. Yours, truly, John Hall,’—which letter or memorandum above libelled was duly received in course of post, or shortly thereafter, by William Strang, then and now or lately station-master at the Largo station of the North British Railway, in the county of Fife; and the said William Strang having replied to the letter or memorandum above libelled, by a letter transmitted by post to you, in the following or similar terms:—‘Largo Station, Nov. 19, 1880.—Mr Hall, Gregson Lane, Blackburn. Dear Sir,—I have yours of 16th inst. to hand, I will be very happy to do a little in the potatoe line myself hoping to hear from you early, Wm. Strang,’ which letter last above libelled, having been duly received in course of post, or shortly thereafter, by you, the said John Hall, or by some person or persons acting in concert with you to the prosecutor unknown, you, in further pursuance of your said fraudulent and felonious scheme, did, on or about the 22d day of November 1880, in or near Four Lane Ends, or in or near Gregson Lane aforesaid, or at some other place in or near Blackburn aforesaid to the prosecutor unknown, wickedly and feloniously, falsely and fraudulently, write and transmit, or cause or procure to be written and transmitted by post, a letter or memorandum, printed and written as aforesaid, and bearing the subscription ‘John Hall,’ or a similar subscription, addressed to the said William Strang, Largo, Fife, his name being therein spelled ‘Wm. Strong,’ all in the following or similar terms:—‘Memorandum.—22d Nov. 1880.—From John Hall, merchant and commission salesman, office, Gregson Lane, Blackburn, Residence, 34 Four Lane Ends, Established 1847, to Mr Wm. Strong, Largo, Fife.—Dear Sir,—I am obliged by your reply to my letter. Champions are worth £3, 5s. per ton—Regents £3, 15s. per ton—Victorias, £4 per ton. I will give these prices for them put on at your station—to be good sound potatoes. My terms for cash payments is either weekly or as you load them. I shall be glad to hear from you.—JOHN HALL,’—which letter or memorandum last above libelled was duly received in course of post, or shortly thereafter, by the said William Strang, to which he replied by a letter transmitted by post to you, in the following or similar terms:—‘Largo station, Nov. 25, 1880.—J. Hall, Blackburn.—Dear Sir,—I have yours of 22d inst., and as weekly payments will suit me best, will accept weekly payments.—W. STRANG,’ which letter last above libelled was duly received

No. 9. in course of post, or shortly thereafter, by you the said John Hall; and you the said John Hall did, by the style, terms, and tenor of said letters or memoranda, printed and written as aforesaid, transmitted or caused to be transmitted by you as above libelled to the said William Strang, wickedly and feloniously, falsely, fraudulently, and wilfully represent, and pretend to the said William Strang that you were a merchant and commission salesman, largely engaged in and carrying on *bona fide* business as a merchant and commission salesman in Blackburn, when in truth you were not engaged in or carrying on any such business, and did thereby impose on and deceive the said William Strang, and induce him to believe that you were a *bona fide* trader, carrying on large and *bona fide* business in Blackburn, and that you would make cash payments for the said potatoes, either weekly, or as the said William Strang should load them; and the said William Strang, on the faith of the said false and fraudulent representations, did, on or about the 25th day of November (Thursday) 1880, at or near the Largo station of the North British Railway Company, at or near Largo aforesaid, deliver, or cause to be delivered, to said company, for conveyance to you at your address above libelled, in or near Blackburn aforesaid, or a similar address, four tons and one hundredweight or thereby of potatoes, of the value of thirteen pounds three shillings and sixpence sterling or thereby, the property or in the lawful possession of the said William Strang; and the said potatoes were accordingly thereafter conveyed to you, and were delivered to you at the railway station of the Lancashire and Yorkshire Railway Company at or near Blackburn aforesaid, on or about the 27th day of November 1880, and the said potatoes were fraudulently received and appropriated by you to your own uses and purposes, and you have not paid and did not intend to pay for the said potatoes, and, in particular, did not intend to pay for the same by cash payments, either weekly or as they were loaded, and the said William Strang has thus been defrauded by you."

The indictment further set forth four other cases of a similar nature, in which the panel was charged with having imposed upon other persons resident in Scotland in a similar way.

Counsel for the panel objected that no relevant charge was set forth in the indictment, as the facts libelled in the minor disclosed nothing against the panel except that he had given certain orders for goods, without, as it was alleged, intending to pay for them. That was no crime by the law of Scotland, though it would be a dishonest course of trading.¹

Argued for the Crown;—The point was closed by precedents.² The alleged dishonest intent constituted the crime, and that, if proved, was sufficient. These cases had ruled the practice ever since. This point was also taken up and disposed of in the cases of *Bradbury* and *Allan*.³ In these two latter cases it was settled further that the Scotch Courts of law had jurisdiction to try a domiciled Englishman whose crime is initiated in England but completed in Scotland, without his ever having been personally in Scotland during the whole time in question.

LORD YOUNG.—The prisoner is charged with falsehood, fraud, and wilful imposition, which is with us the *nomen juris* of the crime of obtaining goods or

¹ Her Majesty's Advocate v. Wilkie, Sept. 13, 1872, 2 Coup. 323; Rae v. Linton, Dec. 11, 1874, *ante*, vol. ii., Just. Cases, 17, 3 Coup. 67.

² Hall, Hume, i., 173; James Hall and Others, July 25, 1849, Shaw's Reps., 254.

³ Her Majesty's Advocate v. Bradbury, June 24, 1872, 2 Coup. 311; Her Majesty's Advocate v. Allan, Feb. 4, 1872, 2 Coup., 402.

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money—and, it may be, other things or advantages—by false pretences, with intent to defraud. To constitute the crime there must be, first, falsehood, which may be by word of mouth, by writing, or by conduct; second, fraud—that is, the falsehood must be with a fraudulent intent; and, third, wilful imposition—that is, the imposition designed by the fraudulent falsehood must be accomplished. The case of an unsuccessful attempt by fraudulent falsehood to cheat another into parting with property I am not now concerned to consider, and shall only say that I think it not doubtful that such an attempt is by our law a punishable offence. The immediate, and, indeed, the only question for my consideration here is, whether any falsehood such as the law requires to constitute the crime charged is alleged? Now, the allegation, stated simply and without a multitude of superfluous words, or which at least would be superfluous except in an indictment, is that the prisoner bought potatoes and took delivery from the sellers without intending to pay for them, and the question is, whether by so doing he committed the crime charged. The Advocate-Depute tried to represent the allegation as extending beyond this, by founding on, first, the introductory averment, in these words—"You having formed a fraudulent and felonious scheme for the purpose of obtaining the goods of others on false pretences, and appropriating and applying the same to your own uses and purposes without paying or intending to pay therefor;" and, second, the averment in each charge that the prisoner's letters ordering the potatoes falsely represented that he "intended to become a *bona fide* purchaser of potatoes." But the scheme imputed in the introductory averment is to obtain goods "on false pretences," meaning, of course, by means of false pretences, which, although unexceptional as a general prefatory statement, does not dispense with the necessity of averring that false pretences were in fact made, and specifying what they were. I accordingly inquired what they were, and received for answer that the prisoner falsely represented that he intended to become a *bona fide* purchaser, and to pay the price of the potatoes. This led to the second question which I put to the Advocate-Depute, In what respect is it meant to be alleged that the prisoner was not a *bona fide* purchaser? to which the answer was, that he was not, inasmuch as he did not intend to pay the price—which, of course, brought back the question, Whether a purchaser of goods who does not intend to pay the price is guilty of falsehood, fraud, and wilful imposition, although practising no falsehood or false pretence to induce the seller to make the bargain or give delivery beyond expressing his intention to pay, or leaving it to be implied from the fact of the purchase? Now, although a man who buys goods which he knows he cannot pay for, and therefore in a very real and practical sense has no intention of paying for, and still more a man who, being able to pay, buys goods intending to leave them unpaid, is certainly dishonest, I am unable to extend the criminal law, as administered in this Court, to such dishonesty as that. The purchaser of goods certainly promises to pay for them, whether the promise is expressed or left to implication, and if he does not intend to keep it he is dishonest. But intention with respect to future conduct, whether expressed or implied, would be a very inconvenient and hazardous issue to send for trial in a criminal Court, and I am indisposed to countenance a legal proposition which might expose anyone to be criminally tried and convicted on such an issue, although the establishment of it might be useful in the comparatively rare cases in which credit is improvidently given to knaves who have practised no falsehood or false pretences beyond representing, expressly or im-

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pliedly, that they are honest men who will honourably pay their debts. I am of opinion that the falsehood which is essential to the crime here charged must relate to a present or past fact—that is, that something shall be asserted (falsely) as an existing or past fact. This, indeed, is the common legal notion of falsehood. A promise or profession of intention to pay money, or to do anything else in the future not intended to be kept, is immorality beyond the scope of the criminal law, which does not, in my opinion, protect people against the consequences of their credulity by punishing those who abuse it, beyond this, that swindlers who impose on them by false representations—spoken, written, or acted—regarding past events or existing facts, shall be punished. Professions, express or implied, respecting the honest intentions of the professor with regard to his future conduct, and depending on his own will—which may change—are not, in my opinion, fitting subjects of criminal charge in this Court. A purchaser without intention to pay may afterwards think better of it and pay, or his creditor may succeed in compelling payment. Again, a purchaser intending to pay may subsequently change his mind and dishonestly refuse. Shall the former—who in fact pays—be punished as a criminal, and the latter—who does not—go free. A crime committed cannot thereafter be uncommitted. The rule that in order to the commission of crime the falsehood—by word, writing, or conduct—shall regard an existing or past fact is simple and safe, and, in my opinion, reasonably sufficient. To extend it so as to include promises as to future conduct not at the time intended to be kept—although in the result they may be kept—would, in my opinion, be very hazardous, and such extension is not, I think, sufficiently recommended by the consideration that some dishonest people whose self professions of their own honest intentions have been relied on may otherwise go unpunished.

I put my judgment exclusively on this, that the only substantive averment against the prisoner is that he fraudulently ordered, received, and kept the goods without intending to pay for them. Had it been averred that the account which he gave of himself, by name, calling, place of business, and residence, in the printed heading of his letters, was false, I should have had another opinion of the case; for I do not doubt that if a man falsely represents himself as a “merchant and commission salesman” at a certain place, “established 1847,” this is a falsehood within the meaning of the rule as I have stated it, and so punishable if anyone has thereby been imposed on and deceived into parting with his goods. Nor, had such falsehood been averred, should I have thought that the averment was answered by evidence that the prisoner had an “office” at the place mentioned, and professed to be a merchant and commission salesman there, if in truth it was a swindler’s trap, and he “no trader, but a practised cheat,” to use the language of Mr Hume in noticing the case of *Hall* (1 Hume, 173).

Had such a case been alleged, and, even as it is, had I thought the libel as it stands relevant, there would have been a question of jurisdiction which I could not, as at present advised, have regarded lightly. For if the prisoner might, without leaving Blackburn in Lancashire, commit a crime in Scotland, and within the district of this Circuit, it is plain that he might in the same view, while never leaving home, commit a crime in any country of the world—for example, in Russia or America—and be subject to trial therefor in such country according to the criminal law thereof. The Advocate-Depute stated very emphatically that according to his information the prisoner did not trangress

the law of England, the purpose of the statement being to point out the difference and superiority of the law of Scotland in such matters, and repudiate all reference to English cases or text-writers as authority or legitimate illustration of principle with respect to such an offence as this libel is intended to present. I am not at present satisfied that we should be prepared to give up and send for trial in a foreign country and according to foreign law a Scotchman who had never quitted Scotland. If he has here transgressed our criminal law he shall be tried and punished according to that law, whether the sufferer by his transgression be a native or a foreigner—here or abroad. But the proposition is, that if a Scotchman residing, say, in Perth, by letter induces a foreigner to send him goods from abroad, he thereby subjects himself to the criminal law of the country to which his letter was addressed, and ought to be sent there for trial and punishment according to that law. If his conduct in the matter is criminal according to our law, he will, as I have said, be subject to trial and punishment here, notwithstanding that the victim of his crime is a foreigner resident abroad; but if not, I venture to ask how we should regard an application to send him abroad for trial, recommended by a representation of the foreign law as superior to ours, and that by it he would get his deserts, which by the law of his own country he would not. The general rule is that criminal law is strictly territorial, so that a man is subject only to the criminal law of the country where he is, and that his conduct there, whether acting, speaking, or writing, shall be judged of as criminal or not by that law and no other. The law of allegiance affords an exception in cases of treason, and there are also, I think, some other exceptions, as, for example, in the case of a British subject murdering another abroad; but the rule is as I have stated. The proposition that imposition by letter sent abroad is an exception, so that the questions of imposition or not, and whether it is of a criminal character or not, shall be determined by common law, and not by that of the writer's country, and in which he wrote it and despatched it, is to my mind so novel, and *prima facie* so questionable, that when it presents itself again, and under circumstances requiring a decision, I venture to think that it will deserve very careful consideration. I have no occasion now to decide it, being of opinion that according to the law of Scotland the libel before me is not relevant.

THE COURT found the indictment irrelevant.

The Advocate-Depute moved for leave to desert the diet *pro loco et tempore*.

THE COURT refused the motion, and dismissed the panel from the bar.

C. MORTON, W.S., Crown Agent—W. M. JOHNSTON, Solicitor—Agents.

SIR MICHAEL SHAW STEWART, Bart., Appellant.—*M'Kechnie*.
RICHARD WILSON, Respondent.

No. 10.

Process—Day Trespass Act, 2 and 3 Will. IV. c. 68—Summary Procedure Act, 27 and 28 Vict. c. 53, schedule B—Complainer appearing by procurator—Complaint signed by procurator.—In an appeal (which was unopposed) against a judgment of the Sheriff-substitute (Cowan) at Greenock dismissing a complaint under the Day Trespass Act, presented in terms of the Summary Procedure Act, 1864, the Court, after hearing counsel, held (1) that the complaint was sufficiently signed by a duly authorised law-agent as procurator for the complainer; and (2) that the complainer might be represented by a law-agent at the trial.

June 10, 1881.
Shaw Stewart
v. Wilson.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Id. Craighill.
Justiciary
Clerk.

CARMENT, WEDDERBURN, & WATSON, W.S.—Agents.

No. 11.

June 10, 1881.
Charleson v.
Duffes.

HECTOR CHARLESON (Respondent), Appellant.—*Rhind*.
ARTHUR DUFFES (Complainer), Respondent.—*W. Campbell*.

Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62), sec. 3, sub-sec. 5—*Appeal—Notice—Posting of notice on last day for giving notice*.—Sub-section 5 of section 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, provides that an appellant shall, “within three days” of receiving the appeal case from the inferior Judge, “give notice of appeal in writing to the respondent.” An appellant posted the statutory notice on the third day, but the respondent did not receive it until the morning of the fourth. Held that this was sufficient compliance with the statute.

Conviction—Alternative complaint—General conviction.—Held (following *Boyd v. M’Jannet*, May 21, 1879, ante, vol. vi. Just. Cases, 43, overruling *Scott v. Morrison*, April 9, 1872, 2 Coup. 218), that a general conviction “of the offence charged” following on an alternative complaint is incompetent.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

HECTOR CHARLESON, innkeeper, Forres, was charged in the Police Court at Forres under the provisions of the Summary Procedure Act, 1864, at the instance of Arthur Duffes, procurator-fiscal in that Court, with an offence against the laws for the regulation of public-houses in Scotland, “in so far as he did keep open said hotel or house occupied by him for the sale of exciseable liquors after eleven o’clock on the night of Saturday, the 19th day of February 1881, or did permit or suffer George Cunningham, watchmaker, Forres, to be drinking therein after said hour, or did sell or give out exciseable liquors to the said George Cunningham after said hour, he not being a lodger or traveller, such offence being the first offence.”

Evidence having been led, the magistrates convicted the accused “of the offence charged.”

Charleson required the magistrates to state a case for the consideration of the High Court of Justiciary, in terms of the Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. cap. 62), sec. 3.

When the case came on for hearing counsel for the respondent objected to the competency of the appeal, on the ground that the appellant had not given due notice to the respondent of his appeal under sub-section 5 of the 3d section of the above Act.*

It appeared that the appellant’s Edinburgh agent posted the notice in Edinburgh on the third day after receipt of the case, and that it was not received by the respondent in Forres until the morning of the fourth day.

Argued for the respondent;—The Legislature evidently meant that the notice should be received by the respondent on the third day. Where it was intended that the date of posting should be held as the date of notice it was always specially set forth, as in the Employers Liability Act, 1880. What he contended for was held in England to be the proper construction of such provisions in statutes.¹ On the merits, the convic-

* Sub-section 5 of the 3d section of the Summary Prosecutions Appeals (Scotland) Act, 1875, provides—“The appellant shall, within three days after receiving the case, give notice of appeal in writing, together with a copy of the case, to the respondent, and shall within the same time transmit the case by post to, or cause it to be lodged with, one of the clerks of the superior Court, together with a certificate under the hand of himself or of his law-agent of intimation as herein required having been made to the respondent.”

¹ *Morgan v. Edwards*, Feb. 14, 1860, 29 L. J. Mag. Ca. 108; *Woodhouse v. Woods*, Nov. 21, 1859, 29 L. J. Mag. Ca. 149; *Pennell v. Church-wardens of Uxbridge*, Jan. 30, 1862, 31 L. J. Mag. Ca. 92; *Banks v. Goodwin*, Jan. 26, 1863, 32 L. J. Mag. Ca. 87.

tion was a perfectly good one, the charges not being properly alternative, but an offence charged as having been committed in one of three different ways.¹

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Counsel for the appellant was not called to argue the question of notice. On the merits he argued;—The conviction was *ex facie* bad, being a general conviction on an alternative complaint.²

LORD YOUNG.—I am of opinion that this preliminary objection ought not to be sustained. I am assuming in what I say that notice was not given within the three days so that it might be received within these three days, but it was so given that it was not received till the post of the day after the last of the three days. If it were necessary to inquire whether it might have been received by the post of the last of the three days we should have to allow a proof, resulting, of course, in a litigation as important as the merits of the case. I should be slow to permit that in a case of summary appeal. Assuming, then, that notice was given, as distinguished from received, within three days, I think it sufficient that it was posted within the three days, and it does not signify that it was not received till the next day, nor would it matter if, having been so posted, it was not received at all. In that case we should do what might be required in order to remedy any inconvenience arising from the respondent's not having due notice, but we would not deny the remedy of appeal because notice had not been received. This appeal was intimated within the statutory time, and it is not suggested that any inconvenience arose from the notice not having been received till the day after the three days expired.

On the merits, the conviction cannot stand. The complaint charges the appellant with doing not all three of the things mentioned in the complaint, but with doing one or other of them. If he did any one of them the statute was violated; and he is liable to a penalty. Now, it being charged that he did one or other, the magistrate, as I read the conviction, says that he did them all. There are no facts to support that result, but it is sufficient to say that the conviction does not bear which of three offences, one or other of which he is charged with, he committed. No conviction on such a complaint could be good which did not specify which of three alternative things charged the accused is held to have done.

LORD CRAIGHILL.—I am of the same opinion. As to the sufficiency of the notice, my only hesitation has been out of deference to the English cases quoted. According to the ordinary use of language one who posts the notice on the last day for giving it gives the notice then. The appellant has done all that it was necessary for him to do. As to the merits of the appeal there is no doubt. The very question was decided in the case of *Boyd v. M'Jannet*.

LORD JUSTICE-CLERK.—I concur. The argument both as to the competency of the appeal and as to the merits has been remarkably well stated for the respondent. As to the competency we could not sustain the objection without having a proof of the dates and hours, as we do not now know them. We do not know when the case was delivered to the agent for the appellant, nor the course of post, and it may be that the notice might have arrived on the day of

¹ Scott v. Morrison, April 9, 1872, 2 Coup. 218.

² Boyd v. M'Jannet, May 21, 1879, *ante*, vol. vi. Just. C'a. 43

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posting. As far as we can see, the appellant did all he could, and that the letter was not received till the fourth day will not exclude his appeal.

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As to the merits, I must, in the case of *Boyd v. M'Jannet*, have been satisfied that my Circuit judgment was erroneous. The alternatives are not alternatives in the sense that one is exclusive of the others. The proper way was to charge them cumulatively, and then say that the person charged was guilty of all or one or other, and then the Magistrate must have found either that all were proved, or that one or more, and, if so, which of them, was proved.

THE COURT sustained the appeal, and quashed the conviction.

WILLIAM OFFICER, S.S.C.—J. & J. GALLETTY, S.S.C.—Agents.

No. 12.

JAMES MORTON (Respondent), Appellant.—*D.-F. Kinnear—Jameson.*
ROBERT GREEN (Complainer), Respondent.—*Asher—M'Kechnie.*

June 10, 1881.
Morton v.
Green.

Sale of Food and Drugs Act, 1875 (38 and 39 Vict. c. 63), sec. 6—Sale of Food and Drugs Act Amendment Act, 1879 (42 and 43 Vict. cap. 30), sec. 2—Cream—Inferior quality at inferior price.—A milk-dealer was convicted, under sec. 6 of the Sale of Food and Drugs Act, for selling, “to the prejudice of the purchaser, 4d. worth of cream, which was not of the nature, substance, and quality of the article demanded.” It was proved that the purchaser had asked for a certain quantity of cream from a servant of the dealer, and was served with cream at 1d. per gill, which, on analysis, was found to be diluted with 34 per cent of skimmed milk. Further, that the dealer had also for sale a superior quality of cream, containing a smaller percentage of skimmed milk, which he was in use to sell at a higher price. The Sheriff found that the cream at 1d. per gill was not of the quality of cream. On appeal, the Court *held* that the sale of the inferior, though pure, quality of cream at a low price was not an offence within the meaning of the statute.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

ON 22d March 1881 James Morton, Elderslie House, Renfrew, manager of and carrying on business as the “Public Dairy Supply,” was charged, in the Sheriff Court at Paisley, under a complaint at the instance of Robert Green, sanitary inspector of the burgh of Paisley, of an offence within the meaning of the Sale of Food and Drugs Act, 1875, as amended by “the Sale of Food and Drugs Act Amendment Act, 1879,” particularly sec. 6 of said first mentioned Act,* “in so far as on the 15th day of February 1881 years, or about that time, in or near St Mirren Street, Paisley, he, by the hands of Alexander Naismith, his servant and agent, did, to the prejudice of the purchaser, sell to the said Robert Green 4d. worth, or thereby, of cream, being an article of food, which article of food, when sold as aforesaid, was not of the nature, substance, and quality of the article demanded from him by the said Robert Green, in respect it was diluted

* Sec. 6 of the Sale of Food and Drugs Act, 1875, provides—“No person shall sell, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20.” Sec. 2 of the Sale of Food and Drugs Act Amendment Act provides:—“In any prosecution under the provisions of the principal Act, for selling, to the prejudice of the purchaser, any article of food, or any drug which is not of the nature, substance, and quality of the article demanded by the purchaser, it shall be no defence to any such prosecution to allege that the purchaser having bought only for analysis was not prejudiced by such sale; nor shall it be any defence to prove that the article of food or drug in question, though defective in nature, or in substance, or in quality, was not defective in all three respects.”

with 34 per cent, or thereby, of skim milk, whereby the said James Morton is liable in a penalty not exceeding £20." No. 12.

Proof in the cause having been led, the Sheriff (Cowan) convicted the said James Morton of the crime charged, and fined him in the sum of £5. June 10, 1881.
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Morton required the Sheriff to state a case for the opinion of the High Court.

The facts as set forth in the case were as follows:—

"This is a case brought under the statute 38 and 39 Vict. cap. 63, sec. 6, as amended by the statute 42 and 43 Vict. cap. 30, sec. 2. The facts as proved on the trial were—

"That the respondent, on 15th February last, demanded from Alexander Naismith, servant of the defender, and then in charge of a cart and horse, selling milk and cream through Paisley, 4d. worth of cream. That the said Alexander Naismith, for whose actings the appellant at the trial admitted himself to be responsible, supplied to the respondent an article which, on being analysed, was found to be cream diluted with 34 per cent of skim milk.

"That no notice was given to the respondent that the article delivered was other than that which he demanded.

"That the article received was divided, sealed up, and appropriated in terms of the statute.

"That cream taken from milk which has stood twelve hours contains on an average 25 per cent of butter-fat, 8 per cent of solids not fat, and 67 per cent of water.

"That the article delivered to the respondent contained 10·50 per cent of butter-fat, 8·14 per cent of solids not fat, and 81·36 of water.

"That in arriving at the conclusion that the article in question was diluted with 34 per cent of milk the analyst made the calculation as if the proportion of butter-fat per cent to be expected in cream was not 25 per cent, but 16 per cent, assigning as his reason that in cream taken from milk which has stood only two hours he has found that low percentage of butter-fat.

"For the defence it was proved that there is, among the dairymen of Glasgow and neighbourhood (there being, however, no proof that the practice extends to Paisley, or is known to the public) a practice of selling two qualities of cream,—one of good cream at 2d. a Scotch gill, and another sold at 1d. the Scotch gill of cream taken from milk in the proportion of one pint of cream from four pints of milk, there being also an extra quality of cream which is supplied when specially ordered, and sold at nearly 4d. per Scotch gill. That the cream at 1d. a gill is largely sold to the working classes.

"That the appellant, while admitting that good undiluted cream, to use his own words when examined, is obtainable in the proportion of one pint of cream from eight pints of milk, instructs those in charge of his dairy, in conformity with the above practice, to cream the milk so as to obtain two pints of cream from eight pints of milk, and that the article supplied to the respondent was so creamed.

"I convicted the appellant, because, in my opinion, the article demanded being cream, and that supplied being such as, on analysis, it was found to be, it was not of the quality of cream.

"The question of law for the opinion of the Court is, Whether or not, upon the evidence above stated, the appellant was properly convicted under the statutes founded on?"

Argued for Morton;—The appellant had sold nothing that was not of the nature, substance, and quality of cream. The purchaser did not specify the quality required, but paid the proper price for what he got,

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and got full value for his money. There was no standard quality of cream; but different qualities were sold at different prices. There had not been any introduction of foreign substances, unwholesome or otherwise, into the cream. The case did not properly fall under the section of the statute.¹

Argued for the respondent;—This was not a question of law at all, but only of fact, therefore the Magistrate's judgment was final. There was a standard of cream, and the article supplied did not conform to it. It did not matter that the liquid added was not unwholesome in itself.² The purchaser asked for cream and he did not get it, but got an article adulterated by the introduction of skim milk.

LORD YOUNG.—The conviction here is under section 6 of the "Sale of Food and Drugs Act, 1875," which provides that "no person shall sell, to the prejudice of the purchaser, any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser." And by an amendment, expressed in unfortunate language, which was passed in 1879, it is provided that "in any prosecution under the provisions of the principal Act for selling, to the prejudice of the purchaser, any article of food, or any drug, which is not of the nature, substance, and quality of the article demanded by such purchaser, it shall be no defence to any such prosecution to allege that the purchaser, having bought only for analysis, was not prejudiced by such sale. Neither shall it be a good defence to prove that the article of food or drug in question, though defective in nature, or in substance, or in quality, was not defective in all three respects." I really do not know what "defective in nature" means, and am unable to comprehend how a commodity can be defective in nature and substance but not in quality, or in nature and quality but not in substance. The charge here is that the appellant did, to the prejudice of the purchaser, sell 4d. worth or thereby of cream, which was not of the nature, substance, and quality of the article demanded. Prejudice to the purchaser is alleged, and prejudice must be proved—that he, the seller, acted in a manner prejudicial to a purchaser, although not to the particular purchaser—where, as in the case before us, the purchaser happened to be a sanitary officer, laying a kind of trap in order to catch a person who was supposed to be in the habit of making prejudicial sales.

I inquire, therefore, whether the appellant made a sale which would have been prejudicial to the purchaser under the circumstances had he not been a sanitary officer purchasing for analysis, and trying to catch a man who, as he supposed, was acting in a manner prejudicial to the public. It is stated by the Sheriff that it was proved by the appellant, who is the manager of a large dairy establishment—and his evidence was corroborated by several milk-dealers in extensive business in the district—that there are at least two qualities of cream sold, one of which is sold at one penny a gill to the poorer classes of customers, who can only afford cream of that kind, the better quality—being just double that price, and, so far as we can judge, just double the richness—being twopence a gill, to those willing to pay that price. That is proved in respect to Glasgow and the surrounding neighbourhood, and though it is said

¹ Davidson v. M'Leod, Dec. 14, 1877, *ante*, vol. v. 1, 3 Coup. 511; Webb v. Knight, June 12, 1877, 2 L. R. (Q. B. Div.) 530.

² Rook v. Hopley, May 18, 1878, 3 L. R. (Exch. Div.) 209; Pashler v. Stevenitt, Feb. 10, 1877, 35 L. T. 862.

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that there was no proof that the practice extended to Paisley, there are no facts stated in the case about Paisley in regard to the matter. I am not surprised to learn that there are two qualities of cream sold. I would have been surprised if I had been told that all the cream sold was of one quality; that is so contrary to experience. It is proved in this case that there are at least two qualities of cream sold. Now, the seller was here asked for "sixpence worth of cream." He replied that he had only fourpence worth remaining, and he gave it, and fourpence was paid, being one penny per gill; and it is not suggested that the article was not of the quality of that sold at a penny per gill—and extensively sold, according to the evidence of the milk-dealers who were examined—and it is not proved that what the purchaser got was not fair value for the money—such as in fact satisfied the numerous real customers in that article. And yet the suggestion made to support this prosecution is that each of the numerous customers of the thousands of gills of this cream sold daily at one penny a-gill, is prejudiced, and that a prosecution would be competent in respect of each sale. I cannot hold that. I cannot hold that there are here facts found proved to justify the conclusion that was arrived at. The Sheriff has told us what the facts are which he has found proved, and the inference that he has made from these facts, viz., that but for the circumstance that the purchaser was here a sanitary officer he would have been prejudiced. I cannot hold that this inference which the Sheriff made upon the question of prejudice is a question of fact. I think it is a question that we are entitled to deal with, and to say whether on the facts which the Sheriff has stated there was such prejudice in the sale made as warranted a conviction. I am of opinion that these facts did not justify the inference of prejudice, or warrant the conviction.

I adhere to what I said in the case of *Davidson v. M'Leod* upon the meaning and interpretation of clause 6 of the statute of 1875 (see Couper, iii., 538, 539), and its application to the substance we are here dealing with.

I am of opinion that upon a right view of the law applicable to the facts, which are as I have stated, the conclusion that the purchaser—but for the circumstance that he happened to be a sanitary inspector—was prejudiced was not justified, and that therefore the conviction cannot be sustained.

I think that we are not called upon to say what quantity of fat is necessary to justify the use of the term "cream." I think the question of fact what degree of richness or percentage of fat must exist to justify the use of the word can never arise or be dealt with as an abstract question. I do not know that science has determined it, and the law has not determined it, but has left it for decision with reference to the circumstances of each individual case.

But upon the general evidence in the case, and upon the facts as stated, I am clearly of opinion that a delivery of that article, which was sold at a penny per gill satisfies a demand for "cream" on the streets of Paisley, there being no suggestion that the article was adulterated or unwholesome, or not worth the money that was paid for it. I desire also to point out here, as I did in the case of *Davidson v. M'Leod*, that the most important part of the statute of 1875 is that which is apart altogether from the clause which was here libelled, viz., the part which relates to adulteration by the admixture of unwholesome ingredients or fraudulent devices to disguise the quality, to make the quality appear better than it really is. Where such is the nature of the charge I would not disapprove of even tricks being resorted to in order to catch a delinquent,

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and have him punished, for the protection of the public. But where there is no suggestion of dishonesty, and no device practised, to disguise the article—where only to suit the public taste and purse, there is sold a wholesome undisguised although inferior article at an inferior price, and at the same time a superior article at a higher price—both being, for anything the Court in this case knows to the contrary, quite honestly constituted and sold at a reasonable price—I think that section 6 of the statute does not apply. There was nothing prejudicial in the sale, and nothing for which a penalty ought to be imposed. I am therefore of opinion that the appeal should be sustained, and the conviction set aside.

LORD CRAIGHILL concurred.

LORD JUSTICE-CLERK.—I concur entirely in the result of the opinions of your Lordships. In the former case of *Davidson* I pointed out that the former statutes, before that which was then in force, had referred only to the introduction into drugs and articles of food foreign substances injurious to health, and my impression was that the main, if not the only, object of the new provision in question was to extend that prohibition to the admixture with food or drugs of foreign substances not injurious to health. I have that impression—although I do not rest my opinion in this case on it—and I concur in the remarks of Lord Young on that subject. Here, however, we have to consider two questions relative to the construction of this clause of the statute, first, What is the true meaning of “quality demanded”? and second, What is the meaning of “to the prejudice of the buyer”? Now, on the matter of quality, I am of opinion that this term implies that the demand made was for an article different in quality from that furnished, and that the words used by the purchaser were intended by him and understood by the seller to mean an article of a different grade in quality, although identical in substance. Here the appellant was, as the proof shews, a professed vendor of cream of different qualities, some at fourpence, some at twopence, and some at a penny a-gill. For which did the purchaser ask? His demand was entirely indefinite, knowing, as I hold he must have known, that these qualities were notoriously and publicly sold by the appellant. If he had asked for “fourpence worth of your cream at a penny a-gill,” he would then have got precisely the quality demanded. The vendor, believing that this was what he wanted, gave it to him, and I see nothing to satisfy me that he expected the vendor to construe his demand in any other sense. I cannot approve of this proceeding. It is too like a catch. The “article demanded” must be held to be the article meant by an ordinary purchaser to be obtained—not in any scientific definition. And this illustrates the broad distinction between the introduction of foreign substances into food and drugs and the mere degree of quality in the same substance. Now, here the trader has different qualities of the same generic substance. They are marked by different prices, and their difference is well known, and perfectly discernible by any ordinary buyer. Again, if the purchaser gets precisely what he wanted at the price he stipulated for how can that be to his prejudice? I think, looking to the aspect of this case, that it seems a rather obtrusive interference with what, as far as I can see, is an honest trade.

THE COURT sustained the appeal, and suspended the conviction.

J. & J. ROSS, W.S.—A. KIRK MACKIE, S.S.C.—Agents.

HER MAJESTY'S ADVOCATE.—*Sol.-Gen. Balfour—Taylor Innes, A.-D.*
JOHN THOMAS WITHERINGTON.—*Jameson—Kennedy.*

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Jurisdiction—Falsehood, fraud, and wilful imposition—Locus delicti.—Held that a domiciled Englishman, resident in England, who had been lawfully apprehended in England and brought to Scotland for trial on a charge of falsehood, fraud, and wilful imposition, by sending letters from England to traders in Scotland, containing false statements and representations, whereby he had fraudulently induced them to forward goods to him in England without paying and without intending to pay for the same, was subject to the jurisdiction of the criminal Courts in Scotland as the *forum delicti*.

Falsehood, fraud, and wilful imposition—Fraudulently ordering and obtaining goods on false pretences.—The minor proposition in an indictment under which J W was charged with falsehood, fraud, and wilful imposition, set forth that the panel, in pursuance of a fraudulent scheme of obtaining, on false pretences, the property of other persons, and applying the same to his own uses and purposes without paying or intending to pay therefor, did wickedly and feloniously, and falsely and fraudulently, write a letter with the false and fraudulent printed heading, "J W, commission salesman, Blackburn," and "did enclose therein a bank cheque or order for the sum of £25," bearing to be signed by him, meaning "by the style, terms, and tenor of the said letter, and by the said cheque or order," to represent to A B that he intended to become a *bona fide* purchaser of goods, and that he was "a person of good credit that the said bank cheque or order was equivalent to a ready-money payment, and that the same would be honoured on its being presented for payment at the office in M of the said bank," and this he did, well knowing that he had "no adequate funds in the said bank to meet the said cheque, and that the same would not be honoured." That the said A B, being deceived by his said false and fraudulent representations, sent certain goods which the panel appropriated, and for which he had not paid, and did not intend to pay. Held that the facts set forth in the minor proposition were relevant to support the charge in the major.

JOHN THOMAS WITHERINGTON was charged at a pleading diet, held on 13th June 1881, before a full bench of the High Court of Justiciary in Edinburgh, with the crime of falsehood, fraud, and wilful imposition.

High Court.
Full Bench.
Justiciary
Clerk.

In the indictment five separate offences were libelled.

The minor proposition applicable to the first offence was in the following terms:—"You having formed a fraudulent and felonious scheme of obtaining, on false pretences, goods, the property of another person or other persons, without paying and not intending to pay therefor, and appropriating the same to your own uses and purposes, did, in prosecution of your said scheme, on or about the 10th day of December 1879, at some place in or near Blackburn, in the county of Lancaster, in England, . . . wickedly and feloniously, and falsely and fraudulently, write, or cause to be written, a letter with the false and fraudulent printed heading 'Memorandum—From J. T. Witherington, commission salesman, Blackburn,' dated 'Dec. 10th 1879,' and addressed 'to Mr C. Muirhead,' or similarly headed, dated, and addressed, which letter is in the following or similar terms:—'Sir,—Enclosed cheque, value £25. Forward 100 couple rabbits, 100 brown hares, and small hamper of grouse. Yours, J. T. WITHERINGTON,' and enclose therein a bank cheque or order for the sum of £25, bearing to be signed by you, and purporting to be dated 'Manchester, Dec. 10th 1879,' to be drawn in favour of 'Mr C. Muirhead or bearer,' and to be addressed to 'the Manchester Joint Stock Bank, Limited,' or of some similar purport, and did, time above libelled, transmit, or cause to be transmitted, by post, from Blackburn aforesaid, . . . to the firm of Charles Muirhead & Company, poulterers, then and now or lately

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carrying on business in or near Queen Street, Edinburgh, or to James Muirhead, then and now or lately the sole partner of said firm, the said letter containing the said bank cheque or order; and the same having, in course of post or shortly thereafter been delivered to and received by the said James Muirhead, at the address of his said firm in or near Queen Street, Edinburgh, you did, by the style, terms, and tenor of the said letter, headed as aforesaid, and by the said cheque or order, wickedly and feloniously, falsely, fraudulently, and wilfully, represent and pretend to the said James Muirhead, and induce him to believe, that you intended to purchase from him rabbits, hares, and grouse, at the price or to the value of £25,—that you were a person of good credit, carrying on business as a commission salesman in Blackburn, and able to pay the said price or value,—that the said bank cheque or order was equivalent to a ready money payment,—and that the same would be honoured on its being presented for payment at the office in Manchester of the said bank; and this you did, well knowing, and the fact being, that you had no adequate funds in the said bank to meet the said cheque or order, and that the same would not be honoured, and intending to defraud the said James Muirhead, and to obtain from him rabbits, hares, and grouse, without payment therefor; and the said James Muirhead, being deceived and imposed upon by your said false and fraudulent representations and pretences, did, on the faith thereof, on or about the 11th day of December 1879, at or near the parcel office of the Caledonian Railway Company in or near Princes Street, Edinburgh, deliver, or cause to be delivered, to some person to the prosecutor unknown in the service of the said railway company, for conveyance to you, addressed to you at Blackburn aforesaid, three hampers, containing sixty or thereby hares, and forty or thereby brace of grouse, of the value of £25 sterling, the property, or in the lawful possession of the said James Muirhead, which three hampers, with the said hares and grouse therein, were thereafter conveyed to and delivered to you on or about the 12th day of December 1879 at or near the station of the Lancashire and Yorkshire Railway Company at or near Blackburn aforesaid, and were fraudulently received by you, and appropriated to your own uses and purposes, and you have not paid, and did not intend to pay to the said James Muirhead the price thereof; and the said bank cheque or order having been, on or about the 13th day of December 1879, presented for payment at the office in or near High Street, Manchester, of the said Manchester Joint Stock Bank, payment thereof was lawfully refused, and the said James Muirhead has thus been defrauded by you."

The minor proposition applicable to the third offence was in the following terms:—“(3) You, the said John Thomas Witherington did, in prosecution of your said fraudulent and felonious scheme, on or about the 9th day of December 1880, at or near Blackburn aforesaid, . . . wickedly and feloniously, and falsely and fraudulently, write, or cause to be written, a letter with the false and fraudulent printed heading, ‘Memorandum—From J. T. Witherington, merchant and commission salesman, Wholesale Market, and 1a, 2b, Gregson Lane, Blackburn, Residence, 40 Henrietta St.,’ dated ‘Dec. 9, 1880,’ and addressed ‘to Messrs Andersons & Williams, Leith,’ or similarly headed, dated, and addressed, which letter is in the following or similar terms:—‘Gentlemen, I see you have been sending some herring pads to this town, and as they seem to please well I am thinking of having some myself.—Wood you kindly state your lowest Price pr. Grouse, say for 5 or 10 Grouse also state how some you could complet the order for 10 Grouce I should Requair them making as quick as posible as I wood like the first 5 Grouce ready for the new year thay other 5 do—to follow quickley after if you can comply with this I will

faver you with my order for the Pads I should requaire them a little smaler then those you have sent to this town. I see the party you have been sending to is stocket as he as stored the last you sent up for Spring. —Please reply earley with all puctiarlors and oblige yours truly J. T. Witherington, and did, time last above libelled, transmit, or cause to be transmitted by post from Blackburn aforesaid. . . . to the firm of Andersons & Williamson, basket manufacturers, then and now or lately carrying on business in or near Quality Street, Leith, or to William Williamson, one of the individual partners of the said firm, the letter last above libelled, which was in course of post, or shortly thereafter, delivered to and received by the said firm, or by the said William Williamson, in or near Quality Street aforesaid, and the said firm, or the said William Williamson, having written and transmitted to you by post a letter, in answer to your said last-mentioned letter, stating that the said firm would supply you with herring pads, and the prices thereof, for ready money or cash, which letter you duly received, you did, on or about the 13th day of December 1880, wickedly and feloniously, falsely and fraudulently, despatch or cause to be despatched from Blackburn aforesaid, to the said firm a telegram in the following or similar terms:—‘From J. T. Witherington, Blackburn, to Anderson & Williamson, Quality Street, Leith. Your letter of the 10th received, and your offer accepted, so push on with the order quick as you can,’ which telegram was duly received by the said firm of Andersons & Williamson, or by the said William Williamson; and you did, by the style, terms, and tenor of the letter last above libelled, and of the printed heading thereof, and of the said telegram, transmitted and despatched, or caused to be transmitted and despatched by you as aforesaid, wickedly, and feloniously, falsely, fraudulently, and wilfully represent and pretend to the said firm of Andersons & Williamson, and to the said William Williamson, or to one or other of them, and induce them, or one or other of them, to believe that you intended to become a *bona fide* purchaser of ten gross of herring-pads, and that you would pay the price thereof on delivery, or on demand of payment, or shortly thereafter; and the said firm of Andersons & Williamson, or the said William Williamson, on the faith that you were a *bona fide* purchaser, and would pay the price of the said herring-pads as aforesaid, did, on or about the 31st day of December 1880, at or near the Caledonian Railway Company’s station at or near North Leith, in the county of Midlothian, deliver, or cause to be delivered, to some person or persons to the prosecutor unknown, in the service of the said railway company, for conveyance to you, addressed to you at Blackburn aforesaid, 720 or thereby herring-pads, the property or in the lawful possession of the said firm of Andersons & Williamson, and the same were thereafter conveyed to and delivered to you at or near the Blackburn station of the Lancashire and Yorkshire Railway Company, on or about the 4th day of January 1881; and the said firm of Andersons & Williamson, or the said William Williamson, on the faith that you were a *bona fide* purchaser, and would pay the price of the said herring-pads as aforesaid, did, in further execution of your said order, on or about the 17th day of January 1881, at or near the Caledonian Railway Company’s station at or near North Leith aforesaid, deliver, or cause to be delivered, to some person or persons to the prosecutor unknown in the service of the said railway company, for conveyance to you, addressed to you at Blackburn aforesaid, 720 or thereby herring-pads, the property or in the lawful possession of the said firm of Andersons & Williamson, and the same were thereafter conveyed to and delivered to you at or near the Blackburn station aforesaid, on or about the 20th day of January 1881;

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No. 13. and the said herring-pads, conveyed and delivered to you as aforesaid, were fraudulently received by you, and appropriated to your own uses and purposes, and you have not paid, and you did not intend to pay, to the said firm of Andersons & Williamson the price thereof, and the said firm has thus been wilfully imposed upon and defrauded by you." The minor propositions applicable to the second, fourth, and fifth offences were similar, *mutatis mutandis*, to that first set forth.

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Counsel for the panel objected (1) that the Court had no jurisdiction; (2) that the *species facti* in the minor of the indictment did not amount to the crime libelled in the major.

Argued for the panel;—On the question of jurisdiction: Scotland was not the *forum delicti*. The letters containing the alleged fraudulent misrepresentations were written and posted in England. The panel did nothing criminal or otherwise in Scotland; he never was there from the beginning of the time libelled to the end; and was apprehended in England. That being so, the criminal Courts of Scotland had no jurisdiction. Decisions adverse to this proposition had been pronounced in the cases of *Bradbury* and *Allan*,¹ but doubts had been expressed on the question by Lord Young in the case of *Hall* (*ante*, March 25, 1881, p. 28), at Perth Circuit. This domiciled Englishman was not bound to know that what he was doing was a crime under the laws of Scotland. He owed no duty to those laws, and was not protected by them. If the jurisdiction was affirmed the consequence would be that any man writing to a correspondent in a foreign country would be bound to know the laws of that country. There was no *forum delicti* where a person has not been actually and physically present in the country during at least part of the time when the crime was being committed. If the panel was not bound to know the laws of Scotland it was contrary to every principle of jurisprudence that he should be tried for an offence under them. Up to the time of *Bradbury* and *Allan* it had never been attempted in any country to try such a case. The Act of Parliament (13 Geo. III., c. 31), which constituted certain offences *crimina continua*, only contemplated cases where the criminal was present at the time of the crime and fled into another country. It had nothing to do with such a case as this. An analogy lay between this case and cases of *quasi delict*. For instance, a man seduced a girl in Manchester, she comes to Dundee, and a child, the result of the seduction, is born there. An action for aliment of the child does not lie in Scotland.² Here the place where the crime was really committed was Blackburn. The act of posting the letter put it out of his control, and so completed the crime. It had been so held in cases applicable to various crimes.³

On the relevancy: In no case prior to those of *Bradbury* and *Allan*¹ had it been held that an allegation that the panel got goods by a promise of future payment, when such payment was never intended to be made, was enough to sustain an indictment charging a panel with falsehood, fraud, and wilful imposition. Those two cases certainly decided that such an indictment was relevant, but the latest case, that of *Hall*, *ante*, p. 28, was an authority in the other direction. Fur-

¹ Lord Advocate v. *Bradbury*, June 24, 1872, 2 Coup. 311; Lord Advocate v. *Allan*, Feb. 4, 1873, 2 Coup. 402.

² *Crichton v. Robb*, Feb. 9, 1860, 22 D. 728, 32 Scot. Jur. 279.

³ Her Majesty's Advocate v. M'Gregor, March 16, 1846, Arkley, 49; Her Majesty's Advocate v. Jeffrey, May 16, 1842, 1 Broun, 337; Her Majesty's Advocate v. Michael, Dec. 26, 1842, 1 Broun, 472; Her Majesty's Advocate v. Taylor, May 16, 1853, 1 Irv. 230; Her Majesty's Advocate v. Smith, Jan. 16, 1871, 2 Coup. 1.

ther, the first charge was deficient in specification, as the only facts alleged did not amount to fraud. The heading of the memorandum was not false; it set forth the panel's real name and address. Where a statement is partly true and partly false the prosecutor must specify which part was false.

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Argued for the Crown;—On the question of jurisdiction: The case was ruled by the cases of *Bradbury* and *Allan*, and these cases had been acted upon in innumerable unreported cases, both in the High and Circuit Courts. It was only when the letter was received and acted on the mind of the recipient that the crime was committed. It was in Scotland that the deceit worked, and, further, the delivery of the goods was made in Scotland, where they were handed to a common carrier. The crime flowed into Scotland, whether it was begun in England or no. It might quite well be that there was jurisdiction in the English Courts as well as in the Scotch.

On the question of relevancy: This question was also foreclosed by the authority of *Bradbury* and *Allan* and the earlier cases.¹

LORD JUSTICE-GENERAL.—The crime charged in the major proposition is falsehood, fraud, and wilful imposition. To the constitution of this offence it is necessary that the accused shall have (1) made false representations; (2) for the fraudulent purpose of cheating the person to whom they are made; and (3) to the effect of obtaining from that person by this means goods, money, or some other value or advantage, without any return or consideration, to the profit of the accused, and the corresponding injury of the other party. In the first charge in the minor proposition the prosecutor alleges (1st) that the panel wrote a letter in the following terms to Mr C. Muirhead of Edinburgh:—"Sir,—Enclosed cheque, value £25. Forward 100 couple rabbits, 100 brown hares, and small hamper of grouse;" (2d) that he enclosed in the letter a cheque for £25 signed by him, and addressed to the Manchester Joint Stock Bank (Limited) in favour of Muirhead; (3) that the letter and cheque were written at Blackburn, in England, and transmitted by post to Muirhead at Edinburgh; (4th) that the paper on which the letter was written had a printed heading in these terms—"Memorandum—From J. T. Witherington, commission salesman, Blackburn;" and that this printed heading was false and fraudulent, by which statement, in an indictment for the offence with which we are dealing, nothing else can be meant than that the representation that the writer of the letter was a commission salesman in Blackburn was false in fact, and made for a fraudulent purpose; (5th) that the panel did, "by the style, terms, and tenor of the said letter, headed as aforesaid, and by the said cheque or order, wickedly and feloniously, falsely, fraudulently, and wilfully, represent and pretend to the said James Muirhead, and induce him to believe, that you intended to purchase from him rabbits, hares, and grouse, at the price or to the value of £25—that you were a person of good credit, carrying on business as a commission salesman in Blackburn, and able to pay the said price or value—that the said bank cheque or order was equivalent to a ready-money payment—and that the same would be honoured on its being presented for payment at the office in Manchester of the said bank; and this you did, well knowing, and the fact being, that you had no adequate funds in the said bank to meet the said cheque or order, and that the same would not be honoured, and intending to defraud the said James Muirhead, and to obtain from him rabbits, hares, and grouse, without payment therefor;" (6th) that Muirhead being deceived by these false and fraudulent

¹ Hall, Hume, 1, 173; Her Majesty's Advocate v. James Hall and Others, July 25, 1849, Shaw's Rep. 254.

No. 13. representations and pretences delivered the goods ordered in the letter of the panel to the Caledonian Railway Company in Edinburgh for the purpose of being conveyed to the panel in Blackburn; (7th) that they reached Blackburn, and were appropriated by the panel to his own use; (8th) that the cheque was lawfully refused by the Manchester Bank, *i.e.*, refused because there were not funds in their hands belonging to the panel.

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The other charges in the minor proposition are libelled, *mutatis mutandis*, in the same way, with slight variations,—that is to say, they contain all the same elements of false and fraudulent representations for the purpose of cheating the person addressed, with the success of the imposture and obtaining of the goods without paying for them.

I.

It appears to me that these are relevant charges, because they answer in detail the definition which I have given of the crime, *viz.*, the making of false representations for the fraudulent purpose of cheating the person to whom they are addressed, and to the effect of obtaining by this means the goods of that person without paying for them, to the profit of the panel and the injury of the party imposed on. The case chiefly relied on by the panel's counsel was that of *Hall*, tried by my brother Lord Young at the last Perth Circuit. But that case is clearly distinguishable from the present, for it was not there alleged in the minor proposition that the representations made in the panel's letter were false in fact. He represented himself as being a merchant and commission salesman, with an office in one part of Blackburn and a residence in another, and no part of that statement was alleged to be false. While I am of opinion that the minor proposition of this indictment is relevant in each of its charges, I must not be supposed to represent it as a well drawn indictment, or one that ought to be followed in practice. On the contrary, it seems to me as if it were a sort of experiment to discover how far a prosecutor may go in looseness and want of precision without becoming absolutely irrelevant.

The objection to the jurisdiction of this Court to try the panel for this crime raises a question of much greater interest and importance. But this question has, I apprehend, been settled in a sense adverse to the panel's contention by two decisions of this Court—the case of *Bradbury* in 1872, and the case of *Allan* in 1873, both to be found in the second volume of Couper's Reports.

Under ordinary circumstances I should have thought it enough to refer to these authorities as a sufficient ground for repelling the objection; but some doubts having been suggested as to the soundness of these judgments, and a full Court having been summoned to dispose of the objections to this indictment, it would hardly be satisfactory if the Judges now present did not expound the principle of law on which these prior judgments are founded.

The objection is rested on these considerations, that the panel is an Englishman; that the only fraud or criminal act alleged against him was committed in England; that he never was in Scotland, and is not subject to the criminal law or to the jurisdiction of the criminal Courts of Scotland; that criminal jurisdiction does not extend *extra territorium*, and that the true foundation of ordinary criminal jurisdiction is the *locus delicti*.

The argument is certainly plausible, and there is, at first sight, something startling and paradoxical in the proposition that a man may commit a crime in a place in which he was never personally present. The proposition is nevertheless not only technically or constructively, but actually, true; and if this is so, then the Court of the territory where the crime was committed, and where

the panel was never personally present, has jurisdiction *ratione loci delicti*, and No. 13.
the whole argument of the objector falls.

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The best and most conclusive example, to my mind, in support of the truth of the above proposition, is the case of a murder by poisoning, which takes place in Edinburgh, while the murderer is domiciled and resident in London, and never was in Scotland. The manner in which the murderer accomplishes his purpose is to send by post, or otherwise, to his victim in Edinburgh, a packet of deadly poison, recommending it to him (knowingly and maliciously for the purpose of accomplishing the death) as a salutary medicine fitted to cure a disease under which he is labouring. If the victim acts on the suggestion and swallows the poison it is not doubtful that a murder has been committed in Edinburgh, and that the murderer was in London all the while. The *species facti* may be varied by supposing that the murderer employs an innocent agent to take the poison to the victim in Edinburgh, and persuade him to swallow it as a useful and potent medicine. The result is the same—the crime is committed in Edinburgh by a man who was never there. Baron Hume, in treating of criminal jurisdiction, after stating that this Court can never sustain its own jurisdiction against a Scotchman, *ratione domicilii*, for a murder or other crime committed beyond the limits of Scotland, proceeds to say—"It does not, however, follow that the law shall apply to those offences which have a continuance of time and succession of acts whereof part may happen here and part abroad. If one compose and print a libel in England and circulate it here, or if one forge a deed abroad and utter it here, certainly the proper Courts for the trial of such a case are those of this country, since it is here that the main act is done which completes the crime, . . . nay, more, it may be plausibly argued that he shall be subjected to the same course of trial who shall write an incendiary letter in England, and put it into a course of conveyance thence, by means of which it is received by the person to whom it is addressed in Scotland." In support of this latter statement the learned author cites a case which actually occurred in 1818.

Mr Alison, in his Practice of the Criminal Law, following the earlier authority, says,—“The principle applies to one who writes an incendiary letter in England and sends it down, whether by post or otherwise, to this country. He stands in the same position with one who, standing on the English side of the border, discharges a gun at a man on the Scotch side, and no reasonable doubt can be entertained of the competence of trying him in this country, where his crime has taken its destined effect.”

To shew that this doctrine is not peculiar to the law of Scotland it may be worth while to advert to a very good example in support of the general proposition which I have advanced, stated by Mr Justice Story (Conflict of Laws, sec. 625, b), as having occurred in the Supreme Court of New York. A citizen of Ohio had written what is called a fraudulent paper addressed to citizens of New York, which made him liable to punishment as for a criminal offence. He sent the paper to New York by an innocent agent, and it was there published and the offence there completed. “The defendant being afterwards indicted in New York for the offence, pleaded that he was a natural-born citizen of Ohio, and owed allegiance to that state; that he had never been within the state of New York, and that the fraudulent paper was executed in Ohio. It was determined that this was no answer to the indictment.”

In all the examples which I have adduced the commencement of the criminal action is in one country and the completion of it in another. But in most of

No. 13. these cases the perpetrator's success in his criminal object is necessary to complete the crime. In the case of poisoners there would have been no murder if the victim had not swallowed the poison, and in the case of incendiary letters there would have been no completed crime if they had not been received by the persons to whom they were addressed. There might, no doubt, have been in either case an attempt to commit a crime, which might have been criminally punishable, but the crime intended would not have been effected.

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There are crimes of a different description which may be fully committed without the criminal succeeding in the object for which he commits the crime. The most obvious of these are forging and uttering. If a man forges a bill of exchange or a bank cheque, and sends it by post or by messenger to a correspondent for the purpose of its being used and acted on as genuine, the crime is completed as soon as the document passes out of his own possession or control, although the forgery may be immediately afterwards detected, and no one is injured. A good example of this occurs in the case of *Smith*, 2 Couper, p. 1.

Now, the question of jurisdiction here seems to me to depend on whether the offence charged in this indictment belongs to the former or the latter of these descriptions of crime.

The false and fraudulent representations are contained in a letter written in Blackburn. But the writing of that letter was not in itself a criminal act. The sending of the letter to Muirhead and its receipt by him would still fall short of constituting the crime charged. It is the success of the scheme which is necessary to complete the crime, and without such success in imposing upon Muirhead and inducing him to send the goods ordered there would be no ground for this indictment. While, therefore, the initiatory act of writing and posting the letter takes place in Blackburn, every other step in the action which is necessary to the constitution of the crime takes place in Edinburgh. It is here that Muirhead is imposed on and induced to believe the false and fraudulent representations of the panel; it is here that he acts on the belief so fraudulently created and delivers the goods in Scotland to a public carrier, who is thereby constituted the innocent agent of the panel in carrying out the fraudulent scheme to its completion. When the goods were delivered to the carrier they passed beyond the control of Muirhead, and the imposition was successful and complete. The poison contained in the Blackburn letter had done its work. For these reasons, I am of opinion that Edinburgh is the *locus delicti* in the present case, just as much as if the panel had sent either an accomplice or an innocent agent to carry out his fraudulent scheme to completion in Edinburgh.

LORD JUSTICE-CLERK.—In regard to both questions which have been argued I am of opinion that they are foreclosed by authority, and ought not to be reopened. As regards the point on the relevancy which has been stated regarding the effect of a charge of obtaining goods without the intention of paying for them, or with the intention of not paying for them, I am of opinion that the relevancy of such a charge is no longer a matter of question. It was held to be so, late in the last century, and the judgment in the case of *Hall*, referred to by Baron Hume, has been followed by repeated subsequent decisions, and has been followed ever since by an unbroken chain of practice. It would, I think, be of the worst example, and could only detract from the stability of the law and the respect due to our judgments, if a point settled by so much weight of authority were considered as a matter of controversy. On the other question also—that

of our jurisdiction to try this question—I adhere to the views expressed by Lord Neaves in the case of *Bradbury*, and those of Lord Ardmillan in the case of *Allan*, delivered nine years ago, and followed in numberless cases since. But in addition to what has fallen from your Lordship I shall say a word or two on the ingenious argument submitted to us from the bar, the ingenuity and ability of which were marked, but not more so than the fallacies on which it was built. As a question of international jurisprudence this point is ruled by the most elementary rules of international law. Two elements are requisite to complete the jurisdiction of any criminal Court, and these must coincide. The crime must be committed within the territory; and the Court must have power over the person of the criminal. But if these do coincide, no further question remains.

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As to the first, every State has the right to punish offences committed within its territory, whatever may be the nationality or residence of the offender. This is, of course, the fundamental principle of civil government, and is of universal application. On the second, it may, no doubt, be that the culprit resides beyond the territory, and so beyond the executive power of the Court; but if the executive authority of the country where he resides thinks fit, by treaty or by legislation, to come in aid of the authorities in the *locus delicti*, that difficulty disappears, and if so, no further question can arise.

Now, here, in my opinion, the crime is sufficiently alleged in the indictment to have been committed in Scotland. It is said that the trader who was defrauded was a Scottish trader; he resided in Scotland; his goods of which he was defrauded were in Scotland, and he parted with them in Scotland in consequence of the fraudulent representations of the accused. It can make no difference that the letters which led to the fraud were written in England. They were intended to take effect, and did take effect in Scotland, and I know of no privilege which an Englishman has to commit offences in Scotland which a Scotchman could not plead.

As to the power of this Court over the person of the accused there is no question. The accused sits at our bar. He is not said to be there illegally, but, on the contrary, he is there through the intervention of an Act of Parliament. Both elements of jurisdiction therefore in this case concur.

LORD DEAS.—I entirely concur with both your Lordships upon this important question of jurisdiction, if indeed it can be called a question at the present day, after having been so repeatedly and solemnly decided. And I particularly agree with the observations of the Lord Justice-Clerk as regards the question of relevancy, and that it is quite enough to constitute a relevant charge of falsehood, fraud, and wilful imposition to set forth that a panel, in pursuance of a fraudulent and felonious scheme to obtain the goods of others on false pretences without paying or intending to pay for the same, passes himself off as a *bona fide* purchaser, and so obtains and appropriates the goods which he does not pay for, and which he all along intended not to pay for. Innumerable indictments framed on this principle applicable to varying circumstances have been sustained, sometimes on argument, and frequently in respect the question was understood by the bar to be no longer open. It is not essential, in order to form a precedent that an indictment should have been objected to and the objection repelled. It is the duty and the practice of every Judge of the Court of Justiciary to examine carefully every indictment, whether objected to or not, and to find it

No. 13. irrelevant if it be so. It would be very remarkable if this were otherwise—if some parties were to be carelessly tried and convicted for alleged crimes which were not relevantly libelled, and which in the case of others similarly indicted were dealt with as no crimes at all. That has never been the practice in this country. Upon the long and elaborate interlocutors of relevancy formerly pronounced a great part of our criminal law is founded.

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As regards the remark made that a charge of falsehood, fraud, and wilful imposition ought to specify, *inter alia*, what the particular falsehood was, I have to observe that a false representation may be, and very often is, just as plainly made by the mere acts done as by words spoken. For instance, I tried a case on Circuit (*Wilkie*, 3 Coup. 102) in which the panel had contrived to live sumptuously, for how long I do not remember, by frequenting a succession of hotels in different localities, and without paying any bills at any of them, walking out on some slight pretence, saying he meant to return immediately, or very shortly, but never doing so. The false representation here consisted solely in assuming the manner and appearance of a *bona fide* customer. The case was keenly defended, but the jury, having the whole circumstances before them, had no difficulty in finding him guilty as libelled.

As regards the question of jurisdiction which has been of new debated in this case of *Witherington*, it is just as little open as the question of relevancy to which I have just alluded. Both points were involved in the indictment now lying on the bench against *John Irwin Watson*, who was tried before me at Glasgow in September 1879. Watson resided in Liverpool, where he was apprehended and brought to Scotland to answer to the charges against him. The indictment set forth in the major proposition that "falsehood, fraud, and wilful imposition is a crime of an heinous nature, and severely punishable: yet true it is and of verity that you, the said John Irwin Watson, are guilty of the said crime, actor or art and part: in so far as you, having formed a fraudulent and felonious scheme for the purpose of obtaining the goods of others, and applying the same to your own uses and purposes without paying or intending to pay therefor, you, the said John Irwin Watson, did, in pursuance of the said fraudulent scheme (1), on or about the 10th day of September 1878, in or near Lower Breck Road, Annfield, Liverpool, or at some other place in Liverpool to the prosecutor unknown, wickedly and feloniously, falsely and fraudulently, write or cause or procure to be written and transmitted by post, a letter bearing the subscription 'D. Fisher,' or a similar subscription, addressed to Robert Robin, wine and spirit merchant, 62 Argyle Street, Glasgow, in the following or similar terms:—'10/9/78—Dear Mr Robin,—Since leaving Glasgow I can't get any whisky here as I like. Please send me two galls. of your very best per rail. Cheque on receipt.—Truly yours, D. Fisher,'"—which letter was duly received in course of post by the person to whom it was addressed, and the whisky forwarded by rail accordingly, and delivery obtained by the panel at the offices of the Globe Parcels Express Company in North St John Street, Liverpool, on 12th September 1878, and fraudulently appropriated by the panel to his own uses and purposes, "and you have not paid and did not intend to pay for the said goods," and the owner had thereby been defrauded by the panel.

The indictment contained thirteen other charges of a similar nature, all of them, with few exceptions, applicable to whisky, from January 1878 to January 1879 inclusive. The panel ultimately pleaded guilty to nine of these charges, and received sentence of three years' penal servitude.

I had the High Court cases of *Bradbury* and *Allan* to guide me, and it never occurred to me that I could do otherwise than follow these cases, even if I had had doubts of the principles involved in the judgments, as I had none.

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LORD MURE.—I am of the same opinion on both points. The questions are important, but I cannot say that I have felt any difficulty on either of them.

As regards the relevancy of the indictment, that is, I think, clear, even according to the strictest rules of law which have been applied in dealing with crimes of this description. For it contains in the minor proposition, as I read it, the three leading constituent elements of the crime of "falsehood, fraud, and wilful imposition." There is a distinct allegation (1) of "the assumption of a false character;" (2) of the fraudulent use of the letter or letters in which that false character was assumed; and (3) of the successful imposition on the parties to whom the letters were addressed, whereby the panel obtained delivery of goods, which he appropriated to his own uses and purposes, without having paid, and without having had any intention of paying therefor. These points being established in evidence, I cannot doubt that the panel must be held guilty of the crime charged in the major proposition of the indictment.

The question of jurisdiction I consider settled by decision, and now no longer open. It was deliberately so settled in this Court in the cases of *Bradbury* and of *Allan*, to which your Lordships have referred, and if the records of the Court were carefully examined I have no doubt that a course of practice would be disclosed in which parties charged with committing the crime of falsehood, fraud, and wilful imposition, in circumstances substantially similar to those which are here libelled, viz., of the crime being conceived or planned in England by parties residing there, but perpetrated or completed in Scotland, have been tried and convicted here. But even if the question were open I should have had no difficulty in concurring. The authority of the leading writers on criminal law and on the sources of criminal jurisdiction in Scotland to which your Lordship in the chair has referred are clear upon the subject, and seem to me conclusive of the question. And the illustrations given appear to me to proceed upon a fair application of the principles upon which the doctrine of *crimen continuum* is based. Because while the crime is here charged as having been conceived in England, it was substantially perpetrated in Scotland. This was, I think, very clearly brought out in the few observations which fell from the Solicitor-General on this point, when he said that the imposition was not effected till the letter reached the person to whom it was written and addressed in Edinburgh. It was in Scotland, therefore, that the party addressed was deceived and imposed upon, and it was in Scotland that he parted with his goods. And these facts being so averred, Scotland is, I think, a *locus* the Courts of which have jurisdiction to try the case.

LORD CRAIGHILL.—I concur. Both questions are, I think, foreclosed by authority, and the objection against relevancy is foreclosed not only by the recent cases of *Bradbury* and *Allan*, but also by the case of *Hall* in 1849, and the still earlier case of *Hall* decided in 1789, the circumstances of which are mentioned in pp. 172-73 of the first volume of Hume's Commentaries. These cases, and the practice which has followed upon them, leave no doubt as to the law. The question as to jurisdiction is, as I have said, also foreclosed, inas-

No. 13. much as it was expressly decided in the cases of *Bradbury* and *Allan* already mentioned.

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Even, however, if there had been no previous decisions to guide us, I should have come, without any difficulty, to the conclusion that neither objection could be sustained. It is not doubtful, in my opinion, that the allegations in the minor support the major proposition of this indictment, nor that if these averments are true, an offence was committed in Scotland. That being so, we must have jurisdiction over the criminal, whoever he may be, or wherever he was at the time the offence was committed. If, indeed, it was the law of Scotland that though a crime was committed, the person committing it could not be held answerable unless he was at the time upon the spot, an objection against jurisdiction in this case would have been formidable, seeing that the accused remained in England doing what was done through the intervention of others. Once grant, however, that a person may be guilty of a crime, although not personally on the spot when it was committed, and the unsoundness of the objection must also be conceded. For it cannot be that the Courts in Scotland are not entitled to try those who are guilty of crimes committed in Scotland, and that there may be accession without personal presence is shewn by what has occurred in many departments of the criminal law, notoriously in the case of persons who through another utter a forged writing or utter base coin. Nay, he may even be art and part in the commission of theft though personally far away at the time from the scene of depredation, and even ignorant of the particular offence which was in contemplation. These things are proved by the practice of this Court. Cases as to uttering I think it unnecessary to cite, but as accession without personal presence in the commission of theft is of less frequent occurrence, I cite three of the cases by which the law upon this subject is illustrated. These are the case of *Walker*, the date of which is 1801, the case of *Wright*, the date of which is 1802, and the case of *Wilson v. Macdonald*, the date of which is 1818. The two first are referred to and commented on by Mr Burnett in his treatise on the Criminal Law, pp. 275 and 555, and all three are set forth in the notes upon p. 116 of the first volume of the Commentaries of Baron Hume.

LORD ADAM.—I concur.

LORD YOUNG was absent.

THE COURT repelled the objection to jurisdiction, and found the libel relevant.

C. MORTON, W.S., Crown Agent—THOMAS M'NAUGHT, S.S.C.—Agents.

No. 14. HER MAJESTY'S ADVOCATE.—*Rutherford, A.-D.*—*Taylor Innes, A.-D.*
JOHN HALL.—*Jameson—Sym.*

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Indictment—Relevancy—Refusal of leave to desert diet pro loco et tempore—Dismissal of panel from bar—Re-indictment for same offence—Competency.—Where a libel was found not relevant, and the Court refused a motion by the Advocate-Depute to desert the diet *pro loco et tempore*, and dismissed the panel from the bar, held that the prosecutor was not barred from raising a new libel for the same offence.

Observed that when the diet is deserted *simpliciter* on the motion of the prosecutor, he is barred from further proceedings for the same offence.

Ante, p. 28.

JOHN HALL was charged on 25th March 1881, at the Circuit Court at Perth, before Lord Young, with the crime of falsehood, fraud, and wilful imposition.

The record of the Court bore—"John Hall (falsehood, fraud, and wilful imposition). Objections having been stated to the relevancy of the libel by Mr Jameson, on behalf of the panel, Lord Young finds the libel not relevant. G. YOUNG.

"The Court dismissed the panel from the bar. ÆNEAS M'BEAN."

Hall was some time after re-apprehended under a new warrant, and was re-indicted for the same offences with which he had been charged at Perth, alteration having been made on the indictment to meet the objections sustained by Lord Young.

On 13th June, before a full bench, objection was taken to the jurisdiction of the Court. This objection was identical with that taken in the case of *Witherington*, *ante*, p. 41, and the judgment of the Court pronounced upon 17th June ruled it also. The objection of want of jurisdiction was therefore repelled, and the indictment was found relevant.

Counsel for the panel thereupon took the further objection that, the panel having been dismissed from the bar at the Circuit Court by the presiding Judge, no further proceedings were competent for the same offences libelled in the first indictment.

It was stated from the bar that at the Circuit Court the indictment having been found irrelevant, the Advocate-Depute (Taylor Innes) moved the Court for leave to desert the diet *pro loco et tempore*, and that leave was refused by Lord Young.

Argued for panel;—It being admitted that the Court had refused the motion to desert the diet against the panel *pro loco et tempore*, and dismissed him from the bar, further proceedings for the same offence were incompetent. A criminal diet must either (1) be continued to a day certain; (2) be deserted *pro loco et tempore*; or (3) be deserted *simpliciter*.¹ The calling of the diet was the act of the Court,² and it is in the power of the Court if they are not satisfied to grant the prosecutor's motion for a desertion *pro loco et tempore*, to refuse to desert otherwise than *simpliciter*. That latter right is at times exercised.³ There were not many instances of refusal of the motion to desert *pro loco et tempore*, because it was usually granted almost as matter of course. It was, however, refused in the case of *M'Atamney*.⁴ In this matter the case of a libel being found relevant does not differ from the case of a libel being found irrelevant. If the prosecutor admittedly cannot go on, and the Court refuses to desert otherwise than *simpliciter*, it must import that the Court does not wish a new prosecution to be raised. There is, indeed, express authority for the proposition in the case of *Tabram*¹, in the opinion of Lord Ardmillan. If these new proceedings were allowed the prosecutor, after the motion for desertion *pro loco et tempore* was refused, would be precisely in the same position as if it had been granted. The motion must have been refused to stop future proceedings, and for no other reason.

Argued for the Lord Advocate;—There was nothing in the fact that a libel was found irrelevant, and that the panel was allowed to go from the

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¹ Her Majesty's Advocate v. Tabram, May 23, 1872, 2 Coup. 259.

² Hume, ii., 275.

³ Hume, ii., 276.

⁴ Her Majesty's Advocate v. M'Atamney, April 6, 1867, 5 Irv. 363.

No. 14. bar, to exclude new proceedings.¹ The prisoner could not be said to have tholed an assize.

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LORD JUSTICE-GENERAL.—The panel here declines to plead to this indictment, on the ground of certain proceedings which took place at the last Perth Circuit, where he was indicted for the same offence, and of which this is the record :—"John Hall was indicted and accused of falsehood, fraud, and wilful imposition. Objections having been stated to the relevancy of the libel on behalf of the panel, Lord Young finds the libel not relevant. The Court dismissed the panel from the bar." That is the whole record. We are told that the Advocate-Depute, on the libel being found irrelevant, made a motion to the Court to desert the diet *pro loco et tempore*, and that that motion was refused. It does not appear to me that the fact of that motion having been made and refused affects the question before us at all. The question is, What is the effect of the Court having dismissed the panel from the bar? Now, when a libel is found irrelevant the course which is very usually followed is that the prosecutor moves the Court to desert the diet *pro loco et tempore*. But supposing the prosecutor not to do so—supposing he makes no motion at all—it is plain that the process must be got rid of somehow or other, and I apprehend that that is the very position of matters to which the observation of Baron Hume refers (vol. ii. 277), where he says—"If the Court desert the diet on account of some objection to the citation, or the form or relevancy of the libel, this also of its own nature is a special judgment relative only to that particular process, and it cannot hinder the raising of a new libel in better form." That means, according to my reading of it, that whether the prosecutor make any motion on the subject or not, if the libel is found irrelevant, the Court must get rid of the process, and may do so by deserting the diet *simpliciter*. But whether the diet is deserted *simpliciter* or not, or whether the Court simply dismisses the panel from the bar in respect of the libel being found irrelevant, it rather appears to me that the result will be the same. Dismissing the panel from the bar seems the logical consequence of finding the libel irrelevant. There could be no further prosecution when the libel was found irrelevant. There could not be a single step taken further. The case is at an end, but it could not hinder the raising of a new process. This, however, is an entirely different proceeding from another which Baron Hume mentions, where the prosecutor moves the Court to desert the diet *simpliciter*. The effect of that is quite different, and it has been adjudged in a well-known case what that effect is. Baron Hume says—"If a prosecutor being present shall himself move the Court to desert the diet *simpliciter*, and thus neither allude to any dilatory cause for dropping his present libel nor intimate any purpose to raise a new one, such a measure cannot well be construed otherwise than as a thorough relinquishment or discharge of his right of prosecution. This construction was finally settled in the case of *William Leslie*, where the libel having been deserted *simpliciter* on the prosecutor's own motion, he was found to have raised a bar thereby in the way of all further process at his instance. In truth, judgment seems to have been given to the same effect long ago in the case of *John Leith & Others*, Nov. 20, 1671." Now, it appears to me that that expounds the law in this matter quite consistently, and very clearly, to be that the desertion of a diet *simpliciter* on the motion of the prosecutor is an end of all proceedings against the panel

¹ Hume, ii., 277.

for the offence libelled against him. But nothing that follows in ordinary course upon finding a libel irrelevant can have that effect. It does not matter whether the diet is deserted on the motion of the prosecutor *pro loco et tempore*, or whether, failing any motion on his part, the Judge simply gets rid of the process by turning it out of Court and dismissing the prisoner from the bar. I am therefore of opinion that this is a bad objection.

No. 14.
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LORD JUSTICE-CLERK.—I entertain no doubt at all upon the point which has been raised, and I entirely concur with your Lordship. I only wish to add, that my impression is that the distinction between an interlocutor deserting the diet *simpliciter* and one deserting the diet *pro loco et tempore* seems to be that in the first case the process is ended, while in the second it remains to this effect, that a new libel only requires to be served to render all the previous procedure available. The effect of this distinction, however, would require further consideration. It does not affect the question of the right to raise a new libel. The mere finding of a libel irrelevant, and a consequent interlocutor deserting the diet *simpliciter*, and dismissing the panel from the bar, is only a termination to that process. It is not a bar to a new libel differently framed unless it have proceeded on the motion of the prosecutor. That being my opinion, I concur in holding that the objection should not be sustained.

LORD DEAS, LORD MURE, LORD CRAIGHILL, and LORD ADAM concurred.

LORD YOUNG was absent.

THE COURT repelled the objection.

C. MORTON, W.S., Crown Agent—JAMES JUNNER, S.S.C.—Agents.

JAMES WARNOCK, Appellant.—*Jameson*.
ARTHUR JOHNSTONE, Respondent.—*J. P. B. Robertson*.

No. 15.

July 15, 1881.
Warnock v.
Johnstone.

Statute—Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), sec. 6, sub-sec. 4.—*Buttermilk*—*Extraneous matter necessary in preparation of article*.—Sec. 6 of the Sale of Food and Drugs Act, 1875, sets forth that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, . . . provided that an offence shall not be deemed to be committed under this section . . . (4) where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."

A person was convicted of an offence under the said section for selling buttermilk containing "30 per cent of added water," to the prejudice of the purchaser. On appeal the Court *quashed* the conviction, on the ground that as the only charge was that of selling buttermilk with a certain quantity of added water, and it had been proved that the addition of some water was necessary in the process of manufacture, the case fell under the exception of sub-sec. 4. (Lord Young, while concurring, preferring to rest his judgment on the ground that the facts did not amount to a contravention of the 6th section of the statute, inasmuch as the water was not proved to have been added with the intention of cheating the public, or to the prejudice of the purchaser.)

Question (per Lord Justice-Clerk) whether sub-sec. 4 did not exclude the possibility of a conviction in respect of the sale of any articles in which extraneous matter was necessarily mixed in the course of preparation or collection, however great the proportion of that extraneous matter might be.

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HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

IN the Sheriff Court of Lanarkshire, at Airdrie, James Warnock, farmer at South Howden farm, in the parish of Bothwell, was charged, at the instance of Arthur Johnstone, inspector of nuisances for the said parish, with an offence within the meaning of sec. 6 of the Food and Drugs Act, 1875,* "in so far as on Tuesday, the 10th day of May 1881 years, the said James Warnock did, by himself, on or near the public road leading through Mossend, in the parish of Bothwell aforesaid, . . . sell to the said Arthur Johnstone a pennyworth of buttermilk, being an article of food, which article of food, when so sold as aforesaid, was not of the nature, substance, and quality demanded, having been found on analysis to contain 30 per cent of added water, and was so sold as aforesaid to the prejudice of the said Arthur Johnstone, the purchaser thereof."

On 8th June 1881, evidence having been led in the case, the Sheriff-substitute (Mair) found the charge proven, and imposed a mitigated penalty of five shillings, "as it was stated that this was the first case of the kind in the district."

Warnock demanded a case for the consideration of the High Court of Justiciary.

The following facts were stated in the case:—The appellant, on the day libelled, sold to the respondent one pennyworth of buttermilk. The respondent thereupon divided the milk into three parts "by putting it into three bottles, and gave one of them to the appellant; that he then stated to the appellant that the milk was to be analysed by a public analyst; and that, after so stating this, the appellant told the inspector that the milk contained water. After the inspector sealed the article, a portion was sent to the public analyst," John Clark, "who furnished a certificate in reference thereto in the following terms:—'The Sale of Food and Drugs Act, 1875, and Sale of Food and Drugs Amendment Act, 1879. I, the undersigned, public analyst for the county of Lanark, do hereby certify that I received on the 11th day of May 1881 from you a sample of buttermilk, marked No. 12, securely sealed, for analysis; and have analysed the same, and declare the result of my analysis to be as follows:—I am of opinion that this buttermilk is diluted with 30 per cent of added water. *Note.*—In cold weather it is customary to add hot water to milk which is to be churned to bring up the temperature, but in no case is it necessary to add more than 20 per cent. . . .—JOHN CLARK, Ph.D., at 138 Bath Street, Glasgow.'

"The analyst, when examined, proved his report, and stated that in no case was it necessary to add more than 20 per cent of water to the milk; and that the opinion of the trade, so far as he knew, was that 20 per cent of water was quite sufficient."

"For the defence four farmers were examined, who all had considerable experience as to churning, and who disposed of their buttermilk in a similar manner to the appellant, and who stated that it was necessary at all times to use water in churning, and that they had always done so, and spoke to its being a universal and well-known practice.

"The quantity of water required, they explained, varied considerably, and depended for the most part on the state of the temperature, as the

* Sec. 6 of the Sale of Food and Drugs Act, 1875, enacts:—"No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20, provided that an offence shall not be deemed to be committed under this section in the following cases,—that is to say . . . (4) where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation. . . ."

milk would only churn when brought up to and kept at a temperature of about 60 degrees. No. 15.

"Three of these spoke to varying quantities of water being used up to 25 per cent, while the fourth stated that water to the extent of 30, 40, and even as much as 50 per cent might be required. . . . Two parties who had purchased buttermilk from the appellant testified that they considered it as fair good buttermilk, and quite up to the quality of that sold in the neighbourhood. July 15, 1881.
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"The appellant stated that he sold the article to the inspector in the same state as that in which it came from the churn, no additional water having been put into it."

The questions of law stated for the opinion of the Court were:—"(1) Whether the finding of the Sheriff-substitute, that the sample in question contained 30 per cent of added water, was justified by the evidence submitted on the point; and, if not, whether the conviction can stand. (2) Seeing that water is invariably used in churning, and is necessary for the preparation of buttermilk, whether the case does not fall under exception 4 to clause 6 of the 'Sale of Food and Drugs Act, 1875'; and, if so, whether the conviction can stand. (3) Whether, in the state of the foregoing facts, it can be held that it was sufficiently brought to the knowledge of the purchaser that he was purchasing an article containing water; and, if so, whether the sale could be said to be to the prejudice of the purchaser; and, if not to the prejudice of the purchaser, whether the conviction can stand. (4) Whether, seeing the appellant only sold as buttermilk an article of food well known invariably to contain a greater or less extent of water, and that without the purchaser making any reference as to the quality, the section founded on justified the judgment pronounced; and, if not, whether the conviction can stand. (5) Whether or not, in the whole circumstances, upon the evidence above stated, the appellant was properly convicted under the statutes founded on."

Argued for the appellant;—The article sold to the respondent was of the nature, substance, and quality of that demanded, and was not sold to him to his prejudice. There was no recognised standard of purity in buttermilk. Further, the case fell under the exception set forth in sub-section 4 of the 6th section of the Act, as it was proved and stated as a fact by the Sheriff that water was invariably added to the milk before the process of churning commenced, and was necessary for the preparation of buttermilk.

Argued for the respondent;—The question was one purely of fact, and the Sheriff's judgment was therefore final. He had stated as fact that there was more water in the sample analysed than was necessary, and therefore the 4th sub-section did not apply. The proportion of extraneous matter necessary was a question for the Sheriff alone, and his decision was not subject to review on that point.

LORD JUSTICE-CLERK.—I think that this appeal ought to be sustained. To the 6th section of the Sale of Food and Drugs Act, 1875, on which this prosecution proceeds, there is in the 4th sub-section an exception expressed in very general terms:—"Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation," then no offence shall be deemed to have been committed.

Now, here we are not called upon to decide whether, where there is an unreasonable quantity of such extraneous matter found in any food or drug, it may not be the subject of a prosecution under the section. That may be doubtful, as it is not by any means clearly stated whether there is not an exception made

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of all articles with extraneous matter necessarily in them. If such a case was meant to be made here, then certainly the libel does not cover it, for in that case it should have been set forth that it was well known what quantity of that extraneous matter there should be in the substance when sold. Now, there is no statement of that kind in the case here at all. On these grounds the difficulty which I confess at first I had, as to how far we could go behind the evidence set forth by the Sheriff, is met by the terms of the second question for our consideration. In the case he tells us, as fact, that water is invariably used in churning, and is necessary for the preparation of buttermilk. That being so, I think the case is within the exception. I must say that I think this is by no means a profitable kind of prosecution, and ought never to have been brought. Looking at the facts stated in the case, I cannot say that I think the quantity of water found in the buttermilk was so extravagant as—if a prosecution could be brought on that ground—to afford ground for a conviction; but we need not decide that question now. I think the appeal should be sustained.

LORD YOUNG.—I concur. I assume the facts to be as stated. I assume that prior to the churning, of which this buttermilk was one of the results, 30 per cent of water was added. The Sheriff finds that that was so. I assume, further, that the analyst thought that no more than 20 per cent of water should have been added. The Sheriff, however, informs us that certain dairymen and farmers were of a different opinion to the analyst as to the quantity of water needful or advisable, and, with great respect to the Sheriff's judgment, I cannot help thinking that these dairymen and farmers, if their evidence is to be relied on, are the best judges on the matter. Now, the result of churning is to produce butter, and a fluid which, ever since churning was known in this country, is called buttermilk, and that without any reference to analysis as to the quantity of water added before the churning took place. Well, without challenging the Sheriff in any of his findings in fact, I suppose that buttermilk is a lawful article of commerce, and that to sell it under that name is not illegal. The buttermilk might have been adulterated for the purpose of cheating the public by concealing its quality. But I find no suggestion of that here. Where, then, is the contravention of this 6th section? How was the purchaser prejudiced? I cannot see it. It is not suggested that the article was not worth the money given for it; all that is said is that the analyst says there should only be 20 per cent of water added before churning, and in that he is contradicted by the trade.

I think this prosecution should never have been instituted. It is an abuse of the statute. I do not care to put my judgment on the 4th sub-section alone, for I think it more wholesome to rest it on the more general grounds which I have stated, that the facts set forth do not shew a contravention of the section itself; but, with reference to the 4th sub-section, I am disposed to agree that the statute does not apply to a greater or less quantity of extraneous matter being used in the manufacture of the article. The skill of manufacture consists in determining the quantity of ingredients to be used in the operation. But, still agreeing on that point, I wish to rest my judgment on the grounds I first stated.

LORD CRAIGHILL.—I agree with your Lordship in the chair in your grounds of judgment, and with both your Lordships in the decision arrived at. I think the case falls under the 4th sub-section, and is not one in which, on the facts stated, there ought to have been a conviction. The Sheriff states that without

water buttermilk cannot be made, and on that ground I think the conviction cannot stand. With reference to what Lord Young said, I wish to add that I do not think this is a question of fraud at all. For wise purposes the Legislature has thought fit to make this section, and if any person supplies to another a different subject to what was asked for, and it is proved to be to the purchaser's prejudice, then there is a contravention of the statute. Prejudice is an easy word to understand. Where a person gets a substance different in nature, quality, or substance from what he asked for, then, unless the contrary be proved, there is that in the case which may be taken as a contravention. The question here is, was this an article different in quality, nature, or substance from what was demanded? It appears to me that it was not, because it, from the mode of its manufacture, necessarily contained water.

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THE COURT sustained the appeal, and quashed the conviction.

THOMAS CARMICHAEL, S.S.C.—WILLIAM B. GLEN, S.S.C.—Agents.

52 of Patt Binn

CASES

DECIDED IN

THE COURT OF SESSION, &c.

1880-81.

WINTER SESSION.

ANGUS KENNEDY, Appellant.—*Patten.*

No. 1.

JOHN ALEXANDER, Objector and Respondent.—*J. P. B. Robertson.*

Nov. 8, 1880.

County Franchise—Representation of the People (Scotland) Act, 1832, sec. 9, and schedule G—Representation of the People Act, 1868, sec. 6—Tenant and Occupant—Entry in Register—Necessity for statement of occupancy on the Roll. Kennedy v. Alexander.
—Held that “tenant” is a sufficient entry in the qualification column of the register of voters, without the addition of the words “and occupant,” even in cases where “actual personal occupancy” is essential to the qualification.

JOHN ALEXANDER objected to Angus Kennedy, who appeared on the Registration roll of voters for 1879 as “Angus Kennedy, farmer, joint tenant, farm, Achslair,” being continued on the roll of voters for Argyllshire, in respect that the qualification set forth in the electoral register was insufficient under the Act of 1868.* The rental of the farm was £71, and there were three joint tenants. The lease was under fifty-seven years.

Lord Mure.
Lord Gifford.
Lord Craighill.
Sheriff of Argyllshire.
B.

The Sheriff (Forbes Irvine) sustained the objection, and expunged Kennedy's name from the roll.

Kennedy took a case.

The facts as stated in the case were,—“The assessor, in correcting the register, had added the words ‘and occupant’ to the qualification without a new claim or notice on the church doors. The original entry was objected to, and also the addition made, as *ultra vires* of the assessor. I was asked to add the words ‘and occupant,’ but I declined to do so, in respect it appears to me to be a change of qualification, and beyond the powers conferred on me by the 44th section of the County Voters Act.”

The questions of law for the decision of the Court of Appeal were (1)

* Sec. 9 of the Representation of the People (Scotland) Act, 1832, enacts, *inter alia*, that tenants in lands, &c. shall be entitled to a vote “where such tenant shall, for the foresaid period of twelve months, have been in the actual personal occupancy of any such subject where the yearly rent is not less than fifty pounds,” &c. Sec. 6 of the Representation of the People (Scotland) Act, 1868, enacts, *inter alia*, that every person shall be entitled to vote who “is and has been during the twelve calendar months immediately preceding the last day of July in the actual personal occupancy as tenant of lands and heritages within the county of the annual value of fourteen pounds or upwards, as appearing on the valuation-roll of such county.”

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"Was the original entry in the electoral register sufficient? (2) Had the assessor the power to make the addition above mentioned? And (3) Had the Sheriff the power to do so?"

Argued for the appellant (Ques. 1);—The original entry on the roll was sufficient without the addition of the words "and occupant." No change in the form of the schedule G, No. 1, according to which the register was made up under the Act of 1832, had been made by the Act of 1868. By that schedule "tenant" was all the entry required on the roll, and yet in certain cases "actual personal occupancy" was required under that Act to entitle the tenant to be put upon the roll as much as it is required by sec. 6 of the Act of 1868. There being no change introduced by the Act of 1868, the words "and occupant" were superfluous. If the first question was answered in the affirmative it was unnecessary for the Court to answer the second and third, as in that case the alteration complained of was unnecessary.

Argued for respondent (Ques. 1);—The words "and occupant" were necessary to be entered on the roll to shew that the voter was qualified under the provisions of the 1868 Act. Under that Act personal occupancy was in all cases required, and the only classes of tenancy which under the Act of 1832 afforded a right of voting without "actual personal occupancy" were tenancy under a lease for fifty-seven years where the tenant's annual interest in the subjects was not less than £10, and tenancy under a lease for nineteen years where his annual interest was not less than £50. Now, the valuation-roll proved that this voter could not be enrolled as joint tenant of this farm under either of these classes, as the rent was only sufficient to afford a qualification for one tenant, and here there were three joint tenants. *Prima facie*, therefore, it appeared from the roll that this voter had not a good qualification; the addition of the words "and occupant" would shew the true state of affairs. At present the voter was registered on a qualification which he did not possess.

LORD CRAIGHILL.—I have listened attentively to the arguments on all the questions set forth in the case, and the consideration I have given to them leads me to say that I think the appellant is entitled to succeed on the first question, and therefore, if your Lordships concur in that view, it will be unnecessary to go any further into the inquiry.

The appellant stood on the roll for 1879 as joint tenant. There were three tenants on the farm, and the rent was £71, which gave him the necessary qualification under section 6 of the Act of 1868. But it is necessary under that section that a tenant should not merely be a tenant, but that he should also be in "actual personal occupancy," so this voter might be a joint tenant, and yet he might not have the statutory qualification. There is no doubt about that. Now, the way the appellant was enrolled was as "joint tenant;" there was nothing about occupancy in the roll of 1879; and that being so, this objection was taken. If it is necessary not only that there should be personal occupancy, but that it should be set forth on the roll, it is plain that the objection is good. If, on the other hand, the last is not necessary, then the objection is plainly bad. I have come to the conclusion that the circumstance of actual personal occupancy is not required as a statutory provision to be set forth on the roll. I do not doubt that, if not always, it has frequently been inserted in the roll since 1868, but it appears to me that the effect of this section of the 1868 Act, shortly stated, is nothing but a reduction of one of the qualifications created by the Act of 1832. Under the 9th section of that Act there were

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tenants of three classes—first, tenants under leases of fifty-seven years, who, whether in actual occupancy or not, were entitled to be on the roll if the clear yearly value of their interest was not less than £10; second, tenants in the same position as to occupancy if they held under a nineteen years' lease and the clear yearly value of their interest was not less than £50; and last of all, tenants who were entitled to be put on the roll if their rent amounted to £50, even if they had nothing but a lease from year to year, but then it was necessary that they should be in actual personal occupancy. Now, these last are, it appears to me, in precisely the same position as tenants under the 1868 Act. Both may be merely tenants from year to year, but both must be in actual personal occupancy. But it was not required by the Act of 1832 that occupancy should be set forth on the register. The schedule to that Act shews the contrary. If the voter is to be registered as proprietor he is described as such; and if as tenant—whether occupancy is or is not required as part of his qualification—he is to be described as tenant. All this being so, and no change having been made with regard to the form of registration by the Act of 1868, I cannot see why we are to have a different form of registration under this Act from what we had under the Act of 1832. I am of opinion, therefore, that we should sustain the appeal on the first question submitted to us, and I think it unnecessary to give any answer to the second and third.

LORD GIFFORD.—I am of the same opinion, and have come to it without much difficulty. I think it very important to start with this, that it is not said that the appellant was not entitled to a vote. But it is argued that he is to be struck off the roll this year because in the old electoral roll he was not properly entered as to his qualification, and because in making up the new roll there was no means of altering the description. Now, I agree that there is no statutory regulation requiring that when a person's qualification depends on occupancy, the fact of occupancy shall be mentioned in the roll. It is contended, on the other hand, that the schedule of the Act of 1832, though it has only columns for proprietors and tenants, means that in those columns you shall also describe the essential requisites without which the tenant or proprietor would not be entitled to the franchise. Were we to hold this it would be to make a new statutory requisite. The policy of the Act is that everyone who is really entitled to a vote should be put on the roll. Now, in the first place, the electoral roll is to be in the form prescribed by the Act of 1832; no new schedule is furnished, no new form or column. Under that Act there was a provision for a class of tenants holding from year to year and paying a £50 rent, to whose right to vote personal occupancy was essential—as essential as it now is under the Act of 1868; but it is not said that the fact of occupancy must appear on the electoral roll under the old Act; and I agree therefore with Lord Craighill on the broad ground that it is not necessary to put under different columns of the roll things which the headings of these columns do not require. We need not enter upon the second and third questions, but on the broad ground I agree that the appeal should be sustained.

LORD MURE.—I am of the same opinion. This is the case of a person who has stood on the roll, at all events since the year 1879. He had been enrolled as joint tenant, and the presumption is that at the time when he was so put on the register it was ascertained that he had a good qualification. The objection, and the only one now made, is, not that he has not a good qualification, but that joint tenancy is not a qualification on which a party can under the Act of

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1868 be allowed to stand on the roll without the addition of the word "occupant." Now, the only difference in this respect which I can see between the Acts of 1832 and 1868 is, that by the 6th section of the Act of 1868 a rental of £14 is sufficient to afford a county qualification, whereas it required £50 to do so under the Act of 1832, and that in the margin of the 6th section of the Act of 1868 the qualification is called an "occupation franchise." The margin, however, is not, strictly speaking, part of the statute. But assuming that it were so, personal occupancy was just as much the basis of the tenancy qualification in the third branch of the 9th section of the Act of 1832 as it is of section 6 of the Act of 1868. Now, if this objection had been raised under the Act of 1832, I do not think it could have been successfully maintained, for the form of register in schedule G of that Act takes no notice of occupancy as a separate qualification. The qualifications at the head of the column are given as those of "proprietor or tenant"; and although the word "occupant" may sometimes have been added after the word "tenant" on the register, there was nothing in the statute to make it imperative to insert that word; and I can find nothing in the Act of 1868 altering the Reform Act of 1832 in the above respects. On these broad grounds I concur in thinking that the entry in the register is sufficient, and that it is unnecessary to give any opinion on the second and third questions. There must therefore be a remit to enrol.

THE COURT sustained the appeal, and remitted to the Sheriff to insert the appellants' name on the roll.

LINDSAY, HOWE, TYTLER, & Co., W.S.—M'NEILL & SYME, W.S.—Agents.

No. 2.
—
Nov. 8, 1880.
Anderson v.
Niven.

JOHN RAMSAY ANDERSON, Appellant and Objector.—*Maconochie*.
JOHN NIVEN, Respondent.—*J. J. Reid*.

County Franchise—Qualification—Beneficiary—Trust—Heritable or Moveable.—A and his two sisters were the sole surviving beneficiaries under a trust-deed and settlement conveying property both heritable and moveable, the value of the heritable estate being £76 per annum, subject to a feu-duty of £5 per annum, and the amount of the moveable estate £1300. The trustees, of whom A was one, were infeft in the property. Under the trust-deed one-fifth of the whole estate was to be paid over to A, and he was likewise to receive the income of other shares as they fell in. At the date of this case he was entitled to and received seven-fifteenths of the income of the whole estate. The trust-deed contained a power of sale, which had not been exercised. An objection to A's right to be placed on the roll of voters as joint proprietor of the heritable property, on the ground that his right was moveable and not heritable, *repelled*.

Registration
Appeal Court.
Lord Mure.
Lord Gifford.
Ld. Craighill.
Sheriff of
Midlothian.
B.

JOHN RAMSAY ANDERSON objected to John Niven, doctor of medicine, who was on the assessor's list, being entered on the roll of voters for the county of Midlothian as "joint proprietor of houses and shop, Currie," on the ground that he was not joint proprietor in the sense of the statute of the said heritable property.

The Sheriff (Davidson) repelled the objection, and admitted Dr Niven to the roll.

The objector took a case.

The facts as stated in the case were—"That under the trust-disposition and settlement of James Abernethy, who died many years ago, Dr John Niven and his two sisters are the only surviving beneficiaries; that Dr Niven is also a trustee under the said deed; that the trust-estate consists of both moveable and heritable estate; that the annual value of the heritable property in the county of Midlothian is £76; that the feu-duty

is £5 a-year; that it is entered in the valuation-roll as belonging to the trustees of the late James Abernethy; that said trustees are infeft in the property; that the value of the moveable estate is about £1300; that under the trust-deed one-fifth of the whole estate is to be paid over to Dr John Niven, and that he is likewise to receive the income of other shares as they fall in; that he is now entitled to seven-fifteenths of the whole estate; that said one-fifth has never been made over to him, but that he receives annually seven-fifteenths of the free annual income of the trust-estate, heritable and moveable, no special part thereof being set apart by the trustees to represent his seven-fifteenths; that the trust-deed contains a power of sale, but the trustees have not exercised that power. The subjects are of sufficient annual value." No. 2.
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Anderson v.
Niven.

Argued for the appellant;—The beneficiary's right in the property was not of the nature of a heritable right. The trustees had not actually conveyed to Dr Niven any part of the heritable estate, and were not bound to do so, the moveable estate of the testator being sufficient to enable them, if they saw fit, to pay the beneficiary his shares entirely from that source. The beneficiary could not point to any part of the heritable estate as being specially his.¹

Counsel for the respondent was not called on.

LORD MURK.—It appears to me that this judgment was right. Reference was made to the case of *Ovens*, where Lord Craighill and I gave opinions last year on substantially the same question; but there is a material difference between the cases, and I have no difficulty as to the broad ground on which that distinction rests. There is here no direction to convert, while in *Ovens'* case there was an express direction to that effect; and in compliance with leading decisions on that point we held that the property, in respect of that direction, had been made moveable estate. Here, on the other hand, the property is heritable, and there is a rent of £76, seven-fifteenths of which go to the claimant, and that is more than sufficient value for a qualification. It is said that there is no obligation on the trustees to give Dr Niven any part of the rents of the heritage. That may be, but we are not told that the trustees have withheld any part, and as to whether they could do so I give no opinion. But to the extent of the value of seven-fifteenths of the property it is matter of admission that the proceeds of the heritable estate belong to the claimant. I am therefore of opinion that there is here a heritable right or interest in the beneficiary of the requisite value under the trust-deed, and that in respect of that interest he is entitled to be registered.

LORD GIFFORD.—I am of the same opinion. I think that the beneficiaries are the real proprietors, the trustees holding merely for their behoof while the property remains unsold and unconverted, and it may never be converted. Are not Dr Niven and his sisters the proprietors of both heritage and moveables? It will not do to say that the trustees might refuse to give Dr Niven any share of the heritage. The trustees could not do so. Dr Niven is entitled to a share of the heritage as well as of the moveables, and accordingly in point of fact the trustees are giving him seven-fifteenths of the whole estate—that is, of the free rents of the heritage—and the free interest of the moveables. The case might be very different if there were a direction to convert, but the present case is quite distinct—there is only a power to sell. It is not contended that there is

¹ *Wilson v. Cowan*, Dec. 19, 1868, 7 Macph. 299, 41 Scot. Jur. 178; *Anderson v. Ovens*, Nov. 14, 1879, *ante*, vol. vii. p. 42.

No. 2.

Nov. 8, 1880.
Anderson v.
Niven.

here any direction to convert, and there is no allegation of any absolute necessity to convert. The trustees merely hold the estate for behoof of the beneficiaries, not in equal shares, but so that Dr Niven shall have seven-fifteenths, and his sisters the remaining eight-fifteenths among them.

LORD CRAIGHILL.—I am entirely of the same opinion. I think if we were to decide otherwise we should be unsettling a rule of law fixed by a train of decisions. Dr Niven is a beneficiary; his share of the heritage forming part of the trust-estate is more than is required for a qualification; and this appears to me to be all that is necessary for a vote according to the interpretation of the statutes long since adopted and consistently observed in this Court.

THE COURT dismissed the appeal, with expenses.

J. & F. ANDERSON, W.S.—R. RICHARDSON, W.S.—Agents.

No. 3.

FRANK RUTHERFORD, Objector and Appellant.—*Darling.*

ROBERT LOCKIE, Respondent.—*A. J. Young.*

Nov. 13, 1880.
Rutherford v.
Lockie.

County Franchise—Claim—Signature of claim by claimant's agent—Necessity for written mandate—Proof of agent's employment.—Held that a claim may be signed for a claimant by his agent, and that no written mandate is required provided there be sufficient proof *aliunde* that the agent has the requisite authority.

Registration
Appeal Court.
Lord Mure.
Lord Gifford.
Ld. Craighill.
Sheriff of Rox-
burghshire.
B.

AT a registration Court for the county of Roxburgh, held by the Sheriff of Roxburghshire (Pattison) at Melrose, a claim was presented for Robert Lockie, Darnick, to have his name entered in the list of voters for the election of a member of Parliament for the said county, his qualification being that of tenant and occupant of house and land in Darnick.

The claim was signed by "Ralph Dunn, solicitor, Melrose, agent for Robert Lockie."

It was objected by Frank Rutherford, writer, Galashiels, a registered voter for the said county, that the claim could not be received as not being signed by the claimant himself, and that Mr Dunn had no written mandate or authority to sign it when he did so. The notice of the claim was dated 4th September 1880, and was duly lodged with the assessor of that date, in terms of the statute.

The Sheriff repelled the objection and admitted the claim, on the ground that the authority to sign the claim was sufficiently proved, and that it was not requisite that the authority should be in writing, or that a written mandate should be granted.

Rutherford took a case.

The following facts were stated in the case:—"It was proved by parole evidence that the claimant, Robert Lockie, had personally instructed Mr Dunn to get him put on the register, and authorised him to sign a claim, and do whatever was necessary thereto; and he had given him receipts for rent which he had paid, by way of instructing and supporting his claim, which receipts Mr Dunn produced in Court. No objection was stated otherwise. The claimant's tenancy and occupancy were established, and the value was sufficient."

Argued for appellant;—The mandate to sign a claim or objection must be in writing. See section 25 of the County Voters Act, 1861.*

* Section 25, County Voters Act, 1861, provides, *inter alia*,—"It shall be lawful for any person who shall have given any notice of claim or any notice of objection to support the same before the Court by himself, his agent or mandator. . . . and every mandate produced to the Court, and bearing to be signed by any person entitled to give or to support any notice of claim or of objection, shall be *prima facie* a sufficient mandate," &c.

This view was supported by section 36 of the Burgh Voters Act, No. 3. 1856.*

In statutes the word "mandate" always meant written mandate. An absent litigant must give a written mandate to his agent. Section 13 of the Reform Act of 1832 allowed a claim to be subscribed for a claimant by his agent, but this case was ruled not by that Act, but by the County Voters Act, 1861. Further, section 3 of the latter Act repealed section 13 of the Reform Act of 1832. Nov. 13, 1880.
Rutherford v.
Lockie.

Argued for the respondent;—Section 13 of the Act of 1832 was repealed by the Act of 1861 only "in so far as the same may be necessary to give effect to the provisions of this Act." No change was thereby made by the County Voters Act on the Act of 1832 with regard to mandates, and under the latter statute a written mandate was not necessary. The objection was a purely technical one.

LORD MURE.—I am satisfied that the Sheriff has here proceeded on a fair construction of the Acts. The Reform Act of 1832, by section 13, provides that a claim may be "subscribed" by a party "or his agent," and I cannot read the repealing clause of the County Voters Act, 1861, as repealing that provision. Now, there is nothing in the Act of 1832 which says that the agent must have a written mandate; and in administering that Act agents have been held entitled to sign claims without any such mandate. In Mr Swinton's Digest of Registration Cases I find that possession by an agent of the titles of a subject has been held equivalent to a mandate to sign a claim for enrolment—case of *Archibald Smith*, 1837, p. 79.

It is plain, however, from the information given in the note on the same page, that in the working of that Act a written mandate was not considered essential to authorise an agent to give in a claim, provided he was in possession of what might be considered equivalent authority at the time the claim was lodged; and to go further back, it will be seen from the cases noted in Connell on Elections, p. 26, that under the old election law possession of titles was, in the ordinary case, held to be sufficient to authorise an agent to make a claim, and that a written mandate was required only where parties were out of the kingdom.

It has been contended for the objector that the Act of 1832 is so qualified by the County Voters Act of 1861 as to make it imperative that an agent should have a written mandate; and the last clause of the 25th section of the Act was referred to and mainly relied on in support of that view. I am, however, unable to read the clause as sufficient to alter the rules laid down and applied under section 13 of the Act of 1832. It simply provides that—"Every mandate produced to the Court, and bearing to be signed by any person entitled to give or to support any notice of claim or of objection, shall be *prima facie* a sufficient mandate." But it does not say that no other evidence of an agent's authority to subscribe a claim than a written mandate is to be admitted. On the contrary, the expression used—shall be *prima facie* evidence of mandate—appears to me to imply that other evidence may be required and adduced to instruct the mandate, such as the possession of title-deeds and instructions given to the agent to sign the claim before it was lodged.

* Burgh Voters Act, 1856, sec. 36,—“Any claim, objection, notice of appeal, or other writ, may be signed, and any proceedings under this Act may be prosecuted by any person as agent or mandatory for the party thereto, and any mandate bearing to be signed by such party shall be *prima facie* a sufficient mandate.”

No. 3.

Nov. 13, 1880.
Rutherford v.
Lockie.

Having regard, therefore, to the rules acted on in the Court of Freeholders, and under the Act of 1832, and there being nothing in the Act of 1861 imperatively requiring a written mandate, the question we have to consider is, whether there is evidence in this case sufficient to satisfy us that the agent had proper authority to do what he did? Now, it is stated in the case that it was proved that the claimant had personally instructed Mr Dunn to get him put upon the register, and authorised him to sign a claim, and that he had handed him his receipts for rents wherewith to support the claim, and which were produced in Court. It appears to me that the giving of the receipts, in the case of a tenancy qualification, is just as good an element of evidence of authority to lodge a claim as that of an agent having the title-deeds in his possession in the case of property qualification. I am, therefore, of opinion that the Sheriff was right in repelling the objection in the present case.

LORD GIFFORD.—I am of the same opinion. Mr Darling argued, with his usual ability, the general point that under the Act 1861 a written authority was absolutely needed. I should be sorry if that were so; and I do not think it is. This is a very technical objection. If an agent can sell an estate without a written authority surely you can put a man on the register in a similar way; or, take the case which was put to us of an illiterate voter, he would require a notary and four witnesses to put him on the roll. The objection is so technical a one that I think we should not sustain it unless compelled to do so.

LORD CRAIGHILL.—I am of the same opinion. The first objection was abandoned by the counsel for the appellant, who conceded that it was not necessary that claims should be signed by the claimant himself, but that his agent may do it for him. On the question whether a written mandate to the agent is required I concur in thinking that it is unnecessary, and that both on a consideration of the statutes and of the past practice as noticed by Lord Mure. Such being the case, the question is always just this, where a claim has been signed by the claimant's agent, has it been proved that the agent had sufficient authority to do so? That is a relevant inquiry, as is shewn by the cases cited to us from the bar. Here there is authority instructed in the ordinary way, and that being so, I am of opinion that all which the statutes require has been complied with. I should regret if any difficulty were put in the way of lodging claims, and that would be so were we to sustain this appeal.

THE COURT dismissed the appeal, with expenses.

J. S. DARLING, W.S.—JOHN STEWART, W.S.—Agents.

No. 4.

Nov. 13, 1880.
Stevenson v.
Miller.

GEORGE H. STEVENSON, Objector and Appellant.—*J. J. Reid.*
JAMES MILLER, Respondent.—*Graham Murray.*

County Franchise—Valuation-roll—Proof aliunde of value—Claimant impugning valuation-roll of preceding year.—The value of certain heritable subjects was entered in the valuation-roll 1879-80 at £10, and in the roll 1880-81 at £20. It was admitted that the entry in the roll of 1879-80 should have been £20. *Held* that the tenant was entitled to the franchise.

Question, whether the valuation-roll of 1880-81 was not in itself conclusive on the question of value.

JAMES MILLER, Musselburgh, claimed to be enrolled as tenant of shootings on the lands of Morham. No. 4.

The claim was objected to by George Henderson Stevenson, a voter on the register, on the ground that the value of the shootings was entered in the valuation-roll for the year 1879-80 at £10 only, and in the roll for the current year at £20 sterling. Nov. 12, 1880.
Stevenson v. Miller.

The Sheriff-substitute (Shirreff) repelled the objection, and admitted the claimant to the roll. Registration
Appeal Court.
Lord Mure.
Lord Gifford.
Ld. Craighill.
Sheriff of
Haddington.

The objector took a case. B.

The facts, as stated in the case, were—"It was admitted that the rent actually paid for the shootings for the year 1879-80 was £20, and that the assessor had entered the value without any return from the proprietor or tenant after the usual time for the giving in of such returns had expired, although the claimant received a notice in the usual form that the shootings were entered at £10 sterling, to which he took no exception."

The question of law was—"Is it competent, in the circumstances, to admit proof of value to contradict the entry in the valuation-roll for 1879-80, in support of a claim under sec. 6 of the statute 31 and 32 Vict. cap. 48?"

Argued for the appellant;—It was not competent to contradict the valuation-roll on the question of value by proof *aliunde*.¹ The claimant must shew, under sec. 6 of the Representation of the People Act, 1868, that he had been in occupation of the subjects for twelve months prior to 31st July of the year in which he makes his claim, and that the subjects were of sufficient value "as appearing from the valuation-roll of the county." That clause made the roll conclusive as to value.

Argued for the respondent;—(1) The assessor's return of the value of these shootings in the roll 1879-80 was admittedly wrong. No doubt the tenant had an appeal under the Valuation Act against that return, and did not exercise it, but to punish him by excluding his vote would be to punish him under one statute for an omission under another. (2) As the valuation-roll runs from Whitsunday to Whitsunday it was necessary to consult two rolls to find the value of a subject for twelve months prior to July 31st. But sec. 6 of the Reform Act, 1868, said "as appearing from the valuation-roll," not rolls. That alluded to the current roll, and admittedly in that roll the value was sufficient for a qualification. The County Voters Act only provided that at the Registration Court the valuation-roll—that is, the current roll—shall be laid before the Sheriff. In *Alexander v. Thomson*¹ the claimant had to impugn the current roll, whereas here the respondent was not even trying to disprove an entry in the roll of last year, for that the entry was erroneous was stated as matter of fact in the case. (3) Proof *aliunde* had been allowed in various cases to contradict the valuation-roll, though not on the question of value.²

LORD GIFFORD.—This is a case of some general importance, for it raises the important question whether it is necessary that, in addition to the occupancy of a subject of sufficient value at the time of registration, there shall be proof of sufficient continuous value during the whole twelve months preceding the last day of July. It is not necessary to settle that question here, as we have an admission of the fact in the special case. But, apart from the general question

¹ *Alexander v. Thomson*, Dec. 19, 1868, 7 Macph. 325, 41 Scot. Jur. 191.

² *Brown v. Holmes*, Dec. 19, 1868, 7 Macph. 328, 41 Scot. Jur. 192; *Blackwood v. Euman*, Dec. 19, 1868, 7 Macph. 325, 41 Scot. Jur. 191; *M'Gaw v. Maitland*, Dec. 19, 1868, 7 Macph. 327, 41 Scot. Jur. 192; *Morrison v. Anderson*, Nov. 5, 1879, *ante*, vol. vii., p. 7.

No. 4. involved, we have plenty of evidence to sustain this vote. When the Sheriff goes over the roll submitted to him by the assessor he has only one valuation-roll before him, viz., that of the current year. The statute says that any tenant claiming under the 6th section of the Act of 1868 shall be entitled to a vote who "is and has been during the twelve calendar months immediately preceding the last day of July in the actual personal occupancy as tenant of lands and heritages within the county of the annual value of fourteen pounds or upwards, as appearing on the valuation-roll of such county." The Sheriff here first tests the sufficiency of the value—it is £20 per annum; secondly, he finds that there has been occupation for the necessary twelve months of the same subject—that is matter of admission. Then rises the question raised in the objection. The objector says,—“You are now in possession of a subject of legitimate value, but I shall prove by the production of the valuation-roll of last year that it was not of that value last year;” and he says that the evidence of that roll is conclusive against the claim. I do not think that that is so. The roll that is conclusive is this year’s roll, but there is nothing in the statute to shew that last year’s roll is conclusive also. According to Mr Reid’s argument it is incompetent to prove any change in the value during the twelve months, though it may have been rising during that period. Even if it were the case that the rent during the first six months had only been £10 I am of opinion that if the rent now amounts to £14 or more, and occupation for twelve months of the whole subject, being the identical subject, is proved, that is enough to sustain the claim. I am therefore of opinion that this appeal should be dismissed.

LORD CRAIGHILL.—I am of the same opinion. This is a claim by a tenant who alleges that he has got the required qualification by means of occupancy of shootings for a year at a sufficient rent. It is objected that the full value of the qualification does not appear from the valuation-roll, and that the claimant is therefore not entitled to vote, as the provisions of the 6th section of the Act of 1868 have not been fulfilled. The facts are, that in the valuation-roll of 1880-81 the subjects are entered by the assessor as of £20 in value; and if that valuation-roll is the one referred to in the section the objection plainly cannot be sustained. But what is said now is that we must read the word “valuation-roll” in that section as if it had been valuation-rolls, because the specified period is that of twelve months immediately preceding July 31st 1880. There is one roll for the years 1879-80 which runs to Whitsunday 1880, and another which runs from that date to July 31st of this year and onwards to Whitsunday 1881. If that view were sound we should be obliged to sustain the appeal. But I think that the statutory meaning of the words “valuation-roll” in section 6 of the 1868 Act is the roll which is laid before the Sheriff to determine the value of the subjects on which claims are given in: the provision in the County Voters Act 1861 is that the roll for the current year is to be laid before the Sheriff; and this, I think, must be taken to be the roll referred to in the 6th section of the Act of 1868. The appeal therefore must be dismissed.

LORD MURE.—I concur with your Lordships in thinking that this is an important question, and it is the one on which we reserved our opinions last year in deciding the case of *Wilkie v. Adair*, Nov. 16, 1879, *ante*, vol. vii. 49. This case, however, necessitates a decision on the point whether any other evidence than that of the valuation-roll of the year in which the Registration Court is

held can be admitted to instruct the value, or an objection to the value, of a qualification. No. 4.

On this question I am clearly of opinion that although the valuation-roll, which is laid before the Sheriff under sec. 24 of the County Voters Act, 1861, is to be taken as evidence of the value of the qualification, it is not to be the sole, but only *prima facie* evidence of the value, and that there is nothing in the provisions of that Act or of the Act of 1868 to prevent the Sheriff from admitting other evidence if necessary in supplement of or even to qualify that roll. The statutes regulating these matters must be read together, and so reading them I have come to the conclusion, as indicated in my opinion last year in the case of *Adair*, that sec. 17 of the Act 19 and 20 Vict. c. 58, has never been repealed, and must therefore be held to be in operation. Now, the Valuation Act of 1854 made the valuation-roll conclusive evidence of value. But by sec. 17 of the Act 19 and 20 Vict. c. 58, which in that section as well as in others, such as in secs. 24, 25, and 27, relative to procedure and appeals, applies to counties as well as burghs, it is provided that the valuation-roll made up under the Act of 1854, shall be "received and taken as *prima facie* proof that the gross yearly rent or value of any subjects specified in such valuation-roll is and has been for the year from the 15th day of May in such year of the amount set forth for the time in such valuation-roll." And it is also specially provided "that it shall be competent to prove to the satisfaction of any Sheriff or Court of Appeal under this or the first recited Act that any such subjects are or have been of a greater or of a less annual value than the value stated in such valuation-roll."

So standing the law at the date of the County Voters Act of 1861, the 24th section of that Act provides that, when the Sheriff holds his Registration Court, the valuation-roll for the year shall be laid on the table of the Court. In the present case the valuation-roll for 1880-81 was laid before the Sheriff, and in that roll the value of the claimant's subject was entered at £20. Now, when in section 6 of the Act of 1868 the annual value is referred to as appearing in the valuation-roll, and when that section is read, as I think it must be, along with the provisions of the Acts of 1856 and 1861, it appears to me that the valuation-roll there spoken of is that extending from the 15th of May of the year with which the Sheriff is dealing, and not the valuation-roll of the preceding year. But it was maintained on the part of the objector, and he undertook to shew, that by the valuation-roll of the preceding year the value during part of the requisite twelve months was only £10, and so proposed to cut down or qualify the roll laid before the Sheriff by the roll of the preceding year, and shew that the qualification was not of the proper value. Now, I do not dispute the appellant's right to lead this additional evidence. But I must also hold that by sec. 17 of the Act of 1856 it was competent to rebut that evidence, and to shew that the old valuation-roll was wrong and the new one right. On these grounds I cannot exclude the evidence led in this case to shew that the rent actually paid during the year prior to 31st July 1880 was £20. I agree, therefore, with your Lordships in holding that the Sheriff's decision is right.

THE COURT dismissed the appeal, with expenses.

JOHN MACPHERSON, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

Nov. 13, 1880.
Stevenson v. Miller.

No. 5.

JAMES AITKEN, Objector and Appellant.—*Maconochie.*

JAMES ROBERTSON, Respondent.

Nov. 13, 1880.
Aitken v.
Robertson.

Process—No appearance for respondent in an appeal.—The Court will not sustain an appeal in respect of no appearance for the respondent, but will require the appellant to shew cause why the Sheriff's judgment should be altered.

County Franchise—Title to object—Person on assessor's list—Altered qualification.—A voter stood on the register for the year 1879–80 as "tenant and occupant." He lost that qualification and at the same time became qualified as "proprietor." The assessor placed him on the list of persons having lost their qualifications, and placed him on the list of persons having become entitled to vote. Held that he was entitled to object to the name of a person being entered on the register.

Registration
Appeal Court.
Lord Mure.
Lord Gifford.
Ld. Craighill.
Sheriff of Lin-
lithgowshire.
B.

JAMES AITKEN, solicitor, Bathgate, who stood upon the assessor's list, objected to James Robertson, who was also on the assessor's list as "proprietor of house and garden, Cuffabouts, Carriden," being placed upon the roll as a voter for the county, on the ground that he had no present beneficial interest in the subject.

A preliminary objection was taken by James Robertson to the competency of Aitken's objection, on the ground that he was not then on the roll of voters so as to entitle him to object.

The Sheriff-substitute (Home) sustained the objection, and Aitken took a case.

The facts as stated in the case were,—“That Aitken stood on the register of voters for the county for the year 1879–80 as a ‘tenant and occupant.’ He had lost that qualification, and had become qualified as a ‘proprietor.’ The assessor had, therefore, placed the said James Aitken (1) on the list of persons disqualified; and (2) on the list of persons having become entitled to vote. There was no objection to the said James Aitken being enrolled on his new qualification.”

When the case came on for hearing before the Appeal Court there was no appearance for the respondent, either by counsel or agent. The Court refused to sustain the appeal in respect of no appearance, and proceeded to hear counsel for the appellant on the appeal.

Argued for the appellant;—(1) The case was not ruled by the case of *Mason v. Weir*, Dec. 19, 1868, 7 Macph. 290. There the objector had not been on the roll in the previous year as Aitken had been. The list made up by the assessor was merely a draft of proposed alterations to be laid before the Sheriff, and Aitken could not be held to be off the roll until the Sheriff had deleted his name. (2) Objections had to be lodged, under the provisions of the County Voters Act, 1861, sec. 11, on or before 4th September, whereas the assessor did not make up his list until 11th September. The appellant's name had therefore not been struck off the roll even by the assessor at the date the objection was sent in. The appellant could have voted on his old qualification until the new roll was adjusted by the Sheriff.

LORD MURE.—I am satisfied that this decision is not well founded. As I understand the case, this objector was on the roll last year as a qualified voter, and if an election had taken place at the time this objection was lodged he would have been entitled to vote. In these circumstances I am very clear that if there is no provision to the contrary in the Act—and I can find none—a person who is entitled to vote is also entitled to object to parties asking to be enrolled.

LORD GIFFORD and LORD CRAIGHILL concurred.

On the merits, their Lordships were of opinion that Robertson was not entitled to be placed on the roll. No. 5.

THE COURT sustained the appeal, and remitted to the Sheriff to strike Robertson's name off the roll. Nov. 13, 1880.
Aitken v. Robertson.

WILSON & DUNLOP, W.S., Agents.

WILLIAM LUNAN AND PETER R. LUNAN, Appellants.—*Maconochie*. No. 6.
C. ALLAN, Objector.

County Franchise—Joint Tenant—Constructive occupancy—Woodyard. Nov. 13, 1880.
—William Lunan and Peter R. Lunan, sole partners of the firm of William Allan. Lunan v. Allan.
Lunan & Co., were joint tenants of a woodyard at Borrowstounness of the annual value of £32. Neither of them resided within the county of Linlithgow, in which the subjects were situated. There was no house on the property, but the woodyard was used for storing wood belonging to the firm. The business was carried on by the servants of the firm. Lord Mure.
Lord Gifford.
Ld. Craighill.
Sheriff of Linlithgowshire.
B.

Held that the partners of the firm were in the actual personal occupancy of the subjects within the meaning of the statute, and were entitled to be registered thereon.

WILSON & DUNLOP, W.S., Agents.

JOHN GENTLES, Pursuer and Respondent.—*J. A. Reid*. No. 7.
PETER BEATTIE, Defender and Appellant.—*J. Burnet*.

Process—Appeal—Expenses—Amount of expenses allowed when appeal withdrawn in Single Bills. Oct. 15, 1880.
—An appeal against a judgment of the Sheriff Beattie. Gentles v. Beattie.
of Lanarkshire was lodged in August and appeared in the Single Bills of the first day of the next session. Counsel for the appellant then moved the Court for leave to withdraw the appeal. The Court allowed this to be done on condition of payment of £3, 3s. of expenses to the respondent, and fixed that sum as the amount of expenses to be awarded in similar cases. 1st DIVISION.
Sheriff of Lanarkshire.
C.

W. & J. BURNES, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

THE LORD ADVOCATE, Petitioner.—*Lord-Adv. M^cLaren*. No. 8.

Sheriff—Sheriff-clerk—Interim appointment of two Sheriff-clerks for separate divisions of a county. Oct. 16, 1880.
—This was a petition to confirm the appointment and of new to appoint two gentlemen to the offices of interim Sheriff-clerks of Renfrewshire, the one for the upper ward of the county and the other for the lower, Mr Hector, the late holder of the office of Sheriff-clerk, having died on 24th September 1880, and the gentlemen whose appointment was now asked to be confirmed having been appointed in vacation by the Lord Ordinary on the Bills. Lord Advocate.
1st DIVISION.
C.

The Lord President requested information as to the practice of appointing two gentlemen to a vacant office of that kind, and on being informed that in the case of Renfrewshire it had been done before, the prayer of the petition was granted, and Mr John Brough was appointed interim Sheriff-clerk for the upper ward of Renfrewshire, and Mr James Adam interim Sheriff-clerk for the lower, both gentlemen having held the office of depute Sheriff-clerk under the late Mr Hector in these wards.

C. MORTON, W.S., Crown Agent.

No. 9. GEORGE GUSTAVUS WALKER AND OTHERS (Admiral Lennox's Trustees),
First Parties.—*D.-F. Fraser—Blair.*

Oct. 16, 1880.
Lennox's
Trustees v.
Lennox, &c.

JAMES GIBSON STARKE AND OTHERS (George James Lennox's Trustees),
Second Parties.—*Gloag.*

MRS E. G. L. LENNOCK, Third Party.—*Gloag.*

GEORGE RICHARD LENNOCK, Fourth Party.—*Muirhead.*

MISS ELIZABETH LEIGH LENNOCK, Fifth Party.—*D.-F. Fraser—Blair.*

Faculty and Powers—Exercise of power of appointment.—A testator left the residue of his estate to trustees, with a declaration that upon the death of his son, or on the death of his son's wife if she survived him, the residue of the trust-funds should belong and be paid to the son's children "at such periods, and in such proportions, and under such limitations, conditions, and restrictions," as his son should direct by any deed under his hand.

The son, in a deed of appointment, after making provisions for his sons, directed his trustees to hold the remainder of the fund "upon trust, to pay the interest thereof" to his two daughters for their own separate use, notwithstanding coverture, and so that the daughters should not have power to dispose thereof by way of anticipation, and upon the death of each daughter to hold her share for her children in such shares as she should have appointed, and, failing children, for such persons as she should have appointed.

In a question, raised during the survivance of the son's widow, between the son's children and the father's trustees, who maintained that the appointments by the son were invalid, on the ground that he had restricted his daughters to mere liferents, and had not validly disposed of the fee of their shares, *held* that the appointment was valid, and had vested in the daughters the capital of their shares, but that these were limited to their separate use for life, independent of any present or future husband, and were to be held by them subject to the power of appointment conferred on them by their father's settlement, but without power to make any other assignment or appointment by way of alienation.

2d Division.
I.

ADMIRAL GEORGE GUSTAVUS LENNOCK died on 12th May 1866, leaving a trust-disposition and settlement, whereby he left the residue of his estate to John Johnston, Esq., and others, as trustees, with instructions to pay the income as an alimentary allowance to his only son, George James Lennox. He gave the son power to "settle and secure to his wife, by marriage-contract or other deed, an annuity out of the said interest, dividends, or other annual produce, payable to her quarterly or half-yearly after his death, as he may direct, the balance, if any, of the said interest, dividends, or other annual produce, being paid to or applied for the maintenance and education of the children of the marriage, if any, in such manner as my said trustees or trustee may direct: Declaring, as it is hereby expressly provided and declared, that upon the death of the said George James Lennox, or, in the event of his marriage, upon the death of the surviving spouse, the said free residue of my estate, so liferented by him, shall belong and be paid to the child or children of the marriage at such periods, and in such proportions, and under such limitations, conditions, and restrictions as he, the said George James Lennox, may have directed by any deed or writing under his hand; failing which, equally amongst them, share and share alike, upon their severally attaining majority; failing all which, to my daughter, the said Anne Murray Lennox otherwise Walker, or her heirs or assignees."

George James Lennox married and had a family, and in his last will and testament he conveyed the trust-funds to certain trustees, and provided the liferent of the whole to his widow, subject to certain payments out of capital of £1700 to each of his three sons on their respectively attaining majority. A farther sum of £1700 was made payable to each

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son on the death or marriage of their mother. And with regard to the residue of the fund he directed—"And after the decease or marriage of my said wife, as aforesaid, I direct and appoint that my said trustees shall hold the sum of £4000, the residue of the said trust-funds, upon trust, to pay the interest and annual proceeds thereof unto my two daughters, Elizabeth and Ann Eleanor, during their respective lives, in equal shares and proportions (subject, nevertheless, as hereinafter mentioned), for their and each of their own separate and absolute use and benefit, notwithstanding coverture, and so that my said daughters respectively shall not have power to dispose thereof by way of anticipation; and from and after the decease of each or either of my said daughters respectively I direct and appoint that one moiety or equal half part of the said trust-moneys, funds, and securities, shall go and be held in trust for the children or child of each of my said daughters respectively, in such shares, and in such way and manner, as my said daughters respectively, by any deed or deeds, with or without power of revocation and new appointment, or by will or codicil, and whether they shall be under coverture or not, shall appoint; and in default of such appointment, and so far as any such appointment shall not extend in trust for the children of each such daughter, who, being male, shall attain the age of twenty-one years, or, being female, shall attain that age or marry, in equal shares; and if there shall be only one such child, the whole to be in trust for that one child: And in case there shall be no such child or children of my said daughters respectively who shall attain a vested interest in the said trust-funds, then in trust for such person and persons, in such shares, and in such way and manner, as my said daughters respectively shall in manner aforesaid appoint."

George J. Lennox died on 21st November 1871, and was survived by his widow Mrs E. G. L. Lennox and by three sons and two daughters. George Richard, the eldest, having been born on 4th March 1859, and so having reached majority on 4th March 1880, claimed payment from his grandfather's trustees of £1700, in terms of the appointment made by his father.

Admiral Lennox's trustees having disputed the validity of the appointment, the question was brought before the Court in a special case.

Argued for Admiral Lennox's trustees;—The appointments made by George James Lennox were bad, in so far as the provision to the daughters was not a competent one under the terms of the Admiral's settlement. Where a right was given to apportion a capital sum it was not duly exercised by giving merely an annuity out of the fund to the beneficiaries.¹ The appointment to the daughters being bad, then all the appointments fell along with it.² If, however, the appointment to the sons was allowed to stand, at all events, the restriction on the daughters' shares must not, and they should take the residue equally as fiars.

Argued for Mr and Miss Lennox;—The appointment to the sons was quite good under the power conferred, and must be given effect to. The restriction, however, upon the daughters' shares could not be given effect to. Whatever they took under their grandfather's settlement must be as fiars, not as liferenters merely.

LORD JUSTICE-CLERK.—When a sum of money is left to certain persons, and

¹ Baillie's Trustees v. Oxley and Others, Feb. 25, 1862, 24 D. 589, 34 Scot. Jur. 338; Ormiston v. Ormiston, Jan. 24, 1809, Hume, 531.

² Hume's Dec. 531; Carver v. Bowles, Jan. 20, 1831, 2 Russell and Mylne, 304; Duke of Northumberland v. M'Gregor, August 28, 1846, 5 Bell's App. 396.

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a power is conferred on another to divide or apportion the amount among them, it has been settled that it is beyond the power to restrict the share of one of the beneficiaries or legatees to a mere right of life-tenure, and an attempt so to exercise the power will be of no avail. But it has been settled by the English case of *Carver v. Bowles*, and is good sense, that if an appointment embraces the whole fund to be distributed it will not necessarily be vitiated by the introduction of conditions and restrictions tending to limit the enjoyment of any particular share. I should have been disposed to follow the authority of that leading case as conclusive of the general doctrine. But it so happens that both the power of appointment and the terms of the appointment itself are in the present case as nearly as possible identical with those which occur in *Carver v. Bowles*. In both the power authorised the appointor to appoint under such conditions and restrictions as might be thought fit, and the actual restrictions imposed in this case are as nearly as may be expressed in the same words. I propose, therefore, that we should pronounce a judgment in terms of that pronounced by the Master of the Rolls in the case I have referred to. It may be quite true, as it was in that case, that some of these restrictions reduce the actual enjoyment to little more than a life-interest, but they do not appear to me to exceed the limits which were contemplated by the testator.

LORD GIFFORD.—I am of the same opinion.

George James Lennock having the power to appoint and to impose limitations and restrictions, he has, in my opinion, executed these powers well. He has conveyed the whole estate to trustees to invest the same, and to pay the whole annual produce thereof to his wife so long as she shall survive him, and continue his widow. So far there can be no dispute as to what he did—he was entitled to make this provision for his wife. The wife's interest, however, is subject to this qualification, that as each of his sons attained the age of twenty-one he is to be entitled to a payment of £1700 out of the capital of the estate life-tenured by her. This also was certainly within his power. He thus appoints to his sons as they attain majority £1700 each. No doubt, so far he has not disposed of the whole fund, but that cannot make this partial appointment invalid. No one has a right to object to this appointment. It is a long step, then, towards our decision to hold that these provisions of £1700 to each of the sons are good. He then goes on to provide that after the widow's death each of his sons shall receive a farther sum of £1700. I think that appointment is also good. In this way he has appointed £3400 to each of his sons, and that leaves £4000 still to be disposed of. This he appoints to his two daughters in the following manner. After the death of the widow he directs his trustees to "hold the sum of £4000, the residue of the said trust-funds, upon trust, to pay the interest and annual proceeds thereof unto my two daughters . . . during their respective lives, in equal shares," for their respective use, notwithstanding coverture, the daughters to have no power to dispose of the same by anticipation. After the death of the daughters the will goes on to provide that one-half of the sum of £4000 shall be held for the children of each daughter in such shares as their mothers may appoint; and failing such children, then for such persons as the daughters may appoint. I think that is a good appointment of £2000 to each of the daughters. They are each to have the interest of that sum absolutely to themselves during their lives, even although they may marry. Then arises the question which alone creates any

difficulty, viz., the provision that the capital of the fund so liferented shall go to the children of the daughters, and to them alone, if any come into existence. But it is not at all necessary for us to decide now as between the daughters and any possible children they may have what their respective rights are. No such question may ever arise. I do not think that anything in that clause affects the validity of the appointment of Admiral Lennock's residua. There is most certainly a valid appointment of £3400 to each of the sons. The trustees will make these payments to the sons, and hold the £4000 for the daughters. When the daughters demand payment of that fund from the trustees it will be time enough to fix their rights. I decline to decide by anticipation what are the rights of these ladies. This is not the time to settle whether they can cut out their children or no.

LORD YOUNG concurred.

THE COURT pronounced this interlocutor:—"Find that the deed of settlement (last will and testament), dated 24th October 1871 constituted a valid deed of appointment in favour of the widow and children of the granter, to the effect of vesting in the granter's sons the provisions therein mentioned, absolutely, in fee, and vesting in the daughters the capital of the sums therein mentioned, but that the respective shares of the daughters are limited to their separate use for life, independent of any present or future husband, and are to be held by them subject to the power of appointment conferred by the said settlement, but without power to make any other assignment or appointment by way of alienation."

HUNTER, BLAIR, & COWAN, W.S.—RONALD & RITCHIE, S.S.C.—JOHN LATTI, S.S.C.—Agents.

CORPORATION OF GLASGOW, Appellants.—*Asher—J. P. B. Robertson.*
INLAND REVENUE, Respondents.—*Sol.-Gen. Balfour—Rutherford.*

No. 10.

Revenue—Inhabited House Duty—48 Geo. III. c. 55, Sch. B, Rules 5 and 6—41 Vict. c. 15, sec. 13, sub-secs. 1 and 2.—The Corporation of Glasgow, as trustees of Glasgow v. under a local Act, were owners (1) of a building occupied by them as an industrial and natural history museum, to which the public were admitted free; and (2) of a building partly occupied by them as picture galleries, to which the public were admitted free, and partly by an institute of engineers, to whom separate rooms were let by the Corporation.

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Held that the whole of these premises were liable for inhabited house duty under 48 Geo. III. c. 55, and did not fall under the exemption of 41 Vict. c. 15, sec. 13, sub-secs. 1 and 2, as "occupied solely for the purposes of any trade or business, &c. by which the occupier seeks a livelihood or profit."

THE Corporation of Glasgow, as trustees under the Public Parks and Galleries Act, 1859, brought the two following appeals against assessments for inhabited house duty. The two cases were argued together.

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Cause.
M.

The facts, as stated in the first case, were—"1st, That the assessment is made in respect of the occupancy by the Corporation of Glasgow as trustees foreshaid of the premises known as Kelvingrove House and Museum, used wholly as an industrial and natural history museum, with the exception of the assistant curator's house. The valuation of the whole premises is £165. 2d, The premises consist of two divisions, the old and the new. The old building is in height two storeys and attics, and is wholly used as an industrial and natural history museum, except the assistant curator's house, consisting of two rooms and kitchen on the first flat, and three rooms on the attic flat. The new building consists of

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one hall with a gallery, and is wholly occupied as an industrial and natural history museum. 3d, There is internal communication by means of stairs and passages throughout the buildings. 4th, The public are admitted free to the museum."

The facts as stated in the second case were—"1st, That the assessment is made in respect of the premises occupied as under, viz.—

Galleries known as the Corporation Galleries, occupied by the Corporation for exhibiting pictures and other objects of art, the valuation of which is	£750	0	0
A caretaker's house, occupied by Alexander Tennant, the valuation of which is	10	0	0
Rooms occupied by the Institute of Engineers, valued at	100	0	0
And rooms occupied by the Philosophical Society, valued at	90	0	0

Making in all a valuation of £950 0 0

"2d, In the upper flat of the main building there are five rooms filled with pictures and other works of art, to which the public are admitted free. In the first flat, a hall and two small rooms let to the Glasgow Philosophical Society, the like accommodation let to the Glasgow Institute of Engineers, and an office used by Mr Paton, the curator of the galleries. In the sunk flat the caretaker's house, consisting of three rooms and kitchen. Behind the above building, and communicating therewith, there are three rooms, with three cloak or retiring-rooms; these rooms are filled with pictures and other works of art, to which the public are also admitted free. 3d, There is internal communication by means of stairs and passages inside the building between the caretaker's house and all the other rooms. 4th, The galleries are occasionally let for meetings or exhibitions."

The Commissioners of Income-tax, &c. having confirmed both the assessments, holding that the assessments were properly imposed under rule 6 of schedule B of 48 Geo. III. c. 55,¹ and that the houses did not come within the exemption of section 13, sub-sections 1 and 2, of 41 Vict. c. 15,² the Corporation of Glasgow obtained cases for the opinion of the Court of Exchequer.

Argued for the Corporation of Glasgow;—(1) The premises here were not liable for inhabited house duty, because they were not inhabited by any one. The Corporation, who were statutory trustees, could not inhabit them, and no more did the public who visited them. At all events the premises of the Corporation Galleries which were occupied by the two societies were not inhabited by any one. (2) The discussions there were for the promotion of their business, and therefore the premises were occupied for business purposes, and so fell under the exemption of 41 Vict. c. 15.³

¹ Quoted as foot-note *ante*, vol. vii. p. 492.

² Quoted as foot-note *ante*, vol. vii. p. 493.

³ Glasgow Coal Exchange Co. v. Inland Revenue, March 18, 1879, *ante*, vol. vi. p. 850; Edinburgh Life Assurance Co. v. Inland Revenue, Feb. 2, 1875, *ante*, vol. ii. p. 394; Union Bank v. Inland Revenue, Feb. 2, 1878, *ante*, vol. v. p. 598; Cowan & Strachan v. Inland Revenue, and Scottish Widows' Fund v. Inland Revenue, Jan. 22, 1880, *ante*, vol. vii. p. 491; Campbell v. Inland Revenue, Feb. 21, 1880, *ante*, vol. vii. p. 579; Glasgow and South-Western Railway Co. v. Banks, July 16, 1880, *ante*, vol. vii. p. 1161; Clark v. Dumfries Commissioners of Supply, July 16, 1880, *ante*, vol. vii. p. 1157.

The opinion of the Court was delivered by

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LORD PRESIDENT.—The two cases before us seem to present no difficulty in the construction of the Inhabited House Duty Acts, and are substantially settled by the principles which we have laid down in previous cases.

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Taking the case of Kelvingrove Museum as the first, because the most simple, the facts are these—The assessment is made in respect of the occupancy by the Corporation of Glasgow, as trustees under a local Act, of the premises known as Kelvingrove Museum, which seems to be kept entirely as an industrial and natural history museum, with the exception of some apartments which are occupied as the dwelling-house of the assistant-curator. It is one house, with internal communications by means of stairs and passages throughout. The museum of course is intended to be exhibited to the public, and admission to it is free. It has been contended, in the first place, that the Magistrates of Glasgow, holding this building for the benefit of the community, are not in the position of occupiers of the house, and that the house itself is not within the meaning of the statute an “inhabited house.” It seems to me impossible to give any weight to either of these contentions. It is needless to say at this time of day that an inhabited house does not mean a place of residence—that habitation in the sense of the statute may consist of any kind of occupation of a house or building. If it be not unoccupied—that is to say, without any use made of it at all—then it is an occupied house within the meaning of the Act, and, being occupied, it is also within the meaning of the statute an inhabited house. But then it is contended further that the case falls within the exemptions contained in the 13th section of the 41st of Victoria, cap. 15. There are two cases for exemption there under the two sub-sections 1 and 2. As regards sub-section 1, it is quite clear that that cannot by any possibility apply to this museum, because that sub-section applies only to the case where parts of the house are let out to different tenants for different purposes, or are at least occupied by persons for different purposes. This museum is occupied entirely by the Magistrates of Glasgow for one purpose. The second sub-section contains an exemption of a different kind, but it is just as clear that that cannot apply, because it exempts only such premises as are occupied solely for the “purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit;” and in no sense whatever can the occupation by the magistrates as statutory trustees be described in these words. Therefore the assessment is obviously quite rightly made in regard to the case of the museum.

The case of the Corporation Galleries stands in a somewhat different position, for the house there consists of several parts occupied in different ways. There is, in the first place, a portion of the premises known as the Corporation Galleries, and occupied by the Corporation for exhibiting pictures and other objects of art, which is the greater part of the building. But there is also a caretaker's house, and there are rooms occupied by the Institute of Engineers, and also rooms occupied by the Philosophical Society. The owners of the entire house are undoubtedly the Magistrates of Glasgow, as trustees under the local Act which I have already mentioned, and therefore the case falls within the 6th rule of schedule B of 48 of Geo. III., as being the case of a house “let in different storeys, tenements, lodgings, or lands, and inhabited by two or more persons or families, in which case the house is to be subject to, and shall in like

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manner be charged to, the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged for the said duties." It is clear, I think, that that rule applies to this case. The greater portion of the house is occupied by the trustees as owners, but other portions of it are occupied by the Philosophical Society and by the Glasgow Institute of Engineers as tenants, and if the case stood upon the original statute only there would be no more to be said. But it is maintained that under the first sub-section of section 13 of Act 41 Vict. cap. 15, there is relief in so far as concerns that portion of the premises which is occupied by those two societies, the Philosophical Society and the Glasgow Institute of Engineers. The provision is this—"Where any house, being one property, shall be divided into and let in different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied," then after certain notice the Commissioners may grant relief from the assessment. Now, I think it may be doubted how far the appellants here have placed themselves in a position to take advantage of this clause of exemption supposing it to apply to their case, because the statute requires that a particular notice shall be given where such relief is claimed, and a notice, not of a formal character merely, but a notice containing a distinct statement of the facts in respect of which the relief is claimed. That is to be given to the surveyor within a certain period, and adjudicated upon separately by the Commissioners. But the respondent here has taken no objection to this question being raised upon the present case, and it would not be desirable to avoid determining the point merely upon the ground of that technicality, and therefore I am quite prepared to give my opinion as to the applicability of this sub-section to the case in hand. No doubt the portions of the premises here occupied by the Institute of Engineers and the Philosophical Society are quite within the description of this clause in so far as they are portions of a building let in different tenements. But it is not in every case where portions of a building are let in different tenements that relief is to be given; it is only where these separate portions of the house are "occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit;" and the appellant has never been able to explain in the course of the argument how the Institute of Engineers or the Philosophical Society are earning a livelihood by carrying on the discussions which take place in these rooms. The discussions, no doubt, may be very useful in themselves, and very profitable in a certain sense to the members of these societies, but there is neither livelihood nor profit in the sense of the statute to be derived from any amount of discussion. Therefore I think it clear that that section of the statute does not apply, and I need hardly say that the second section, although pleaded upon also in the case of the Galleries, is just as clearly inapplicable. In both cases, therefore, I think the assessment must be confirmed.

IN both cases the Court confirmed the decisions of the Commissioners.

CAMPBELL & SMITH, S.S.C.—D. CROLE, Solicitor of Inland Revenue—Agents.

MAJOR MACDONALD HALL AND OTHERS (Miss Campbell's Trustees),

No. 11.

First Parties.—*Guthrie Smith—A. Gibson.*

REVEREND JOHN GIBSON CAZENOVE, D.D., AND OTHERS (Miss Campbell's Legatees), Second Parties.—*Sol.-Gen. Balfour—Ferguson.*

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Succession—Period of Payment—Intention of Testator—Calendar or Lunar Month.—A testatrix directed her trustees, with all convenient speed, to collect and realise her moveable estate, and “as soon as convenient after my death to deliver, and at the first term of Whitsunday or Martinmas six months after my death,” to pay such bequests and legacies as should be directed by any writings under her hand. Lastly, the trustees were directed to pay the interest of the whole residue of the estate to the heir of entail in possession of a particular estate “at the said term of Whitsunday or Martinmas six months after my death.” The first term’s payment of said interest to commence “as at the term of Whitsunday or Martinmas twelve months after my death.” The testatrix died at nine in the morning of 15th May 1880. A question having arisen as to whether the legacies became payable at Martinmas 1880 or not until Whitsunday 1881, held that on a reasonable construction of the settlement, and in accordance with the evident intention of the testatrix, Martinmas 1880 was the first term six months after the testatrix’s death, and that the legacies became payable then.

Opinion (per Lord Young) that the words “six months” fell to be construed as meaning six lunar months. X

MISS LAURA ISLAY CAMPBELL of Dunstaffnage died at nine o’clock on the morning of 15th May 1880, leaving a trust-disposition and settlement dated 19th June 1879. By this settlement she named certain trustees and conveyed her whole estate and effects to them. The directions to the trustees were (1) with all convenient speed to collect and recover the whole of her moveable and personal estate and effects, and from the proceeds thereof to pay her debts and deathbed and funeral expenses; (2) “as soon as convenient after my death to deliver, and at the first term of Whitsunday or Martinmas six months after my death to pay or account for all such bequests and legacies, and to carry out all such instructions” as the testatrix might thereafter give; (3) certain specific articles were directed to be delivered to persons named in the settlement; (4) “my trustees shall, at the first term of Whitsunday or Martinmas six months after my death, make payment of the following legacies;” (5) certain additional legacies were directed to be paid to her trustees and others; and (lastly) the whole residue of her means and estate were directed to be held for the liferent behoof of Alexander James Henry Campbell, heir of entail to Dunstaffnage, “or, failing him, the heir of entail who shall at the said term of Whitsunday or Martinmas six months after my death be in possession of the family estate of Dunstaffnage; and my trustees shall pay to such heir of entail the free income arising from the said residue half-yearly as soon as convenient after the same falls due, beginning the first term’s payment as at the term of Whitsunday or Martinmas twelve months after my death for the half year preceding.” The said Alexander James Henry Campbell survived Miss Campbell, and became heir of entail in possession of Dunstaffnage.

Owing to Miss Campbell dying on the morning of the Whitsunday term day, 1880, a dispute arose as to what was the first term of Whitsunday or Martinmas six months after her death, and a special case was prepared setting forth the above facts, to which Miss Campbell’s trustees were the first parties, and her legatees, including her residuary legatee, the second parties.

Miss Campbell’s trustees maintained that as the testatrix died on the morning of the Whitsunday term, 1880, the first term of Whitsunday or

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R.

No. 11. Martinmas six months after her death was the term of Whitsunday 1881, and that her pecuniary legacies were not payable until that term, and that the residue of her trust-estate fell to be liferented by the heir of entail of Dunstaffnage who should be in possession at that term.

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The legatees maintained that the first term of Whitsunday or Martinmas six months after Miss Campbell's death was Martinmas 1880.

The opinion and judgment of the Court was requested upon the following question:—"Which is the term of Whitsunday or Martinmas six months after Miss Campbell's death within the meaning of her trust-disposition and settlement?"

Argued for Miss Campbell's trustees;—In questions of this sort "month" meant calendar month. By custom in the case of bills of exchange a month was a calendar month.¹ By Act of Parliament it was expressly declared that in all public statutes month meant calendar month.² That being so, the period of six months here must be calculated as calendar months, and in that case the six months had not expired as at Martinmas 1880.

Argued for the legatees;—(1) The question was to be settled according to the intention of the testatrix. Her intention clearly was to give her trustees a reasonable space of time in which to realise her estate. The result of holding that Martinmas was not the first term six months after the testatrix's death would be that legacies directed to be paid six months after her death would not be paid until twelve months had elapsed. (2) The legal term between Martinmas 1879 and Whitsunday 1880 did not expire until the Whitsunday term day had come to an end, and the testatrix must therefore be held to have expired in that half year. It followed from that that Martinmas 1880 was the first term six months after her death according to every reasonable consideration. (3) If the time was to be calculated strictly, then the true "month" in its strict sense was a lunar month of twenty-eight days, in which case six such months had elapsed between 15th May and 11th November 1880.

LORD JUSTICE-CLERK.—I am inclined to think that it is unnecessary while deciding this case to refer to the question of whether the months are to be taken as lunar or calendar. The simple question seems to be whether or not the *punctum temporis* of Whitsunday is to be held as one and indivisible, and if not, whether, as the testatrix died before it expired, the ensuing Martinmas must not be held as the first term six months after her death. I think that on a reasonable construction of the whole circumstances it must be held that the six months expired at Martinmas 1880, and that result seems certainly most in accordance with the intention of the testatrix.

LORD GIFFORD.—I am inclined to think that the six months had really elapsed by Martinmas 1880. I think the testatrix was looking to the well-known terms of Whitsunday and Martinmas, and not to the exact space of six months. To hold that is to give effect to the intention of the testatrix, which is the proper thing to do in such a case.

LORD YOUNG.—I am of the same opinion, and I arrive at it from every point of view.

¹ Chitty on Bills, 264; Bell's Prin. 46.

² 13 and 14 Vict. cap. 21, sec. 4.

In deciding the question, however, we have the exact meaning of the word "months" as here used to interpret, and in my opinion we must interpret what is meant by "six months" in a will which directs something to be done at the "first term of Whitsunday or Martinmas six months after" the testatrix's death.

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"Month" has two significations in our language. Primarily, it means a period of twenty-eight days. Its second—and only other meaning—is a calendar month, that is, one of the twelve named months into which the year is divided in the almanac, which months are of different durations. In Scotland we are quite alive to the distinction which I have now mentioned, but as there is seldom occasion to give effect to it, there is great scarcity of decision upon the point. In every criminal sentence, however, whether in the supreme or inferior Courts, when a prisoner is to be confined for a period of months, there is invariably inserted the word "calendar," and I think if that word were not so inserted the period would be taken as so many lunar months, and that that is the reason why the word "calendar" is made use of. I cannot hold the unvarying use of "calendar" to be mere surplusage. In the case of bills of exchange merchants who deal most with them have made a law for themselves, and fortunately the custom is the same on both sides of the Tweed, and a month means a calendar month.

If, however, there exist no decision and no practice on which rights are founded and established, I think it of great advantage that the recognised meaning of such a period of time as a month should be the same throughout the whole country. At the same time calendar months can be most easily calculated, and accordingly in 1850 a statute was passed directing that in all Acts of Parliament a month should mean a calendar month unless otherwise expressed, and that statute extends to Scotland. It was quite proper that such a statute should be passed, but at the same time it must be observed that it proceeds upon the assumption that a well-known distinction exists between calendar and lunar months.

In this particular case I am of opinion that the "first term of Whitsunday or Martinmas six months after" the testatrix's death, taken in the primary signification of a month, is clearly Martinmas 1880, being the Martinmas following the Whitsunday on which she died. That is also a reasonable conclusion, and probably in accordance with the intention of the testatrix. There can be no presumption that she wished the term of payment of legacies six months after her death, and the term when payment of interest on residue twelve months after her death was to commence to be on the same day, and that day the anniversary of her death. I therefore arrive at the same conclusion as your Lordships, and think that the question should be answered to the effect that "the first term of Whitsunday or Martinmas six months after" the testatrix's death was the term of Martinmas 1880.

LORD JUSTICE-CLERK.—Although I am averse to resuming any subject after it has been discussed, and think that it is not a practice to be indulged in, I wish to state that I purposely restricted my observations on the ground of judgment. I have only now to add that I reserve my opinion upon the question of calendar and lunar months, as I am not at present prepared with any remarks upon it. I understand that Lord Gifford concurs with me in the ground upon which I based my judgment.

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THE COURT pronounced this interlocutor:—"Find the first term of Whitsunday or Martinmas six months after Miss Campbell's death, within the meaning of the trust-disposition and settlement, is the term of Martinmas 1880: Find both parties entitled to their expense relative to the special case, to be paid out of the trust-estate."

MITCHELL & BAXTER, W.S.—W. G. L. WINCHESTER, W.S.—Agents.

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derson, &c.

ISAAC LYONS, Nominal Raiser and Pursuer.—*Millie*.
MATTHEW THOMAS ANDERSON AND OTHERS, Real Raisers and Defenders.—*Millie*.

FRANCIS WOODROW MANFORD, Claimant and Objector.—*Strachan*.

Poinding of the ground—Effect of service of Summons.—The service of a summons of poiding of the ground has the effect of putting a *nexus* on the moveables which are on the subjects at the date of service, and interps the heritable proprioritor from allowing others to acquire rights over them.

Held that an auctioneer who had, under the instructions of the heritable proprioritor of certain subjects, removed moveables which had been on the subjects when a summons of poiding of the ground was served, and who had afterwards sold these moveables by auction, notwithstanding service of a note of suspension and interdict, was not entitled to deduct from the price received therefor either advances made to his employer or his commission.

2D DIVISION.
Lord Adam.
I.

By bond and assignation in security recorded on 9th August 1876 Matthew Thomas Anderson and others admitted themselves to have borrowed from Francis Woodrow Manford the sum of £2000, and in security of the loan they disposed certain heritable subjects in Dunoon, including a villa called Belmont, of which they were proprietors, to Mr Manford. On 7th August 1879 Mr Manford raised an action of poiding of the ground against the borrowers under the bond, and on 21st October he obtained decree in absence in that action. At the date of the service of the action there was a considerable quantity of household furniture and other moveable property in the villa and the subjects in Dunoon, but shortly after the service of the summons the borrowers employed Isaac Lyons, auctioneer, Greenock, to remove the furniture and moveables from Dunoon, and to sell the same for their behoof in Greenock. Mr Manford having presented a note of suspension and interdict against the sale of these articles the note was served on Lyons on 12th October, and interdict was granted and declared perpetual on 21st November 1879. In the meantime the various articles had been removed from Dunoon to Greenock and had been sold by auction by Lyons on 15th October. The amount realised by the sale was £76, 15s. 0½d. This sum was subject to deduction of the expenses of removal, and Lyons also claimed to deduct £20 advanced to the borrowers, and a charge of £3, 16s. 9½d. as his commission. Matthew Anderson and others and Mr Manford both having claimed the proceeds of the sale in the hands of Lyons, a multiplepoiding was raised, in which Lyons was made nominal raiser and Matthew Anderson and others were the real raisers. Lyons lodged a condescendence of the fund *in medio*, in which he deducted the sum of £23, 16s. 9½d. above mentioned. Mr Manford compeared as a claimant, and objected to the fund *in medio* in so far as the sum of £23, 6s. 9½d. was deducted from the proceeds of the sale. He pleaded;—(1) The objector having, by the execution of the said summons of poiding the ground and decree following thereon, acquired a real and preferable right to the said furniture, the said Isaac Lyons is not entitled to deduct or retain from the proceeds thereof any sums said to have been advanced by him to the

granters of the said bond, or any of them. (2) The sale of the said furniture by the said Isaac Lyons having been a wrongful and illegal act on his part, and to the prejudice of the objector, he is not entitled to deduct or retain any sum for commission on the said sale.

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Lyons pleaded that the objections were untenable in law.

On 17th June 1880 the Lord Ordinary sustained Mr Manford's objections to the condescendence of the fund *in medio*, and found that the sum of £23, 16s. 9½d. fell to be added thereto. On 22d June Mr Manford was ranked and preferred to the fund as amended.

Lyons reclaimed, and argued;—The service of the summons of pointing of the ground had no effect in itself. No *nevus* was laid upon the moveables until they were scheduled, and so effectually pointed.¹ In this case the furniture, &c. were removed from the heritable subjects and were in Greenock and sold before decree was obtained in the action.

Argued for Mr Manford;—The service of the summons of pointing of the ground put a *nevus* on the moveables then on the subjects which interpellated the proprietor from removing them or allowing any rights to be obtained over them by others.² Pointing of the ground was thus essentially different from ordinary pointing.

LORD JUSTICE-CLERK.—I certainly had a very strong impression that a heritable creditor who had raised an action of pointing of the ground could not compete with personal creditors whose diligence had been executed until he himself had actually executed his pointing,—that is to say, until not only decree had been pronounced on an executed summons, but actual pointing following thereon had taken place. I am not satisfied, however, that I can maintain that position in the face of the cases which have been cited to us, and I think we must follow them, and hold that immediately the summons of pointing of the ground is served the debtor is interpellated from allowing others to acquire rights over the moveables on the subjects pointed.

LORD GIFFORD.—I am quite of the same opinion. I think the cases quoted shut us up to find as your Lordship proposes. Pointing of the ground differs from personal pointing in so far that the creditor who points the ground in doing so is not trying to get what he had not before, but is rather asking for a declarator of a right which he already has. There is no race of diligence between a pointing of the ground and a personal pointing. Lord Mackenzie in *Campbell's Trustees v. Paul* fully explains the reasons for this distinction.

LORD YOUNG.—As soon as the facts of the case were explained it became quite clear that the dispute between the parties turned upon the question whether any, and if any what, virtue lies in the execution of a summons of pointing of the ground, and early in the argument I asked if there was no authority upon that point. If no virtue attaches to the mere execution of the summons in the way of restraining the debtor from dealing with his moveables and disposing of them voluntarily, or hindering personal creditors from acquiring rights over them, it is quite plain that this privilege of a heritable creditor would be worthless, because the actual scheduling is the end of a somewhat long course of procedure, and the execution of the summons would have merely the

¹ Bell's Com. ii, 56-7; Royal Bank v. Baird, July 6, 1877, *ante*, vol. iv., p. 985.

² Campbell's Trustees v. Paul, Jan. 13, 1835, 13 Sh. 237, 10 F. 143; Barstow v. Mowbray, March 11, 1856, 18 D. 846, 28 Scot. Jur. 341.

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effect of giving notice to the debtor to remove his moveables. I was therefore not surprised to find that it has been distinctly decided that the execution of the summons has the effect of preventing other rights being acquired over the moveables.

That is the view of the law established by these cases. In taking that view we proceed on an assumption which is undoubtedly anomalous, and in the opinion of some objectionable, namely, that a creditor having a security over land has also a real right over the moveables of the land of a peculiar character, because it does not operate in the way of preventing the debtor from conferring rights over the moveables on other persons so long as he is not interpellated; but then the execution of the summons of poinding the ground acts as an interpellation, and in that way the right over the moveables has an actual value.

I entirely agree with your Lordships that this case is decided by the authorities, as it could only be decided consistently with the practical existence of a real right in the moveables in the heritable creditor. That right, I repeat, is anomalous, and in the opinion of many objectionable, but so long as it exists it would be worthless were we to hold that it could not be of any value until a long course of procedure had been gone through.

THE COURT adhered.

ANDREW CLARK, S.S.C.—MACKIE & GRANT, S.S.C.—Agents.

No. 13.

Oct. 22, 1880.
Montgomery
v. Mont-
gomery.

JAMES MONTGOMERY, Pursuer.—*Ure.*

MARGARET EDMISTONE OR MONTGOMERY, Defender.—*A. J. Young.*

Husband and Wife—Divorce—Aliment—Expenses.—A husband having obtained decree of divorce in the Outer-House, the wife presented a reclaiming note. On the wife's motion the Court gave her decree for aliment, to continue until final judgment on the reclaiming note, and for a sum to account of her expenses up to the close of the proof in the Outer-House.

1ST DIVISION.
B.

THIS was an action of divorce on the ground of adultery by James Montgomery, feuar and portioner, Airdrie, against his wife. Before the action the parties had been living apart, and it was admitted that under an agreement the husband allowed his wife 28s. a-week for the maintenance of herself and six children. The Lord Ordinary allowed a proof, granted an interim decree for £10 to the wife for her expenses of process, and, after the proof was led, pronounced decree of divorce.

Mrs Montgomery presented a reclaiming note. After the case had been sent to the roll Mrs Montgomery presented a note asking a sum from her husband in name of aliment from 15th August 1880, up to which time she had received aliment from him, to the date of final judgment, and also a sum for payment of the expenses of process.¹

LORD PRESIDENT.—We think the reclamer should have the aliment under the agreement continued at the rate of 28s. a-week from the date of the last payment, and that a sum of £30 should be paid towards the expense of leading the evidence. It must be distinctly understood that it is towards the expense of the proof that this sum is to be applied, and not towards the expense of printing the proof, which forms part of the expense of this reclaiming note.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

¹ Ritchie v. Ritchie, March 11, 1874, *ante*, vol. i., p. 826.

THE COURT pronounced this interlocutor:—"Decern against the pursuer and respondent for payment to the reclamer of aliment at the rate of 28s. a-week since 15th August last, to continue till final judgment in the cause: Further, decern against the respondent for payment to the reclamer of the sum of £30 further to account of her expenses to the close of the proof in the Outer-House."

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Montgomery
v. Mont-
gomery.

A. MORISON, S.S.C.—T. CARMICHAEL, S.S.C.—Agents.

ANDREW WALLACE, Inspector of Govan Combination, Pursuer.
ARCHIBALD DEMPSTER, Inspector of City Parish of Glasgow, Defender.

No. 14.

Oct. 22, 1880.
Wallace v.
Dempster and
Deas.

—Pearson.

JOHN S. DEAS, Inspector of Greenock, Defender.—Guthrie Smith.
—Jamieson.

Poor—Poor-Law Act, 1845 (8 and 9 Vict. c. 83), secs. 69 and 76—Interruption of acquisition of residential settlement by obtaining medical advice and drugs from the parochial board.—Held that the acquisition of a residential settlement was interrupted by the pauper having applied for and obtained medical advice and drugs to the extent of 2s. 2d. from the parochial board.

ANDREW WALLACE, inspector of the poor of the Govan Combination, Glasgow, raised this action in the Sheriff Court at Greenock against J. S. Deas, inspector of Greenock, and A. Dempster, inspector of the City Parish of Glasgow, for repayment of sums expended on the maintenance of a pauper, Peter McNeil, and his children.

1st Division.
Sheriff of
Renfrew.
M.

The defenders admitted that the pursuer was entitled to be relieved of the sum he sued for by either one or other of them, and they gave in a minute relieving him from further appearing in the case.

A proof was led.

It was admitted that the pauper was born in the City Parish of Glasgow, and it appeared from the proof that during the time he resided at Greenock he (on 23d May 1876) applied for parochial relief; "that he was then in destitute circumstances, seriously ill from pleurisy, and unable to work, and that he was a proper object of parochial relief; that the defender Deas offered to admit him to the poor-house, which offer he refused, but that he received medical advice and also drugs to the value of 2s. 2d. or thereby."

The City Parish maintained that the proof shewed that he had gone to reside in Greenock on 10th May 1871, and had completed a five years' residence therein without having applied for or received parochial relief.

The Sheriff-substitute (Smith) held that it was proved that he had gone to reside in Greenock only on 26th June 1871, and that his application for and receipt of parochial relief on 23d May 1876 prevented him acquiring a settlement there.

The Sheriff (Fraser) adhered.

The inspector of the City Parish appealed, maintaining that the pauper had acquired a residential settlement in Greenock either by five years' residence from 10th May 1871 or from 26th June 1871.

LORD PRESIDENT.—(After stating that he concurred with the Sheriffs in holding that the pauper's residence in Greenock was not proved to have commenced prior to 26th June 1871)—The other question is of a different kind, and turns upon this, whether what occurred on 23d May 1876 was, in the meaning of the Poor-Law Act, a receipt of parochial relief. The

No. 14. relief was medical treatment and medicine. The pauper was visited by the parish doctor, a salaried officer of the parochial board, and received medicine at the expense of the parochial board. Now, that relief was given under the authority of the statute (sec. 69), and was relief which the parochial board is not entitled to give to anyone but a pauper. Section 69 provides "that in every parish or combination it shall and may be lawful for the parochial board, and they are hereby required, out of the funds raised for the relief of the poor, to provide for medicines, medical attendance, nutritious diet, cordials, and clothing for such poor, in such manner and to such extent as may seem equitable and expedient." Now, the power which is here given to the parochial board, and the obligation which is imposed upon them, is to provide out of the proper poor's funds medical assistance and medicine for "such poor," and they can go no further. If this man was not in the position of a pauper he was not entitled to receive medicine or medical advice at the expense of the parochial board. But it was hardly suggested that he was not in that position. No doubt he did not require to be fed or clothed, but these are not indispensable conditions of pauperism. If he was off work and in want, the parochial board was entitled to assist him in whatever way he required, whether with food, clothing, or medicine, and though here the relief was confined to medicine, it was no less relief given, and quite properly given, under the statute. If it had been thrust upon him when he did not require it, that would have been another affair; and cases have been decided in which it was held that a residential settlement was not interrupted by relief so given, because it was improperly given. But that was not the case here; on the contrary, the relief was given quite properly, and consequently, under section 76 of the statute, there has not been a period of five years during which the person acquiring the settlement has not been in receipt of parochial relief.

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LORD DEAS.—I am of the same opinion. The medical advice was obtained at the expense of the parochial board, who paid the doctor by salary. I do not know what another doctor might have charged; I do not know what the medicine was; it may or may not have been costly, but whatever the value was, I agree that this man was not entitled to get it from the parochial board unless he was a pauper. The principle applicable is the same as if he had received food or clothing.

LORD MURE concurred.

LORD SHAND.—(After expressing his concurrence on the question of fact).—The second and more important point raises a question of law. Is professional medical advice and medicine parochial relief in the sense of the statute? I think there is no difference between aid given in that form and food and clothing. If it had been a case of voluntary giving of medicine, or if the applicant had gone to a public dispensary, there might have been a different question. But here we have a formal application followed by relief, and though the amount was small the principle seems none the less clear. I therefore agree with your Lordships on this point, which I think is the only question of any consequence in the case.

THE COURT refused the appeal.

W. & J. BURNES, W.S.—DUNCAN & BLACK, W.S.—Agents.

THOMAS L. SELKIRK (Service's Trustee), Pursuer.—*Pearson—Ure.*
 JAMES SERVICE, Senior, Defender.—*D.-F. Fraser—Rhind.*

No. 15.

Oct. 22, 1880.

Selkirk v.
Service.

Bankrupt—Action of exhibition and transumpt—Trustee's power of recovering documents—Bankruptcy (Scotland) Act, 1856, 19 and 20 Vict. c. 79, secs. 90, 91, 92.—The trustee of a bankrupt brought an action against the bankrupt's father as sole trustee under his own antenuptial marriage-contract, under which the pursuer alleged that the bankrupt had a right of fee in certain properties, concluding for exhibition and transumpt of the writs and evidents. *Held* that the proper remedy of the trustee was to call for production of the writs he required under sections 90, 91, and 93 of the Bankruptcy Act of 1856, and action dismissed as unnecessary.

THIS was an action of exhibition and transumpt by Thomas L. Selkirk, trustee on the sequestrated estate of James Service, junior, writer in Glasgow, against the father of the bankrupt, as sole surviving trustee under his own marriage-contract. The pursuer averred that James Service, senior, had, under his antenuptial marriage-contract, conveyed to himself and others, as trustees, certain properties, and that his wife had also conveyed by the same deed certain other properties to the same trustees; that the trustees were to hold these properties for the spouses in liferent and the children of the marriage in fee, and that one of these properties had been sold for £1050 to the Glasgow Improvement Trustees under their Act of 1866, and that the price ought to be in bank; that the bankrupt and his sister were the only children of the marriage, and thus that the bankrupt had an interest in these properties, and the money obtained by the sale of one of them.

1st Division.
 Sheriff of
 Lanarkshire.
 C.

The prayer of the petition was "to grant a warrant against the above named defender, ordaining him to exhibit and produce in the hands of the clerk of Court the whole writs, vouchers, and evidents of and concerning the re-investment or deposit in bank of the sum of £1050 sterling mentioned in the condescendence hereto annexed, and also the whole writs and evidents of the heritable subjects described in the sixth statement of the condescendence hereto annexed, to the effect that the said writs, vouchers, and evidents may be judicially transumed, and authentic transumps thereof delivered to the pursuer; and on the same being so produced, to ordain that the said writs be exactly transumed, and that transumps thereof duly authenticated by the clerk of Court be delivered to the pursuer; and to declare that the said transumps shall be as sufficient and of as great force, strength, and effect to the pursuer as if he had extracts of the same from your Lordship's Court-books."

The pursuer pleaded;—(1) The pursuer, as trustee on the sequestrated estate of the said James Service, junior, having acquired the bankrupt's right of fee in one-half of the said sum of £1050, is entitled to decree as craved *quoad* the writs, evidents, and vouchers of the re-investment or deposit in bank of the said sum of £1050. (2) The pursuer, as trustee foresaid, having acquired right to the bankrupt's *spes successionis* in one-half of the said sum of £1050, is entitled to decree as craved *quoad* the writs, evidents, and vouchers of the re-investment or deposit in bank of the said sum of £1050. (3) The pursuer, as trustee foresaid, having acquired the bankrupt's right of fee in one-half of the subjects described in article 6 of the foregoing condescendence, is entitled to decree as craved *quoad* the writs and evidents of the said subjects.

The defender pleaded;—(1) The action is incompetent. (2) No title to sue. (3) The pursuer's averments are not relevant or sufficient to support the prayer of the petition.

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The Sheriff-substitute (Erskine Murray) found that the pursuer was entitled to exhibition and transumps, and ordained the defender to produce the writs called for for this purpose.

On appeal, the Sheriff (Clark) found "that the pursuer has not set forth grounds sufficiently relevant to warrant the prosecution of the present action of transumpt: Therefore sustains the third plea in law for the defender, and dismisses the action, and decerns."*

The pursuer appealed, and argued that although the trustee might have other ways of obtaining the documents, yet that the present action was a competent mode.¹

LORD PRESIDENT.—I do not think there is any doubt as to the proper office of an action of transumpt, though it is one which is not often seen now-a-days. It is stated very clearly by Erskine (iv. 1, 53)—"An action of transumpt, which is also accessory, is competent to any person who has a partial interest in a writing, or immediate use for it to support his titles or defences in other actions against him in whose custody the writing lies, to exhibit it, that so a transumpt thereof may be judicially made out and delivered to the pursuer." And he says a little further on—"The pursuer's title to it is most commonly an obligation signed by the defender to grant transumps; but though there should be no such obligation, the action lies if the pursuer can prove that he has an interest in the writings, e.g., that they make part of the title-deeds of his lands; but in that case he must bear the whole expense of transuming." Now, the only question here is, whether that action is a proper proceeding for a trustee in a sequestration to resort to, where his object is to investigate the affairs of the bankrupt, and see whether a certain interest under the provisions of a marriage-contract has vested in the bankrupt, and can be made available for the benefit of his creditors? and I am clearly of opinion with the Sheriff that it is not a proper course. A trustee is armed under the Bankruptcy Statute with very large powers, and especially by sections 90, 91, and 93, he has the means of obtaining exhibition of the whole documents which he seeks in this action by summoning the bankrupt and his father and sister, the only persons interested in this property, and examining them all—in short, of obtaining the whole information in that form, and exhibition of the whole writings here asked for, in the most summary form and at the smallest possible expense. I think it is quite out of the way of a trustee's duty to resort to such a proceeding as this, and I am for adhering to the Sheriff's interlocutor.

If the trustee were to persist in the present action, and were allowed to do so,

* "NOTE.—The averments on record, in so far as they refer to the right of obtaining exhibition for transumpt, are very loose, though probably they are as strongly made as the circumstances of the case warrant. The documents referred to are apparently of two classes. The first are those which have been placed on record, and they therefore can be obtained inspection of, and certified copies taken in the ordinary way. The second are such as can be reached under sections 90 and 91 of the Bankruptcy Act of 1856. It is therefore difficult to see what end will be served by allowing the present action to proceed. On looking into the authorities as regards an action of transumpt, I do not find any case, nor could any case be indicated, in which the action of transumpt was used for the expiscation of matters arising in a sequestration. Upon these grounds it seems to me that the present action falls to be dismissed."

¹ Ersk. iv., 1, 53; Webster v. Reid's Trustees, Nov. 24, 1857, 20 D. 83, 30 Scot. Jur. 53.

the first thing he would require to do would be to prove his interest in the writings, which would just be to enter on the merits of the whole case.

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LORD DEAS concurred.

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LORD MURE.—I concur with the Sheriff in holding that what the pursuer wants might be got by simpler means, for it is plain that the documents called for could be reached under the provisions of the Bankruptcy Act. I am of opinion, therefore, that this action is, in the circumstances, incompetent, or rather unnecessary, but I am not prepared to concur with the Sheriff in holding that the grounds of the action are irrelevant. The pursuer avers that the bankrupt has an interest in the fee of certain property, that the property was sold and a price got for it, and that he cannot find out whether or how that price has been invested. Now, in the absence of any other mode of recovering the documents, I should not be prepared to hold that this action would be irrelevant, but I think that it is an expensive and unnecessary form of proceeding, in a case where the Bankrupt Act has provided a simpler remedy, and that it ought, on that account, to be dismissed.

LORD SHAND.—I am of the same opinion, and I very much agree with the remarks which have just fallen from Lord Mure. I am not prepared to say that the trustee has no right to the exhibition and copies of these documents; he probably has; and if this dispute had occurred before sequestration, and the question had been one between James Service, junior, and his father as sole trustee, to get access to these writings, I think the action might have been quite competent. The trustee must prove an interest in the documents, but even assuming that he has done so, he had under the statute a shorter and cheaper remedy. The statute enables bankrupt estates to be wound up without unnecessary litigation, and it is the duty of trustees to avoid expensive legal proceedings as far as possible. I concur with the grounds of judgment stated in the Sheriff's note.

THE COURT of new dismissed the action as unnecessary.

J. GILLON FERGUSON, W.S.—WM. OFFICER, S.S.C.—Agents.

GEORGE DENHOLM, Appellant.—*J. Guthrie Smith—M'Kechnie.*

No. 16.

HUGH THOMSON, Respondent.—*Rhind.*

Oct. 22, 1880.
Denholm v.
Thomson.

Reparation—Wrongous information—Privilege—Malice and want of probable cause.—A tenant, while removing some flooring from his house was stopped by his landlord on the street; the tenant having refused to return with the flooring, which he claimed as his own, was given into custody by the landlord, but on being taken to the police-office was at once liberated. In an action for reparation held that the landlord had in the circumstances been guilty of such recklessness in giving the tenant into custody as to amount in law to malice, and damages given accordingly.

HUGH THOMSON occupied a house in Fleming Street, Glasgow, as 2D DIVISION. tenant, from Whitsunday 1871. Having a fancy for keeping pigeons he, in Sheriff of Lanarkshire. 1872, obtained leave from his then landlord to lay flooring upon the rafters in an attic above his dwelling-house, and this attic so floored he fitted up with pigeon-houses and used as a place for rearing and keeping his pigeons.

In 1876 George Denholm purchased the tenement in which Thomson's house was, and Thomson became his tenant, and remained so until he received notice to leave as at Whitsunday 1880. Thomson took another house, and proceeded in April to remove his pigeon-houses and the flooring of the attic from Fleming Street to it. About nine

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o'clock on the evening of 16th April, while Thomson was engaged with some companions in wheeling a barrow loaded with pigeon-houses and flooring from Fleming Street to his new house, Denholm, accompanied by one of his clerks, came up to him in New Road, and insisted upon his taking the wood back to Fleming Street, alleging that the flooring belonged to him as owner of the house. This Thomson refused to do, and Denholm then appealed to a police constable who was standing by. In consequence of this Thomson was taken into custody, and he and the barrow of wood were taken to the Camlachie police-office. When at the police-office Denholm charged Thomson with taking wood belonging to him from the Fleming Street house. The police-inspector suggested that as the matter seemed to involve a question of civil right Thomson should in the meantime take back the wood to Fleming Street, and the case was dismissed, no charge being entered in the police books.

On 28th April Thomson raised an action in the Sheriff Court against Denholm, concluding for £50 in name of *solatium* or reparation for the injury done to his character and feelings by the accusation which had been made against him. He pleaded;—(1) The defender having acted towards pursuer in a malicious and injurious manner, is responsible for the result of such actings. (2) The defender having, by his grossly calumnious conduct as aforesaid, severely damaged and hurt the character, reputation, and feelings of the pursuer, is bound to make reparation therefor.

Denholm defended the action, and pleaded;—(1) The charge made by defender against pursuer was made with probable cause, and was privileged. (2) The statements made by defender regarding pursuer being true, and made upon justifiable occasion, he should be assoilized, with costs.

A proof was taken, at which the facts given in the above narrative were brought out. It appeared that Denholm had never in so many words charged Thomson with stealing the wood, but it had been generally understood that that was the nature of the charge made. Thomson adduced evidence that the fact of his apprehension and removal to the police-office had been made the subject of comment by his neighbours and acquaintances.

On 30th June 1880 the Sheriff-substitute (Spens) pronounced this interlocutor:—"Finds that on Friday 16th April, about nine o'clock in the evening, defender gave the pursuer into custody on a charge of stealing wood from him: Finds that the pursuer was taken along the streets in custody to the Camlachie police-office: Finds that the defender, in preferring such a charge, acted with a recklessness amounting to malice in the legal sense: Finds also that the charge was made without probable cause: Finds, accordingly, that defender is liable in damages to pursuer; assesses these at the sum of £20: Repels, accordingly, the defences, and decerns against defender for said sum of £20 sterling," &c.

Denholm appealed to the Court of Session, and argued;—The only legal force which can be employed to prevent the wrongous removal of the property of an individual is the police, and that was all that was done here. There was no malice in what had been done. The defender was in the *bona fide* belief that his property was being taken away without his consent, and he called in the strong arm of the law to protect himself. It did not matter that he was in error as to whose property the wood really was. He acted *in bona fide*, and therefore could not be said to be malicious. There was certainly a probable cause for his actings. Both malice and want of probable cause must be made out before such an action could succeed.¹

¹ Thomson v. Adam, Nov. 14, 1865, 4 Macph. 29, 38 Scot. Jur. 25.

LORD JUSTICE-CLERK.—I am quite satisfied with the views expressed by the Sheriff. It is plain that this flooring was put in by the tenant himself for his own purposes. He thought he could remove it, and he was in the act of doing so when the defender interfered and handed him over to the police as taking away what did not belong to him—in other words, on a charge of theft. The evidence of the police officers shews this, and the only question is, has the pursuer good grounds for an action of damages under the circumstances? and I think there is no question that he has. Where privilege is pleaded it is necessary for the party aggrieved to shew that the act complained of was maliciously done—in other words, with undue disregard to the rights of persons—and I think that we have here a very strong case of that kind. The defender, no doubt, had what he thought his rights, but he ought to have made inquiries before he took the course he did. He was not entitled to risk the pursuer's character by exposing him to the public gaze in the way he did on such grounds, and therefore I think that we have malice here, and that the Sheriff-substitute is right. I also think that he has not treated the defender harshly, and there can be little doubt that had the case gone to a jury the penalty to be paid would have been considerably greater.

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Denholm v. Thomson.

LORD GIFFORD.—I am of the same opinion. There seems to have been considerable difficulty attending the dispute as to whether the flooring was a fixture proper or only a trade fixture, and therefore removable by the tenant, but the way to settle it was certainly not to give the pursuer into charge of the police. Here, though there may have been privilege, there was undoubted recklessness in making the charge, and I must say I think that the Sheriff-substitute in the damages awarded has read the defender a very mild lesson indeed.

LORD YOUNG.—It is said in the summons that the defender maliciously and without probable cause gave the pursuer into custody as a thief, and it only remains for us to say whether the evidence supports the charge, and I think it does, and I therefore concur with your Lordships in affirming the interlocutor appealed against. The only criticism I desire to offer on the interlocutor is that I wish the finding had been one of malice and want of probable cause alone, without the addition of a partial definition of malice. The malice here no doubt arose from a temper of mind unduly exciting the man to act with an ill-feeling which would not probably in other circumstances have appeared; but I wish to offer this remark to the consideration of Sheriffs, that I think it is not desirable that they should put partial definitions into their interlocutors.

THE COURT pronounced this interlocutor:—"Find that on the occasion libelled the appellant (defender) gave the respondent (pursuer) into the custody of a police officer on a charge of stealing wood, and that the respondent was in consequence conducted in custody through the streets of Glasgow to the police office: Find that in so doing the appellant acted maliciously and without probable cause: Therefore dismiss the appeal," &c.

ADAMSON & GULLAND, W.S.—W. ELLIOT ARMSTRONG, S.S.C.—Agents.

No. 17.

DAVID CHARLES GUTHRIE, Petitioner.—*Sol.-Gen. Balfour—Jameson.*
 BEATRICE MARY GUTHRIE AND OTHERS, Petitioners.—*Mackintosh—*
H. Johnston.

Oct. 23, 1880.
 Guthrie, &c.

Succession—Heritable and Moveable—Heritable Security—Conveyancing Act, 1868, 31 and 32 Vict. c. 101, sec. 117.—Held in the construction of a will disposing of the testator's moveable estate, and of a trust-settlement containing a general conveyance of his whole heritable estate (both executed in 1872), that a bond heritably secured fell under the former and not under the latter deed, in respect that the Conveyancing Act of 1868 made such securities moveable as regarded the succession of the creditor.

1st Division.
 B.

JAMES A. GUTHRIE, of Craigie, died in January 1873. He left a will in the English form dated 20th April 1872, and a trust-disposition and settlement in the Scotch form dated 1st May 1872. A question having arisen in the course of certain proceedings in England whether a heritable bond, belonging to the deceased, over certain lands in Forfarshire was carried by the will or by the trust-disposition, a Case from the High Court of Justice, Chancery Division, was taken for the opinion of the Court of Session by the parties, viz. (1) the deceased's eldest son, David Charles Guthrie, and (2) Beatrice Mary Guthrie and others, his other children.

By the will Mr Guthrie nominated his wife and certain other persons his executors. After certain other provisions, which did not mention the bond, the executors were directed to hold the residue for the widow and children. By the trust-disposition and settlement, on the narrative that he was "desirous to settle the succession and disposal of my heritable estate in Scotland in the event of my death," Mr Guthrie appointed Mr A. C. Guthrie and others trustees, and conveyed to them "all and sundry lands and heritages, and in general the whole heritable estate, of whatever kind or nature, situate in Scotland, at present belonging or which shall belong to me at the time of my decease, with the whole vouchers and instructions, writs, titles, and securities of and concerning my said heritable estate situated in Scotland, and all that has followed or may be competent to follow thereon." He directed them, in the first place, "to dispoise and convey my lands and estates of Craigie, and whole other lands and heritages belonging or which shall belong to me at my death, situated in the county of Forfar, parts of the lands and other heritages, in general terms above disposed, to and in favour of David Charles Guthrie, my eldest son, whom failing," &c. In the second place, he directed his trustees to dispoise and convey the estate of Flichity, and the whole lands and heritages belonging to him in Inverness-shire, to his second son.

Argued for David C. Guthrie, the eldest son ;—The words in the trust-settlement, "whole other lands and heritages belonging or which shall belong to me at my death situated in the county of Forfar," carried the bond. Before the Act 1868 was passed these words would, without doubt, have included the bond, and there was nothing to affect the meaning of the words in sec. 117* of the Act of 1868, or in the interpretation

* "From and after the commencement of this Act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus*, in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor."

clause sec. 3.* Bonds were still called heritable securities, and fell under the words "lands and heritages." The truster's intention was that everything heritable belonging to him in Forfarshire should go to his eldest son, including the bond. This was a reasonable construction of the deed, and ought to be given effect to by the Court. The special words in the disposition applicable to the bond should be preferred to the general words of the will.

No. 17.

Oct. 23, 1880.
Guthrie, &c.

Argued for the younger children;—The question was whether the bond was heritable or moveable, and as that question was decided it would be carried by the disposition or by the will. There could be no doubt that the bond was moveable under section 117 of the Act of 1868, and was carried by the will.

THE COURT pronounced an interlocutor returning this answer—

"By the operation of the statute 31 and 32 Vict., cap. 101, the heritable bond for £19,000 in the said case mentioned forms part of the personal estate of the said deceased and belongs to his executors, to be administered by them in terms of his last will and testament, unless by any valid testamentary writing the said deceased has directed the said bond or sum of money therein contained to be otherwise disposed of: For the purpose of determining the said question of law the two testamentary instruments left by the said deceased, viz., the last will and testament dated 20th April 1872, and the trust-disposition and settlement dated 1st May 1872, though executed of different dates, must be read as contemporaneous instruments embodying the whole testamentary purposes of the deceased, except in so far as the same are altered by the codicil of 16th November 1872: The clause in the first named of these instruments conveying the residue of the personal estate and effects of the said deceased to his executors is suitable and effectual to carry and convey the said heritable bond and sum of money therein contained: The last named of these two testamentary instruments, according to its sound construction, does not convey or purport to convey the said bond and sum of money: The Court, therefore, is of opinion that the said bond was carried to the executors of the said deceased by the said last will and testament, and was not carried to the trustees acting under the said trust-disposition and settlement."

COWAN & DALMAHOY, W.S.—LINDSAY, HOWE, TYTLER, & Co., W.S.—Agents.

* "The words 'heritable security' and 'security' shall each extend to and include all heritable bonds, bonds and dispositions in security, bonds of annual-rent, bonds of annuity, and all securities authorised to be granted by the seventh section of the Act of the nineteenth and twentieth Victoria, chapter ninety-one, intituled An Act to amend and re-enact certain provisions of an Act of the fifty-fourth year of King George the Third relating to judicial procedure and securities for debts in Scotland, and all deeds and conveyances whatsoever, legal as well as voluntary, which are or may be used for the purpose of constituting or completing or transmitting a security over lands or over the rents and profits thereof, as well as such lands themselves and the rents and profits thereof, and the sums, principal, interest, and penalties, secured by such securities, but shall not include securities by way of ground-annual, whether redeemable or irredeemable, or absolute dispositions qualified by back-bonds or letters. The word 'creditor' shall extend to and include the party in whose favour an heritable security is granted, and his successors in right thereof."

No. 18.

GEORGE CLEMENT MOSCRIP, Appellant.—*J. Guthrie Smith—Kennedy.*
O'HARA, SPENCE, & COMPANY, Respondents.—*Brand.*

Oct. 23, 1880.

Moscrip v.
O'Hara,
Spence, & Co.

Proof—Proof pro ut de jure of agreement to qualify contract of employment—Agent and Client—Agent's right to recover fees—Notary-public.—In an action by a notary-public, who paid attorney-tax, but was not otherwise a qualified law-agent, against a firm of money-lenders for payment for professional services in collecting debts, protesting bills, &c., the money-lenders averred that by a verbal agreement entered into before the notary-public was employed it was expressly stipulated that he was to get no remuneration except what he could extract from the debtors. The pursuer pleaded that such an agreement could only be proved by writ or oath. The Sheriff allowed a proof at large, and on considering the evidence held the agreement proved. On appeal the Court adhered to his judgment.

2d DIVISION.
Sheriff of
Lanarkshire.
I.

In June 1879 O'Hara, Spence, & Co., a money-lending firm in Glasgow, raised an action in the Sheriff Court of Lanarkshire against George Moscrip, designed as writer in Glasgow, but who was merely a notary-public, and had paid attorney-tax as such, for payment of certain sums of money he had been employed to collect for the pursuers, which they alleged he had received, and had not accounted for. Moscrip defended the action, and averred that any balance apparently due had been paid by him for the professional services of a procurator in the Sheriff Court, employed on behalf of the pursuers.

In answer O'Hara, Spence, & Co. averred, *inter alia*, that by the agreement under which Moscrip was employed to act for them he was to receive no payment from them, but was to get his expenses out of the parties from whom he collected the money.

Moscrip pleaded, *inter alia*, that the special agreement founded on by O'Hara, Spence, & Co. could only be proved by his writ or oath.

Moscrip then raised another action against O'Hara, Spence, & Co., concluding for £230 as due to him for his own professional services, and for outlays made by him when compelled to employ a procurator to act for him in the Sheriff Court.

The actions were conjoined.

A proof was taken, in the course of which three partners of the firm of O'Hara, Spence, & Co. deponed that the agreement averred by them was entered into as a condition of Moscrip being allowed to collect their accounts, protest bills, and otherwise act for them. Moscrip himself denied that any such agreement had ever been made, and in support of his statement produced certain accounts, from which it appeared that on several occasions O'Hara, Spence, & Co. had paid him small sums in name of expenses. O'Hara, Spence, & Co. deponed that the sums so paid were expenses paid by the client along with his debt to themselves direct, and that they had at once paid the expenses so recovered to Moscrip. Moscrip was unable to produce any books, and, indeed, had kept none.

The Sheriff-substitute (Lees), on 24th December 1879, found "that the defender was employed by the pursuers to carry on their judicial and other the like legal business for them, but expressly on the footing that he was not to be paid by them for so doing, and was to look to the opposite parties for payment in the event of success." He, however, found him entitled to repayment of outlays *bona fide* made by him in the conduct of the pursuers' business.

Moscrip appealed to the Sheriff (Clark) who, on 16th February adhered to the Sheriff-substitute's interlocutor.

Moscrip appealed to the Court of Session, and argued;—(1) Such an agreement as was averred here qualifying the well-known contract of

employment could only be proved by writ or oath.¹ (2) Although a notary-public was not entitled to charge according to a qualified law-agent's table of fees, still he was entitled to payment *quantum meruit*.²

No. 18.
Oct. 23, 1880.
Moscrip v.
O'Hara,
Spence, & Co.

At advising,—

LORD JUSTICE-CLERK.—In this case we have thought it right to read the evidence, and the result at which we have arrived is that we see no reason to differ from the Sheriffs in the Court below.

The case, however, is not without difficulty and delicacy. There are two actions, the one at the instance of this money-lending firm against their collector—because that is truly the position in which Moscrip put himself—for certain sums of money which they say he collected on their behalf. The other action is at the instance of the collector against his employers for payment of professional services alleged to have been rendered by him to them in the course of recovering or endeavouring to recover various sums of money due to them.

In regard to the first action I need say nothing, but with respect to the second the defenders plead that it was agreed between them and Moscrip that he was to give his professional and personal services for nothing except what he might manage to extract from the debtors while collecting the debts. The collector denies this agreement, and pleads in addition that any such qualification of the contract of employment can only be proved by writ or oath.

Moscrip is not a law-agent—he is only a notary-public. The business, however, in which he was principally engaged was not a notary-public's work, and although I am not to be understood as saying that a notary-public who pays attorney-tax is not entitled to recover remuneration for his services *quantum meruit*, still I think the nature of the services rendered makes a difference in the strength of his claim for remuneration.

Although I am not disposed to interfere with or differ from Lord Rutherford's dictum in the case of *Taylor v. Forbes*, which has been referred to, still I am not inclined to follow it in this case. That was the case of a duly qualified practitioner suing for payment for professional services rendered in the ordinary course of his business. This is not a case of that kind at all. It is the case of an ordinary individual without any peculiar qualification undertaking a certain business under a certain contract.

The next question which arises is whether the contract is proved, and what it was. I think it is proved that Moscrip was to carry on the legal and other business of these money-lenders on the footing that he was to look for his remuneration solely to the persons opposed to him, and that, of course, only in the event of success. From the evidence I hold that to be the contract. Three partners of the firm speak to that as being the arrangement. True, Moscrip denies that that was the agreement—and that is not the least unpleasant part of this case—because the case turns on simple averment and denial.

The real evidence of the case shews, however, that that was the true nature of the contract. The exceptions from the ordinary course of dealing, which were so strongly pressed upon us, are the very cases which prove the defenders' case. They are all cases where the debtor paid the debt and expenses direct to

¹ Edmondston v. Edmondston, June 7, 1861, 23 D. 995, 33 Scot. Jur. 514; Taylor v. Forbes and Others, Jan. 13, 1853, 24 D. 19 (note).

² Winton v. Airth, July 17, 1868, 6 Macph. 1095, 40 Scot. Jur. 622; Aitken v. Kirk, March 15, 1876, ante, vol. iii. 595.

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the lenders, and the lenders then at once paid over the sums recovered in name of expenses to Moscrip. There is also the suspicious fact that this collector kept no books in which to enter his various transactions and services rendered to his employers.

On the whole no case has been made out to us to shew that the Sheriffs have been in error.

LORD GIFFORD and LORD YOUNG concurred.

THE COURT pronounced this interlocutor :—" Having heard counsel for the parties on the appeal in the conjoined actions, dismiss the same, and affirm the judgment of the Sheriff appealed against, and decern : Find the appellant liable in expenses."

JOHN GILL, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

No. 19.

HUGH LENNOX, Pursuer.—*J. Campbell Smith—Millie.*
JAMES ALLAN & SON, Defenders.—*Keir—Dickson.*

Master and Servant—Yearly engagement—Tacit relocation—Special agreement.—Held that the rule of tacit relocation did not apply to an engagement of a workman for one year.

ON 5th January 1879 a strike took place in the shoemaking trade in Edinburgh. James Allan & Son, boot and shoemakers there, in order to secure workmen, undertook to supply those men who would return to their workshop with constant employment for a year. On 24th February they entered into an engagement with, among others, Hugh Lennox, a journeyman shoemaker. This engagement was in the following terms :—" Memorandum.—From Allan & Son, bootmakers, 42 Leith Street, to Mr Hugh Lennox.—Edinburgh, 24th February 1879.—Dear Sir,—I bind and oblige to give you constant work for the period of twelve months from this date, at the rate of 28s. per week. JAMES ALLAN & SON."

Lennox entered their service and continued to work for them until 24th February 1880, when Allan & Son's manager reminded him that his engagement expired that day. Lennox thereupon consulted an agent, who wrote to Allan & Son that day claiming that he was entitled to a new engagement for a year by tacit relocation, forty days' notice not having been given him of the proposed termination of the engagement. Allan & Son did not recognise this claim, but, on 25th February, they put up a notice in their workshop stating that none of the yearly engagements were to be renewed. In consequence of the 24th of February being a Wednesday they allowed Lennox to work on for them until Saturday when they paid him his week's wages as usual, and intimated that they would thereafter only engage him on the same terms as their other workmen. Lennox refused to work on these terms, and raised an action against Allan & Son, in which he concluded for £72 as the amount of wages which he was entitled to under the new twelve months' engagement, which he averred had been entered into by tacit relocation.

Allan & Son defended the action.

Pleaded for Lennox ;—(1) The defenders' agreement with the pursuer having been renewed by tacit relocation, they were not entitled during its currency to terminate the same without fault or consent on his part.

A proof was allowed and taken, in the course of which it was admitted that engagements for twelve months were very unusual in the shoemaking trade.

The Lord Ordinary, on 24th July 1880, pronounced this interlocutor :—" Finds that the pursuer was engaged by the defenders as a shoemaker,

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Moscrip v.
O'Hara,
Spence, & Co.

Oct. 26, 1880.
Lennox v.
Allan & Son.

2D DIVISION.
Lord Lee.
I.

for the period of twelve months from 24th February 1879, at the rate of 28s. per week, in terms of the memorandum, No. 6 of process, and that at the end of that period he was informed by the defenders that his engagement was terminated, and that if he remained it would be on the same terms as other workmen daily engaged : Finds that he was not dismissed, and that he was not entitled to hold his said engagement renewed for another period of twelve months : Finds also, that having been offered continued employment upon the usual terms, he had no claim to wages in room of notice : Therefore assoilzies the defenders from the conclusions of the action, and decerns : Finds the defenders entitled to expenses," &c.*

No. 19.
Oct. 26, 1880.
Lennox v.
Allan & Son.

Lennox reclaimed, and argued ;—No warning had been given before

* " NOTE.—By agreement of parties the proof in this case was held to be the proof also in two other actions against the same defenders ; and the Lord Ordinary was desirous to go over the evidence before disposing of any of them. The result, however, has been, that the Lord Ordinary is unable to find in any of the cases ground for a judgment in favour of the pursuers.

" In the present action at the instance of Hugh Lennox, the pursuer's engagement took place on 24th February 1879, under the special circumstances described by him. It was embodied in a memorandum in the following terms :—(quoted in narrative).

" According to the Lord Ordinary's view of the proof, no warning was given to the pursuer, prior to 24th February 1880, that his services were to be discontinued. The defenders evidently thought no warning was needed. But when they heard on the morning of 25th February, by the letter, No. 12 of process, which they then received from the pursuer's agent, they caused notice to be given to the pursuer and other workmen similarly engaged, that their engagements were not to be renewed, and that if they remained after the expiry of their engagements (as apparently they might have done), it would be upon the same terms as the other workmen daily engaged. The pursuer was told that he might work out his week, and have continued employment upon the ordinary terms, but he insisted that he would work under a continued yearly engagement, or not at all ; and at the close of the week he accordingly left, intimating his claim to a renewed service for another period of twelve months upon the ground of tacit relocation.

" The Lord Ordinary is of opinion that the engagement in question was not one to which the doctrine of tacit relocation is applicable. It was quite a special engagement entered into under exceptional circumstances, and unaccompanied by any stipulation, express or implied, that the service was to continue at the end of the twelve months for another period of the same duration if no notice was given. In substance it was, in the Lord Ordinary's view, an engagement by the week, with a guarantee on the part of the employer that it should endure for twelve months. It does not follow that at the end of the period either party might terminate the employment without any notice whatever. The Lord Ordinary inclines to think that some notice was necessary, and that a week's notice would have been held to be reasonable in a question either of desertion by the servant or dismissal by the master. In the present case, however, he has come to be satisfied that there was no dismissal. He thinks it proved that the pursuer was offered farther employment, and refused to take it except upon the condition of his being accepted as a yearly servant, engaged by tacit relocation for a second period of twelve months.

" The Lord Ordinary has found the pursuer liable in expenses, because, in his view, there was no justification for raising the present action in the Court of Session, excepting the pursuer's desire to try the question of right as to whether the engagement was of the character which he ascribes to it. Upon that question the pursuer, in the Lord Ordinary's view, has failed ; and as his mistake upon that point has been the cause of the whole litigation, in which he has been unsuccessful, the usual consequences must follow."

No. 19. the expiry of this yearly engagement, and in consequence tacit relocation for another year had taken place.¹

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LORD JUSTICE-CLERK.—The foundation of the pursuer's argument fails entirely, as he is without the basis on which alone it can be supported. The law of tacit relocation, upon which he relies, has reference only to specific classes of servants—agricultural, domestic, and the like. The pursuer does not dispute that the rule as regards them depends upon custom, yet he seeks to import it into the case of master and workman, where there is no such custom at all. The reason why there is no such custom as exists in the case of servants of the kind I have referred to is that an engagement of the kind that we have here is very unusual. The rule is an artificial one, and is created and grows out of the ordinary understanding among the people to whom it applies. If extended to other forms of employment it might easily become excessively inconvenient. In such cases an engagement for twelve months is not usual. This engagement must, therefore, be held to have been for twelve months only, and then to come to an end. In that case there was no necessity for notice of any sort on either side, except in the case of dismissal or throwing up of the employment.

LORD GIFFORD.—I am of the same opinion. The necessity for giving forty days' notice in the case of an agricultural servant depends upon custom altogether—it is therefore a matter of customary law. It is true that custom was the foundation of it—that is, custom preceded the establishment of the law. If there had been an averment here of a custom or usage in the trade a proof of that custom would have been allowed. But there is no allegation of custom with regard to shoemakers, nay, it is admitted that there is no such custom, such an engagement as this being admitted to be very rare and exceptional. This is a very special engagement, framed to meet a strike among the workmen, and under it twelve months' employment is promised to this workman if he will break from his fellow-workmen during the strike. That leaves open the question of what is reasonable notice. That the circumstances of the case always decide. I concur with the Lord Ordinary that this is a special case, where there is no room for the application of tacit relocation.

LORD YOUNG.—I am entirely of the same opinion. The only point on which I wish to guard myself is whether there is any occasion at all for notice where the engagement is for a precise period. On that point I give no opinion; but my impression is that where there is no usage, and the agreement is for a precise specified period, the agreement itself contains the notice, distinguishing it from the case where no period is specified. What I would not approve of is that where, as here, we have an obligation to keep a man in work for a year, he should be able to say that that meant for longer than a year.

THE COURT adhered.

DANIEL TURNER, S.L.—GEORGE ANDREW, S.S.C.—Agents.

Similar actions had been raised by other workmen in the same position as Lennox, and this judgment was held to rule them all.

¹ Maclean v. Fyfe, Feb. 4, 1813, F. C.; Morrison v. Allardyce, June 27, 1823, 2 Sh. 434 (N. E.) 387; Campbell v. Fyfe, June 5, 1851, 13 D. 1041, 23 Scot. Jur. 481; Lord Advocate v. Drysdale, April 24, 1874, *ante*, vol. i. (H. L.), p. 27, Lord Selborne p. 36, L. R. 2 Sc. App. 368; Ersk. Inst. iii. 3, 16, Lord Ivory's note; Fraser on Master and Servant, p. 232.

ARCHIBALD VINCENT SMITH SLIGO, Pursuer and Respondent.—*Dickson*. No. 20.
JOHN KNOX, Defender and Appellant.—*J. C. Lorimer*.

Nov. 2, 1880.
Smith Sligo v.
Knox.

Expenses—Appeal—Where appeal withdrawn after printing by respondent.
—An appeal was sent to the short roll upon the 15th October. The appellant, on the 2d November following, moved in the motion roll that it be dismissed, with modified expenses. The respondent asked to be allowed full expenses, as he had been put to considerable expense in printing documents in preparation for the discussion of the case. Appeal dismissed, the respondent being found entitled to full costs, as taxed.

1ST DIVISION.
Sheriff of
Lanarkshire.
M.

J. L. HILL & Co., W.S.—MACBRAIR & KEITH, S.S.C.—Agents.

JOHN GREIG, Pursuer and Respondent.—*Salvesen*. No. 21.
JOSEPH LEASK SUTHERLAND, Defender and Appellant.—*J. C. Smith*.

Nov. 3, 1880.
Greig v.
Sutherland.

Process—Appeal—A. S., 10th March 1870—Omission to lodge prints in due time.—Circumstances in which the Court sent an appeal from the Sheriff Court to the roll although the appellant had failed to lodge prints within fourteen days after the process had been received by the Clerk of Court, as required by sub-sec. 1 of sec. 3 of A. S. March 10, 1870.

IN this appeal from the Sheriff Court of Midlothian the respondent objected to its being sent to the roll on the ground that the appellant had failed to print and box the note of appeal, &c. timeously, in terms of the Act of Sederunt of 10th March 1870.* The Sheriff's judgment was dated 15th June 1880; the appeal was taken on 12th October. The clerk received the process upon 14th October. The print of the note of appeal and other papers, which was due upon the 29th October, the 28th having been the autumn Fast Day, was not boxed till the 1st November. The appellant stated as the cause of delay that he was prevented from obtaining access to the process by the absence from town of his counsel, in whose hands it was. There was no reponing note by the appellant.¹

1ST DIVISION.
Sheriff of
Midlothian.
M.

THE COURT appointed the cause "to be put to the roll on condition of the appellant paying to the respondent the sum of £2, 2s. in respect of the delay by the appellant in printing the proceedings."

BOYD, MACDONALD, & Co., S.S.C.—ANDREW CLARK, S.S.C.—Agents.

* The Act of Sederunt, 10th March 1870, sec. 3, sub-sec. 1, provided that "the appellant shall, during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the clerk he shall have obtained an interlocutor of the Court dispensing with printing in whole or in part; . . . and if the appellant shall fail, within the said period of fourteen days, to print and box . . . the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed, as herein-after provided."

Sub-sec. 3 provided,—"It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session . . . to repon him to the effect of entitling him to insist in the appeal, which motion shall not be granted by the Court or the Lord Ordinary except upon cause shewn, and upon such conditions as to printing and payment of expenses to the respondent, or otherwise, as to the Court or the Lord Ordinary shall seem just."

¹ *Authorities quoted.*—Robertson v. Barclay, Nov. 27, 1877, ante, vol. v., p. 257; Walker v. Reid, May 12, 1877, ante, vol. iv., p. 714.

No. 22. EARL OF BREADALBANE, Pursuer and Respondent.—*Kinnear—Low.*

Nov. 4, 1880.
Earl of Bread-
albane v. Mac-
dougall.

ALEXANDER WILLIAM MACDOUGALL, Defender and Reclaimer.—*Trayner—J. C. Lorimer.*

Superior and Vassal—Non-entry—Proof of Superior's title.—In 1821 a vassal entered with a superior. The lands were subsequently sold, and no other entry was asked by the superior until 1879, when an action was brought for payment of casualty against a singular successor of the vassal in question. It was not stated when the latter died. *Held* that the defender was liable unless he could shew that the superiority belonged to some one other than the representative of the superior with whom the previous entry had been made.

1ST DIVISION.
Ld. Curriehill.
M.

THE Earl of Breadalbane was superior of the six merk land of old extent of Soroba and others, in the parish of Kilbride, lordship of Lorn, and sheriffdom of Argyll, and now claimed payment, under the 4th section of the Conveyancing Act, 1874, of a casualty, being one year's rent of the lands, of which the entry was untaxed, from Alexander William Macdougall of Soroba.

Major Duncan Macdougall was the vassal last seised in the lands, conform to precept of *clare constat* by John fourth Earl of Breadalbane, dated 20th August 1821, and instrument of sasine following thereon. He had since died, but the date of his death was not stated.

In 1824 Major Macdougall had sold the lands to Hugh Munro of Bar-naline, and his trustees in turn sold to the defender, who was now infest.

The defender denied that his lands were held of the pursuer. He averred that Macdougall of Dunollie was his superior, and he produced certain titles shewing that Dunollie held the six merk lands of Soroba directly under the Duke of Argyll from the beginning of the last century, and had acquired the superiority and been entered with the Crown in virtue of a conveyance by the then Duke of Argyll in 1819, and had thereafter consolidated the superiority and mid-superiority by resignation in his own hand.

A proof was led, at which certain titles were produced, which are sufficiently narrated in the Lord President's opinion.

The Lord Ordinary, on 17th June 1880, decerned in terms of the declaratory conclusion, and gave decree for payment of £284, 13s., being one year's rent of the lands after deductions.

The defender reclaimed, and argued ;—The pursuer had not established that he was superior of the defender's lands. He must do so before he could get decree.

LORD PRESIDENT.—Is it not enough to shew that there is a superiority of these lands vested in a party whose ancestor you have recognised? What do you say to *Innes v. Gordon*, Nov. 20, 1844, 7 D. 141?

Trayner.—The defender was not called on to pay the pursuer and risk a second payment to Dunollie. Upon the titles the one was as much superior as the other.

Argued for the respondent ;—Major Duncan Macdougall, the defender's predecessor, having entered with the then Lord Breadalbane in 1821, the defender must pay the casualty due upon the death of the Major, unless he could shew that Lord Breadalbane was not his superior. This had not been done. Under Dunollie's titles both property and superiority were consolidated. That shewed that his lands of Soroba were not the same as those for which the casualty was asked.

LORD PRESIDENT.—I think this is a very clear case. The pursuer alleges

that he is the superior of certain lands, and, as such, claims a casualty from the defender, who, he asserts, is his vassal in the lands. The defender denies the pursuer's title. In such a case the first thing is to look at the defender's titles in order to see when and with whom he was last entered. The defender bought the lands in question in 1870 from a Mr George Grant Mackay, who had himself purchased them a short time previously. Before that, in 1824, Hugh Munro of Barnaline, a disponsee of Major Duncan Macdougall of Soroba, was infeft in the same lands. Major Macdougall had entered with the superior a few years previously, and the party with whom he entered was the pursuer or his predecessor, for, by precept of *clare constat*, dated 20th August 1821, he was acknowledged to be the vassal by the then Earl of Breadalbane, and was infeft in the same year. No doubt there has been no entry since. But we do not know how long Major Macdougall lived. He may have lived for a long time after 1824, and so long as he lived the fee was full. A purchaser of the estate would hold of him during his lifetime. So that we cannot tell when Lord Breadalbane had an opportunity of obtaining a new entry. And, therefore, there may be nothing very extraordinary or inexplicable in the circumstance that these lands may have been in non-entry for some years.

But the important fact is that the last entry was with a Lord Breadalbane, and that the present defender is the singular successor of the person who took that entry. That fact is conclusive of the case upon the authority of *Innes v. Gordon*, unless the defender will undertake to shew that the superiority is not with Lord Breadalbane, but with some one else. The present Lord Breadalbane is a successor of the Lord Breadalbane of 1821, by a regular progress of titles, so that the titles on both sides, both those of the superiority and of the *dominium utile*, are complete. There is therefore an end of the case, unless the defender can shew that the entry in 1821 was a mistake, and ought not to have been taken.

But when we go backwards from that date we find not one such entry but several such entries. There is one in 1740, another in 1795, and this one in 1821; so that thereby the defender's task is rendered the more difficult, because he must shew that all these entries proceeded upon a mistake, owing to the superiority having really belonged to some different person. How does he attempt to do this? He begins five years later than the date of the first entry I have mentioned, with a charter by the Duke of Argyll to Macdougall of Dunollie in 1745. It would be odd if Lord Breadalbane were giving in 1740 one entry to this subject and the Duke of Argyll were giving five years later another entry under the same superiority, the right of which had been exercised so recently before by another party. But passing that by, the state of the titles produced by the defender instructs that in 1819 Macdougall of Dunollie, being the owner of "the six merk land of Soroba," obtained a conveyance to the superiority from the Duke of Argyll, and upon that he was entered as crown-vassal in 1819. Then, having both rights in his own person he consolidated the property and superiority, and his successor now stands infeft as a crown-vassal in the superiority and *dominium utile* as so consolidated. He holds the superiority directly, just as a crown-vassal would. How that could put him into the position of being the superior of the defender I do not see. He is infeft in a substantial estate of *dominium utile* held of the Crown. But in the estate we are dealing with under this summons there is a mid-superiority reaching from 1740 down to the present day, or, at least, to 1821. I ask whether it is

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No. 22. possible that these two estates can be one and the same, or is it not clearly demonstrable that they are separate subjects?
 Nov. 4, 1880. Earl of Breadalbane v. Macdougall. A puzzle, no doubt, arises from the use of the same name; but it is possible, if not common, that there should be two such estates, and that is the only way of explaining the obscurity. But in order to the success of the defender it must be demonstrated that a person other than the pursuer is his superior; and I am therefore of opinion with the Lord Ordinary that the pursuer is entitled to have his casualty.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT adhered.

DAVIDSON & SYME, W.S.—H. & H. TOD, W.S.—Agents.

No. 23. JAMES ANDERSON, Complainer.—*Guthrie Smith—Brand.*
 Nov. 5, 1880. Anderson v. Liquidators of City of Glasgow Bank. LIQUIDATORS OF CITY OF GLASGOW BANK, Respondents.—*Sol.-Gen. Balfour—Kinnear—Asher—Low.*

Public Company—Companies Act, 1862, 25 and 26 Vict. c. 89, sec. 121—Contributory—Suspension of a charge to pay calls granted without caution.—The liquidators of a joint stock bank, which was being wound up, came to an arrangement with one of the contributories, who was unable to pay the second call, that he should pay a sum of money and they should grant him a discharge. The authority of the Court was interposed to the compromise, and the money was paid. The liquidators refused to deliver the discharge, and obtained an order against the contributory for payment of the call, and caused him to be charged thereon. They averred that the contributory had not made a fair disclosure of his affairs before obtaining the discharge, and in particular that he had not disclosed the fact that he had recently become a partner of a trading company. They also averred that after the date of the compromise he had paid money into the copartnery funds.

In the special circumstances of the case note of suspension of the charge to pay a call *passed* without caution.

1st Division. Lord Lee. Bill-Chamber. B. JAMES ANDERSON, farmer, Sandyhills, was holder of £257 stock of the City of Glasgow Bank at the date of its stoppage on 2d October 1878. He paid the first call of £500 per each £100 stock. The liquidators having made a second call on 22d April 1879 Mr Anderson could not pay £5782, 10s., which was the amount he was liable for, and he entered into negotiations for a compromise. The liquidators eventually agreed to give him a discharge on his paying £1300. Accordingly he raised the money and paid the liquidators £1300 on 5th March 1880. The Court, on 19th March 1880, by interlocutor, interposed their authority to this arrangement. A discharge was prepared and was signed by Mr Anderson, but the liquidators refused to go on with it, and retained it in their own hands. They included the name of Mr Anderson in a list of contributories presented to the Court under section 121 * of the Companies Act, 1862, and

* “Section 121. Where an order, interlocutor, or decree has been made in Scotland for winding up a company by the Court, it shall be competent to the Court in Scotland during session, and to the Lord Ordinary on the Bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively, and of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respec-

obtained an order on him to pay the second call. Having been charged under this order Mr Anderson brought a note of suspension. No. 23.

The liquidators lodged answers, in which they averred that the complainer had not made a fair surrender of his estate. They stated,—“ Explained that after the sanction of the Court had been obtained to the proposed compromise with the complainer, the respondents discovered that at the time when he was negotiating the said compromise with them he was a partner in the firm of John R. Rennie & Co., tube manufacturers, Wallace Street, Tradeston, Glasgow. The complainer had concealed the fact from the respondents. On making this discovery the respondents at once directed that the discharge should not be delivered to the complainer, and that inquiries should be made as to his connection with said firm. The result of these inquiries was to shew that the complainer had entered into partnership with John R. Rennie, as tube manufacturers, by contract of partnership dated 2d July 1879. By said contract the complainer agreed to contribute £1500 to the capital of said firm. The respondents employed Mr John M'Lean, accountant, Glasgow, to examine the books of the firm, and, from a report furnished by him it appeared that the complainer had, on 31st December 1879, a sum of £698, 3s. at his credit in said firm. The complainer had paid that sum into said firm by instalments, the first of which was paid on 29th August 1879, and the last on 31st December 1879. The respondents, after receiving Mr M'Lean's report, called upon the complainer for an explanation, and on 4th May 1880 the complainer furnished them with a statement in which he attempted to reconcile the facts stated above with his said declaration upon which the said proposed compromise proceeded. As the said statement was unsatisfactory, and in several respects obviously untrue, the respondents called upon the complainer to account to them for the sum at his credit in said firm. The complainer refused to do so, and the respondents then took decree against him (as they were entitled to do), as a defaulting contributory, and gave him the charge which he now seeks to suspend.”

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The complainer pleaded;—(1) The respondents having accepted the surrender of his estates made by the complainer, having thereupon compromised their claim against him, and he having executed a discharge, they are not now entitled to refuse delivery of the said discharge in duplicate, or to proceed with the present diligence. (2) The decree on which the said charge proceeds having been obtained without informing the Court of the foresaid compromise and of the foresaid executed discharge, has been obtained on a partial and misleading application, and is therefore not due authority for the diligence now complained against. (3) As the Court would not have granted the said decree had all the facts now stated been mentioned the present charge ought to be suspended.

The respondents pleaded;—(1) The complainer having fraudulently concealed his interest in the said firm the respondents were entitled to refuse delivery of the said discharge, and to take decree against the complainer as a defaulting contributory, and that notwithstanding that the said proposed compromise had been sanctioned by the Court.

The Lord Ordinary pronounced this interlocutor:—“The Lord Ordinary having heard parties' procurators and considered the note of suspension,

tively, with interest from the said date till payment, at the rate of £5 per centum per annum, in the same way and to the same effect as if they had severally consented to registration for execution on a charge of six days of a legal obligation to pay such calls and interest; and such decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignation, unless with special leave of the Court or Lord Ordinary.”

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answers thereto, and productions, grants special leave to the suspender to apply for suspension of the charge complained of without caution or consignment, and passes the note without caution or consignment."

The respondents reclaimed, and argued ;—They were quite justified in obtaining an order for payment of calls under the 121st section of the Companies Act, as the complainer had concealed the fact that he was a partner of the firm of Rennie & Co. when he made the arrangement for a compromise. The status of partner was worth something, and ought to have been disclosed. The discharge was not a delivered deed, and was no bar to the liquidators proceeding to enforce calls. Even if delivered, there was evidence to shew that it proceeded on an insufficient valuation of the complainer's means. It was not a contract, as the only person who got benefit from it was the complainer. At all events the note should not have been passed without caution.

Argued for the complainer ;—The complainer had made a fair surrender of his whole effects, and the fact that he got funds from friends after he had arranged with the liquidators was no reason for refusing to give him the benefit of the discharge. The discharge was admitted by the liquidators, and therefore did not require delivery. The decree under the 121st section was obtained without any notice to the complainer, and he should have an opportunity of stating objection to it. He was unable to find caution, and if the note was not passed without caution he would be unable to obtain any inquiry into the circumstances.

LORD PRESIDENT.—In this case there was an arrangement made between the liquidators of the City of Glasgow Bank and the complainer for a surrender of his estate, in respect that he was unable to pay the second call which had been made upon the shares held by him in the City of Glasgow Bank, and that arrangement proceeded upon a payment made by him of £1300, in respect of which it was agreed that he should obtain a discharge from the liquidators of his whole obligations as a partner. The arrangement, the money having been paid, was sanctioned by the Court on the 19th of March last. The effect of course was to liberate Mr Anderson from all farther liability ; but notwithstanding the liquidators have taken decree against him as a contributory in terms of the 121st section of the Companies Act of 1862, and he has brought a suspension of that decree upon grounds which are certainly rather peculiar. If the arrangement for compromise is binding upon the liquidators it is quite plain that they were not entitled to take the decree against him which they have done. But the ground upon which they have proceeded is, that they discovered, after the sanction of the Court had been given to the arrangement, but before the discharge had been delivered to Mr Anderson, that he had not made a fair surrender of his estate, but was possessed of funds and of an interest in a trading company which he had not disclosed to them. Now, it is quite necessary in a case of this kind to attend particularly to the terms and effect of the 121st section of the statute. It enacts that it shall be competent for the Court, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls, and of the amount due by each contributory, to pronounce forthwith a decree therefor, and that such decree may be extracted immediately. A similar clause in the Joint Stock Companies Act, 1858, has been interpreted in the case of *Lumsden*, in the same year (21 Dunlop, 110), as meaning that where an application is made by the liquidators, in terms of this section, to the Court, decree passes as a matter of course, and no person against whom

decree is sought under that application is entitled to be heard against the granting of the decree. But then the statute provides further, that no suspension of that decree shall be competent except upon caution or consignment, unless with special leave of the Court or Lord Ordinary. Now, although that part of the clause is expressed in a negative form, it plainly implies an affirmative enactment, that a suspension may be competent upon caution or consignment, and also with special leave of the Court without caution or consignment. The question therefore comes to be, whether in the circumstances of this case we should comply with the demand of the complainer to pass this note without caution or consignment? That course is certainly not to be followed except in exceptional circumstances. But it rather appears to me, on full consideration, that we shall not be doing any violence to this clause of the statute, nor acting inconsistently with its spirit and intention, if we affirm the Lord Ordinary's interlocutor passing the note without caution or consignment.

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It must be observed, that unless the liquidators are well founded in their complaint that this gentleman has not made a full and fair surrender of his estate, they would have had no right to take this decree against him at all, because they had undertaken that he should be discharged of all his obligations upon payment of a sum of £1300, which has been actually paid. And the peculiarity of the case therefore is, that this suspension must necessarily be passed, unless it can be shewn by the liquidators that there is some justification for what they have done—I mean in withholding the delivery of the discharge. Under all ordinary circumstances, where the liquidators have not come under any obligation to the contributory, it would be quite out of the question to pass the note without caution or consignment, because the contributory is on the list of contributories, and that is the foundation of his liability. But in the present circumstances this contributory would be entitled to have the discharge which has been actually executed delivered over to him, and in his hands, but for the allegation which the respondents make, that he has not made a full and fair surrender of his estate. Now, if the liquidators could have shewn in the Bill-Chamber that this complainer was certainly possessed of funds and estate which he had not disclosed or given up, I think we should have been in a condition at once to refuse the note; but the circumstances brought before us do not bear that construction very clearly. I give no opinion on what the ultimate result of this case may be, but all I say in the meantime is, that without further inquiry I think we have not before us a sufficient justification of the liquidators refusing to go on to complete the arrangement which they made with this gentleman by delivering the discharge; and therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAR.—It appeared to me at first that this note should only be passed upon caution, but it is plain enough that this would be equivalent to refusing the note, and as such investigation need not occupy much time, I am not disposed to differ from your Lordships that, after what has already taken place with the liquidators, it will be more satisfactory to have the investigation, and therefore that the note may be passed without caution.

LORD MURR.—I have come to the same conclusion. The only doubt in my mind was as to whether the note should be passed without caution: for in the circumstances of the case I have no doubt the note should be passed to try the points in dispute between the parties. There is a distinct allegation here, on

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the part of the complainer, that he has made a fair surrender of his property. That is denied by the liquidators, and is a very material fact in the case which requires investigation. To clear up that fact therefore, upon which the whole matter turns, proof is required. The difficulty is as to caution. But it must be observed that of the £5000 odd for which the liquidators take decree a very considerable sum has been paid to them on the understanding that the compromise was to take place. The only circumstance as to withholding information, which was strongly founded upon on the part of the liquidators, was that the complainer did not disclose the fact that he was a partner of a concern in Glasgow at the time the declaration was emitted. In point of fact, that is correct. There was no specific disclosure of that fact; and although the complainer had only recently become a partner, and had put no funds into the concern at that time, it would undoubtedly have been better if he had stated what his intentions were in that respect. But as far as I see at present, that is the only incorrect statement he made with regard to the information given to the liquidators. It appears, however, that since the date of the declaration he has paid certain sums of money into that concern. But I do not see any evidence to instruct that his statement is correct, that the money so paid in was all borrowed from friends after the date of the discharge, and that £200 of it was got from the relief fund in Glasgow which was distributed among the unfortunate shareholders of the bank; and I do not think it probable that the parties, who had the distribution of that relief fund, would have contributed this £200 to the complainer, if he had been in the position of having funds of his own. Upon the whole facts of the case I think we are warranted in passing the note without caution.

LORD SHAND.—I entertain a very clear opinion that the Lord Ordinary's interlocutor is right, and that he had no other course in justice to the complainer except that which he has adopted, of passing this note without caution. The statute, in the section of it to which your Lordship has referred, provides that decree shall pass against the contributories in a list given in by the liquidators, as a matter of course, and that a party shall not be heard to resist the granting of that decree at the time it is asked. That, I think, would have been a very harsh and unjust enactment if it had not been guarded as it has been by the Legislature; but there is a provision at the end of the section to the effect that while decree shall be so given for the purpose of despatch in the liquidation, the Court have it in their power in a suspension to allow the decree to be suspended without caution or consignation; and I shall only say that I think that while the Court will no doubt jealously see that a note is not passed in such circumstances without reasonable grounds, on the other hand where there are reasonable grounds for trying the question as between the liquidators and a contributory, the contributory should have the benefit of that provision.

Now, in this case the suspender says,—“I arranged that my entire liability should be met by a certain payment;” and the liquidators admit that. He says he made the payment, and the liquidators admit that. He is therefore in the position of having a concluded compromise with them with the authority of the Court. They say they have discovered something subsequently that destroys that agreement, but it appears to me to be very clear that the *onus* in regard to that matter is upon them; and unless they were in a position to satisfy the Court now beyond all question, upon the documents before the Court, that the

agreement was not binding, I think this gentleman is entitled to have the note passed without caution, because it is obvious that if caution is imposed upon him it is simply throwing him out of Court, and deciding the case against him. No. 23.
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I shall say nothing upon the merits of the question involved, except this, that the case which the suspender presents is one of a class of which we have seen many—where a contributory ruined by the fall of this bank has made arrangements for beginning the world again as soon as he gets his settlement made. He had apparently arranged to enter into a contract of copartnery, and signed the contract in the beginning of July, and on 25th July he signed a declaration in which he says that he had disclosed everything he had in the world. The liquidators say he should have mentioned this contract of copartnery, and I do not say that a very cautious man might not have done so. But if the fact be that that contract of copartnery had given him nothing, and could give him nothing, in the way of property unless and until he got friends to advance money for him to put into the business to enable him to begin the world again, I can perfectly well understand the reason why there was no notice taken of that contract in the declaration. Accordingly, he does say that he had not put a penny into this business, and he had not a penny to put into it, and that after he had got his matters arranged friends lent him money, and he put that money subsequently into the business. I put it to the counsel for the liquidators if they were prepared to gainsay that, and if they were in a position to prove that this gentleman had funds of his own which he was improperly concealing, and I got the answer, No. In these circumstances, I have not the slightest doubt that the clear course, in justice to the suspender, was to pass the note, and that we ought to adhere to the Lord Ordinary's judgment.

I shall only say further that I think it will be matter of regret if the parties should think it necessary to go into a proof upon this matter unless they find on investigation that there is clear evidence of concealment here. On the one hand, I think the suspender is somewhat to blame for the very loose way in which his explanatory statement was framed. Perhaps he may not be himself at fault for that; it may be that his agent is to blame for it. There was undoubtedly enough in articles 5 and 6 of that statement to justify the liquidators in thinking for a time that there had been an improper concealment here. But when we come to the subsequent part of the statement, and the documents on which it is founded, I cannot help thinking that extrajudicial investigation should shew one way or other quite clearly whether the sum of £600 put into the business was not got, as the suspender says it was, from friends after he had made the arrangement with the bank. If it should be found on such extrajudicial investigation—the suspender, of course, giving every facility in that direction—that this money was really borrowed from friends, and was not property of which he was possessed at the time he made this declaration, then I should hope that this litigation will proceed no farther. It may be that the suspender ought to pay the expense caused by the loose statement in his declaration, but I think that this is a case in which the liquidators should make such extrajudicial investigation as I have pointed at, and, if possible, get this matter arranged.

THE COURT adhered.

ADAM SHIELL, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

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answers thereto, and productions, grants special leave to the suspender to apply for suspension of the charge complained of without caution or consignment, and passes the note without caution or consignment."

The respondents reclaimed, and argued;—They were quite justified in obtaining an order for payment of calls under the 121st section of the Companies Act, as the complainer had concealed the fact that he was a partner of the firm of Rennie & Co. when he made the arrangement for a compromise. The status of partner was worth something, and ought to have been disclosed. The discharge was not a delivered deed, and was no bar to the liquidators proceeding to enforce calls. Even if delivered, there was evidence to shew that it proceeded on an insufficient valuation of the complainer's means. It was not a contract, as the only person who got benefit from it was the complainer. At all events the note should not have been passed without caution.

Argued for the complainer;—The complainer had made a fair surrender of his whole effects, and the fact that he got funds from friends after he had arranged with the liquidators was no reason for refusing to give him the benefit of the discharge. The discharge was admitted by the liquidators, and therefore did not require delivery. The decree under the 121st section was obtained without any notice to the complainer, and he should have an opportunity of stating objection to it. He was unable to find caution, and if the note was not passed without caution he would be unable to obtain any inquiry into the circumstances.

LORD PRESIDENT.—In this case there was an arrangement made between the liquidators of the City of Glasgow Bank and the complainer for a surrender of his estate, in respect that he was unable to pay the second call which had been made upon the shares held by him in the City of Glasgow Bank, and that arrangement proceeded upon a payment made by him of £1300, in respect of which it was agreed that he should obtain a discharge from the liquidators of his whole obligations as a partner. The arrangement, the money having been paid, was sanctioned by the Court on the 19th of March last. The effect of course was to liberate Mr Anderson from all farther liability; but notwithstanding the liquidators have taken decree against him as a contributory in terms of the 121st section of the Companies Act of 1862, and he has brought a suspension of that decree upon grounds which are certainly rather peculiar. If the arrangement for compromise is binding upon the liquidators it is quite plain that they were not entitled to take the decree against him which they have done. But the ground upon which they have proceeded is, that they discovered, after the sanction of the Court had been given to the arrangement, but before the discharge had been delivered to Mr Anderson, that he had not made a fair surrender of his estate, but was possessed of funds and of an interest in a trading company which he had not disclosed to them. Now, it is quite necessary in a case of this kind to attend particularly to the terms and effect of the 121st section of the statute. It enacts that it shall be competent for the Court, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls, and of the amount due by each contributory, to pronounce forthwith a decree therefor, and that such decree may be extracted immediately. A similar clause in the Joint Stock Companies Act, 1858, has been interpreted in the case of *Lumsden*, in the same year (21 Dunlop, 110), as meaning that where an application is made by the liquidators, in terms of this section, to the Court, decree passes as a matter of course, and no person against whom

decree is sought under that application is entitled to be heard against the granting of the decree. But then the statute provides further, that no suspension of that decree shall be competent except upon caution or consignment, unless with special leave of the Court or Lord Ordinary. Now, although that part of the clause is expressed in a negative form, it plainly implies an affirmative enactment, that a suspension may be competent upon caution or consignment, and also with special leave of the Court without caution or consignment. The question therefore comes to be, whether in the circumstances of this case we should comply with the demand of the complainer to pass this note without caution or consignment? That course is certainly not to be followed except in exceptional circumstances. But it rather appears to me, on full consideration, that we shall not be doing any violence to this clause of the statute, nor acting inconsistently with its spirit and intention, if we affirm the Lord Ordinary's interlocutor passing the note without caution or consignment.

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It must be observed, that unless the liquidators are well founded in their complaint that this gentleman has not made a full and fair surrender of his estate, they would have had no right to take this decree against him at all, because they had undertaken that he should be discharged of all his obligations upon payment of a sum of £1300, which has been actually paid. And the peculiarity of the case therefore is, that this suspension must necessarily be passed, unless it can be shewn by the liquidators that there is some justification for what they have done—I mean in withholding the delivery of the discharge. Under all ordinary circumstances, where the liquidators have not come under any obligation to the contributory, it would be quite out of the question to pass the note without caution or consignment, because the contributory is on the list of contributories, and that is the foundation of his liability. But in the present circumstances this contributory would be entitled to have the discharge which has been actually executed delivered over to him, and in his hands, but for the allegation which the respondents make, that he has not made a full and fair surrender of his estate. Now, if the liquidators could have shewn in the Bill-Chamber that this complainer was certainly possessed of funds and estate which he had not disclosed or given up, I think we should have been in a condition at once to refuse the note; but the circumstances brought before us do not bear that construction very clearly. I give no opinion on what the ultimate result of this case may be, but all I say in the meantime is, that without further inquiry I think we have not before us a sufficient justification of the liquidators refusing to go on to complete the arrangement which they made with this gentleman by delivering the discharge; and therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS.—It appeared to me at first that this note should only be passed upon caution, but it is plain enough that this would be equivalent to refusing the note, and as such investigation need not occupy much time, I am not disposed to differ from your Lordships that, after what has already taken place with the liquidators, it will be more satisfactory to have the investigation, and therefore that the note may be passed without caution.

LORD MURK.—I have come to the same conclusion. The only doubt in my mind was as to whether the note should be passed without caution: for in the circumstances of the case I have no doubt the note should be passed to try the points in dispute between the parties. There is a distinct allegation here, on

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the part of the complainer, that he has made a fair surrender of his property. That is denied by the liquidators, and is a very material fact in the case which requires investigation. To clear up that fact therefore, upon which the whole matter turns, proof is required. The difficulty is as to caution. But it must be observed that of the £5000 odd for which the liquidators take decree a very considerable sum has been paid to them on the understanding that the compromise was to take place. The only circumstance as to withholding information, which was strongly founded upon on the part of the liquidators, was that the complainer did not disclose the fact that he was a partner of a concern in Glasgow at the time the declaration was emitted. In point of fact, that is correct. There was no specific disclosure of that fact; and although the complainer had only recently become a partner, and had put no funds into the concern at that time, it would undoubtedly have been better if he had stated what his intentions were in that respect. But as far as I see at present, that is the only incorrect statement he made with regard to the information given to the liquidators. It appears, however, that since the date of the declaration he has paid certain sums of money into that concern. But I do not see any evidence to instruct that his statement is correct, that the money so paid in was all borrowed from friends after the date of the discharge, and that £200 of it was got from the relief fund in Glasgow which was distributed among the unfortunate shareholders of the bank; and I do not think it probable that the parties, who had the distribution of that relief fund, would have contributed this £200 to the complainer, if he had been in the position of having funds of his own. Upon the whole facts of the case I think we are warranted in passing the note without caution.

LORD SHAND.—I entertain a very clear opinion that the Lord Ordinary's interlocutor is right, and that he had no other course in justice to the complainer except that which he has adopted, of passing this note without caution. The statute, in the section of it to which your Lordship has referred, provides that decree shall pass against the contributories in a list given in by the liquidators, as a matter of course, and that a party shall not be heard to resist the granting of that decree at the time it is asked. That, I think, would have been a very harsh and unjust enactment if it had not been guarded as it has been by the Legislature; but there is a provision at the end of the section to the effect that while decree shall be so given for the purpose of despatch in the liquidation, the Court have it in their power in a suspension to allow the decree to be suspended without caution or consignment; and I shall only say that I think that while the Court will no doubt jealously see that a note is not passed in such circumstances without reasonable grounds, on the other hand where there are reasonable grounds for trying the question as between the liquidators and a contributory, the contributory should have the benefit of that provision.

Now, in this case the suspender says,—“I arranged that my entire liability should be met by a certain payment;” and the liquidators admit that. He says he made the payment, and the liquidators admit that. He is therefore in the position of having a concluded compromise with them with the authority of the Court. They say they have discovered something subsequently that destroys that agreement, but it appears to me to be very clear that the *onus* in regard to that matter is upon them; and unless they were in a position to satisfy the Court now beyond all question, upon the documents before the Court, that the

agreement was not binding, I think this gentleman is entitled to have the note passed without caution, because it is obvious that if caution is imposed upon him it is simply throwing him out of Court, and deciding the case against him.

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I shall say nothing upon the merits of the question involved, except this, that the case which the suspender presents is one of a class of which we have seen many—where a contributory ruined by the fall of this bank has made arrangements for beginning the world again as soon as he gets his settlement made. He had apparently arranged to enter into a contract of copartnery, and signed the contract in the beginning of July, and on 25th July he signed a declaration in which he says that he had disclosed everything he had in the world. The liquidators say he should have mentioned this contract of copartnery, and I do not say that a very cautious man might not have done so. But if the fact be that that contract of copartnery had given him nothing, and could give him nothing, in the way of property unless and until he got friends to advance money for him to put into the business to enable him to begin the world again, I can perfectly well understand the reason why there was no notice taken of that contract in the declaration. Accordingly, he does say that he had not put a penny into this business, and he had not a penny to put into it, and that after he had got his matters arranged friends lent him money, and he put that money subsequently into the business. I put it to the counsel for the liquidators if they were prepared to gainsay that, and if they were in a position to prove that this gentleman had funds of his own which he was improperly concealing, and I got the answer, No. In these circumstances, I have not the slightest doubt that the clear course, in justice to the suspender, was to pass the note, and that we ought to adhere to the Lord Ordinary's judgment.

I shall only say further that I think it will be matter of regret if the parties should think it necessary to go into a proof upon this matter unless they find on investigation that there is clear evidence of concealment here. On the one hand, I think the suspender is somewhat to blame for the very loose way in which his explanatory statement was framed. Perhaps he may not be himself at fault for that; it may be that his agent is to blame for it. There was undoubtedly enough in articles 5 and 6 of that statement to justify the liquidators in thinking for a time that there had been an improper concealment here. But when we come to the subsequent part of the statement, and the documents on which it is founded, I cannot help thinking that extrajudicial investigation should shew one way or other quite clearly whether the sum of £600 put into the business was not got, as the suspender says it was, from friends after he had made the arrangement with the bank. If it should be found on such extrajudicial investigation—the suspender, of course, giving every facility in that direction—that this money was really borrowed from friends, and was not property of which he was possessed at the time he made this declaration, then I should hope that this litigation will proceed no farther. It may be that the suspender ought to pay the expense caused by the loose statement in his declaration, but I think that this is a case in which the liquidators should make such extrajudicial investigation as I have pointed at, and, if possible, get this matter arranged.

THE COURT adhered.

ADAM SHIELL, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

No. 24. GEORGE A. JAMIESON, &c. (Huntly's Trustees), Pursuers.—*Kinnear—J. P. B. Robertson.*

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THE REV. JOHN STEVENSON, &c. (Hallyburton's Trustees), Defenders.—*Asher—Mackay.*

Entail—Right of heir to cut timber.—A truster directed his estate to be entailed on A, his nephew, and certain other heirs, with this provision,—“And for the preservation of the growing timber and plantations on my said lands, I hereby direct my trustees to reserve the timber and plantations on my said estate when they convey the said lands to A, and the other heirs before mentioned : And it is hereby provided and conditioned that it shall not be lawful to A, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of my said trustees ; and that my said trustees shall not be empowered to give such consent unless the growing timber or plantations on my said estate shall require such cutting down or thinning for their better preservation : Declaring also that the produce of all fallen trees, or cut timber, or bark, shall be applied in discharge of the various burdens charged on my said estate.” By a deed of alteration and ratification, executed a year later, he made this provision,—“I declare that the principal sums of all debts, legacies, and provisions shall be charged and chargeable upon and affect only the fee of my said lands and estate of . . . and others, and that the rents thereof shall be chargeable with annual payments only ; and I further declare that the free revenues of my said estates shall not be accumulated during the subsistence of this trust, nor applied in the payment of capital debts or provisions, but, on the contrary, shall be regularly paid over to my nephew, A, and the heirs of entail substituted to him, as the same shall arise,—that is, the rents and revenues of these estates, after deducting all public burdens, interest of debts, and provisions, jointures, annuities, and other annual charges.” *Held* (rev. judgment of Lord Rutherford Clark) upon a construction of the two deeds that the heir in possession was not bound to apply the proceeds of sales of timber to the reduction of the capital debts of the estate.

Opinion per Lord President that he would have been so bound had the first deed not been altered by the second. *Opinions per Lord Deas and Lord Shand* that neither deed required him to do so.

Bona fide consumption.—*Opinions per Lord President and Lord Rutherford Clark* that the plea of *bona fide* perception and consumption applies only in cases where a person has been in possession of a heritable subject upon an apparently good but invalid title, and has been evicted and is called to account for the rents. *Opinions per Lord Mure and Lord Shand contra.*

Bona fide consumption.—B, an heir of entail, raised an action of count and reckoning against the representatives of A, a former heir of entail, for the proceeds of the timber which he was annually allowed to sell, on the ground that by the deed of entail he was bound to apply these in reduction of the capital debts secured on the estate. The defenders, besides maintaining that under his titles A was entitled to appropriate the proceeds of the wood sold, pleaded alternatively *bona fide* perception and consumption. *Opinions per Lord Mure and Lord Shand* that the plea of *bona fide* consumption was well founded. *Opinions per Lord President and Lord Rutherford Clark contra.*

1st DIVISION.
Lord Rutherford
Clark.
B.

IN 1835 Lord Douglas Gordon Hallyburton conveyed his estates to trustees, with directions to hold them (after paying certain legacies and annuities) for behoof of such persons and for such purposes as he might direct in any subsequent deed.

By a “trust-disposition and deed of entail,” dated in August 1838, Lord D. G. Hallyburton directed his trustees, as soon as they had executed the trust reposed in them by the deed of 1835, to execute an entail of the estate of Hallyburton on his nephew, Lord John Frederick Gordon, and his heirs, whom failing, on a series of heirs named. This deed contained a power to “revoke and alter the foresaid course and order

of succession as to heirs of tailzie and provision, except the said Lord John Frederick Gordon and the heirs-male of his body." The deed contained this clause,—“And for the preservation of the growing timber and plantations on my said lands and estate of Pitcur I hereby direct and appoint the said Hunter Gordon and Patrick Chalmers, my said trustees, to reserve the timber and plantations on my said estate when they convey the said lands to the said Lord John Frederick Gordon, and the other heirs before mentioned : And it is hereby provided and conditioned that it shall not be lawful to the said Lord John Frederick Gordon, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of my said trustees ; and that my said trustees shall not be empowered to give such consent unless the growing timber or plantations on my said estate shall require such cutting down or thinning for their better preservation : Declaring also that the produce of all fallen trees, or cut timber, or bark, shall be applied in discharge of the various burdens charged on my said estate : But reserving to myself full power, at any time during my life, to direct and appoint my said trustees to cut down and dispose of such parts of the said growing timber and plantations as I shall think fit, the proceeds thereof to be disposed of as I shall direct.”

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In March 1839 Lord D. G. Hallyburton executed a “deed of ratification and explanation,” which contained the following clauses :—“First, I declare that the principal sums of all debts, legacies, and provisions shall be charged and chargeable upon and affect only the fee of my said lands and estate of Pitcur and others, and that the rents thereof shall be chargeable with annual payments only ; and I further declare that the free revenues of my said estates shall not be accumulated during the subsistence of this trust, nor applied in the payment of capital debts or provisions, but, on the contrary, shall be regularly paid over to my nephew, Lord John Frederick Gordon, and the heirs of entail substituted to him, as the same shall arise,—that is, the rents and revenues of these estates, after deducting all public burdens, interests of debts, and provisions, jointures, annuities, and other annual charges : Second, Notwithstanding my injunction on the trustees to denude in favour of my said nephew, Lord John Frederick Gordon, and the heirs of entail substituted to him, only after the other purposes of the trust have been fulfilled, I now hereby authorise and direct my said trustees to denude as soon as possible after my wife's decease without issue, taking care, however, when doing so, to secure heritably on the estate such of the debts and provisions or annuities as may then still exist and remain unpaid : Third, And even during my wife's liferent I authorise my said trustees to denude as aforesaid, provided the same be done with my wife's concurrence, and upon an opinion given by counsel that her provisions, and the other provisions made by me, have been duly secured, and provided a proper indemnity is also granted and secured to my said trustees in regard to the contingent repayment of the money drawn by me from the trustees under my wife's marriage settlement : Fourth, I declare that the power of making provisions on grandchildren shall be as competent to my said nephew, Lord John Frederick Gordon, as to any of the substituted heirs of entail : Sixth, As the intention of keeping up the foresaid trust is merely to secure payment and fulfilment of the various provisions made by me, I hereby declare that, so far as may be consistent with that object, and under reservation always of my said wife's right to the mansion-house of Pitcur and adjoining grounds, as provided by the said deed of 1838, the whole management of the said lands and estate of Pitcur and others, situated in the counties of Perth and Forfar, shall, notwithstanding the subsistence of the said

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trust, be given to my said nephew, Lord John Frederick Gordon, and the substituted heirs of entail in their order, who shall have full power, under the limitations of the prescribed entail, to grant leases, to excamb grounds, and to make provisions on his or their wives and children or grandchildren, as permitted by the prescribed entail, in the same manner as if they were actually infest and possessed of the said lands and estate, and to avail themselves of the statute 10th George the Third, chapter 51, made to encourage the improvement of entailed estates in Scotland, and the later statutes of the 5th George the Fourth, chapter 87, and the 6th and 7th William the Fourth, chapter 42, and generally to exercise all the powers of administration competent to an heir of entail in possession which may not be inconsistent with the purposes of the said trust, hereby directing my said trustees to concur in and to give full effect to all such acts and deeds as aforesaid of my said nephew, Lord John Frederick Gordon, or the existing heir of entail beneficially entitled to my said estate for the time being: Lastly, I hereby expressly declare that these presents are granted in corroboration and explanation only of the foresaid trust-disposition, and trust-disposition and deed of entail executed by me as aforesaid, and shall not be held or construed to infer or import any alteration or innovation thereof, or of any of the clauses therein contained, except to the extent before specially specified and declared."

Lord D. G. Hallyburton died on 25th December 1841, and the trustees entered upon the management of the estate. The woods on the estate of Pitcur were very extensive. During the time the trustees acted they cut down considerable quantities of the timber. They did so only when they were informed by a person or persons skilled in forestry that the wood was ripe for cutting, or required thinning in the course of judicious management. The trustees dealt with the proceeds derived from the sale of timber as revenue, applying the same towards meeting the annual charges on the estate, and paying over the surplus, when there was any, to Lord John Frederick Gordon (now) Hallyburton. They so acted in conformity with an opinion they received from the late Mr, afterwards Lord Rutherford, in 1842, "that the price of the wood so annually cut down should be considered as a part of the revenue of the estate for the year, and should not be applied in extinguishing capital of debt."

Lady D. G. Hallyburton died in 1851, and the trustees, with the view of getting exoneration of their past actings, and getting the deed of entail to be executed by them in favour of Lord John Frederick Gordon Hallyburton and the other heirs judicially adjusted, raised in the year 1854 an action of multiplepoinding and exoneration in the Court of Session. In this process a deed of entail was adjusted and executed in 1855. There was inserted in it a clause in the following terms:—"Reserving always the timber and plantations on the said estate, which for the preservation of the growing timber and plantations on the said lands and estate, we are, by the foresaid deed called a trust-disposition and deed of entail, directed and appointed to reserve when we convey the said lands and estate to the said Lord John Frederick Gordon Hallyburton and the heirs before mentioned; and it is hereby conditioned and provided that it shall not be lawful to the said Lord John Frederick Gordon Hallyburton, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of us as trustees foresaid, or of our successors in office, which consent, it is declared by the said last mentioned deed, we shall not be empowered to give unless the growing timber or plantations on the said estate shall require such cutting down or thinning for their better preservation; by which deed it is likewise declared that the produce of all fallen trees or cut timber or bark shall be

applied in discharge of the various burdens charged on the said estate." No. 24.
 Lord John Frederick Gordon Hallyburton was duly infeft under the entail, conform to instrument of sasine recorded in the General Register of Sasines 31st January 1856.

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Lord John Frederick Gordon (now) Hallyburton, possessed the estate from 31st January 1856 to his death on 29th September 1878. He was succeeded by his nephew, the present (the eleventh) Marquis of Huntly, who disentailed the estate, and conveyed it to George Auldjo Jamieson, &c., as trustees.

The tenth Marquis of Huntly and the Earl of Aboyne (who in 1863 became eleventh Marquis of Huntly) were parties to the action of multiplepoinding. The question of cutting timber was made matter of averment in the condescendence in the multiplepoinding, and was referred to in two separate reports by the late Mr Hunter, Auditor of the Court, and by his successor, Mr Baxter, in 1868. The Lord Ordinary, on 9th January 1869, approved of these reports, and exonerated the trustees, and found that Lord J. F. Gordon Hallyburton was entitled to the free revenue of the estate. No objection was raised by the eleventh Marquis of Huntly.

The present action was raised by Mr Jamieson, &c., as trustees of the eleventh Marquis of Huntly, against the Reverend John Stevenson, &c., as trustees under the trust-settlement of the late Lord J. F. Gordon Hallyburton. The summons concluded for declarator that the late Lord J. F. Gordon Hallyburton "as heir of entail in possession of the lands and estate of Pitcur, in the counties of Forfar and Perth, was, in terms of the trust-disposition and deed of entail mentioned in the condescendence, bound to apply the whole proceeds realised by him from the sale of the fallen trees or cut timber or bark on the said estate in extinction of the debts, legacies, and provisions, &c., charged upon and affecting the fee of the said estate," and for count and reckoning of the proceeds of sales of timber during the time Lord J. F. Gordon Hallyburton possessed the estate, and failing that, for payment of £15,000.

The pursuers pleaded;—1. The said deceased Lord John Frederick Gordon Hallyburton having been bound to apply the whole proceeds realised by him from the sale of the timber on the said lands and estate of Pitcur in extinction of the debts, legacies, and provisions, &c., charged upon and affecting the fee of the said estate, and having failed to do so, decree ought to be pronounced in terms of the declaratory conclusions of the summons. 2. The proceeds realised from the sale of the said timber having been received by the said deceased Lord John Frederick Gordon Hallyburton, the defenders, as his representatives, are bound to account to the pursuers therefor, and to make payment in terms of one or other of the conclusions of the summons.

The defenders pleaded;—3. There being no obligation imposed upon the late Lord John Frederick Gordon Hallyburton by the trust-settlements of the late Lord Douglas Gordon Hallyburton, or by the entail of the estate of Pitcur, to apply the proceeds of the sale of wood to the extinction of the burdens upon the fee of that estate, the defenders are entitled to be assoilzied from the conclusions of the summons. 4. The late Lord John Frederick Gordon Hallyburton having *bona fide* received and consumed the proceeds of the sales of wood on the estate of Pitcur, so far as not necessary for estate purposes, and to keep down the annual charges upon the said estate, and in accordance with the construction of the trust-settlements of Lord Douglas Gordon Hallyburton, sanctioned by the interlocutors of the Court in the action of multiplepoinding and exoneration, the defenders are entitled to be assoilzied from the conclusions

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of the summons. 5. The Marquis of Huntly having, in the full knowledge of the circumstances, acquiesced in the receipt and application of the said proceeds by the said Lord John Frederick Gordon Hallyburton, the pursuers, as claiming through him, are barred from raising the present action. 6. In no event can the defenders, as trustees and executors of the said Lord John Frederick Gordon Hallyburton, be held liable to account for a greater sum than the free proceeds of his executry estate remaining in their hands after satisfying all prior claims.

The Lord Ordinary pronounced this interlocutor:—"Finds, declares, and decerns in terms of the declaratory conclusions of the libel: Further, appoints the defenders to lodge in process an account of the intromissions of the deceased Lord John Frederick Gordon Hallyburton with the proceeds realised by him from the sale of fallen trees or cut timber or bark on the estate libelled from 31st January 1856 to 29th September 1878: Further, grants leave to the defenders to reclaim." *

* "NOTE.—The question in this case turns on the construction of two deeds executed by the late Lord Douglas Gordon Hallyburton, dated respectively 27th August 1838 and 28th March 1839. By a previous *inter vivos* trust-deed Lord D. G. Hallyburton had vested the estate of Pitcur in trustees, and the deeds which have been just mentioned contained his instructions with respect to the disposal of it. It is sufficient to say that he directed his trustees to entail on the late Lord John Frederick Gordon Hallyburton as institute, and a series of heirs. This was accordingly done by a deed of entail executed on 16th and 17th July 1855, and on the death of Lord J. F. G. Hallyburton the Marquis of Huntly succeeded as heir of entail. He subsequently disentailed the estate with the necessary consents, and has sold it.

"The question is, whether, under the clause contained in the deed of August 1838, and quoted in article five of the condescendence, the 'produce of fallen trees or cut timber or bark' was appropriated to the payment of the capital of the burdens on the estate, of which a considerable number remain undischarged. It is admitted, on the one hand, that Lord J. F. G. Hallyburton cut down a considerable quantity of timber; and, on the other hand, it is not disputed that the cutting of the timber was an act of ordinary and proper administration, the timber so cut being either ripe wood or thinnings.

"1. The defenders objected to the pursuers' title. Assuming the claim to be otherwise well-founded, they contended that the title to sue was not vested in the Marquis of Huntly alone, but in him and the heirs of entail, with whose consent the estate was disentailed. The Lord Ordinary cannot adopt that view. By the disentail the Marquis became the absolute proprietor of the estate, and has right to all the dispositions which have been made in favour of the heirs of entail. If the produce of the timber is applicable to the payment of the debts which are charged on the estate, and if it had been so applied, the Marquis would have been so much the richer. It is suggested that he would have had to pay more for the consents of the next heirs, and that in consequence they have an interest. But the defenders, it is thought, have no title to raise any such question. By the disentail, the next heirs have surrendered all their interest, and it seems to be impossible in this case to enter on the conditions of the surrender.

"2. Again, the defenders maintain that the meaning of the truster was that the produce of the timber was to be applied in keeping down the interest of the debts on the estate, and they point to a clause in the deed of 1839, called a 'deed of ratification and explanation,' in which it is directed that the free rents and revenues shall not be accumulated, but paid over to Lord J. F. Gordon Hallyburton.

"The Lord Ordinary is of opinion that the case of the pursuers is well founded. He thinks that the just construction of the deed of 1838 is, that the produce of the timber was to be applied in the payment of the capital of the

The defenders reclaimed, and argued ;—(1) On a sound construction of all the deeds the heir in possession was entitled to cut the timber and sell the wood for his own behoof. The “revenue” of the estate which was given to the heir meant something more than the rents, and the only other thing it could mean was the proceeds of the sales of wood. The truster’s intention evidently was not to prevent ordinary cutting, but to preserve the wood for the amenity of the estate. Even if the deed of 1838 left this doubtful, it was clearly his intention under the deed of 1839 to give the whole of the revenue, including the proceeds of the cuttings, to the heir in possession. (2) The proceeds of the wood sales were duly received by the heir in possession, and *bona fide* consumed by him. In order to found a plea of *bona fide* consumption competing titles were not necessary. It was only necessary that there should be a counter right and an absence of challenge, on the one hand, and a colourable title and *bona fide* possession on the other.¹ (3) The defenders were barred by Lord Huntly having acquiesced by the proceedings in the multiplepoinding to which he was a party.

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Argued for the pursuers ;—(1) The Lord Ordinary was right on the construction of the deeds. The direction in the deed of 1838 by which

debts affecting the estate, and this direction was not recalled by the subsequent deed of 1839. It is true that the produce of ripe timber and of thinnings would fall to the heir in possession, and that it may be regarded as a part of the revenue of the estate ; but it is thought that the deed of 1839 did not refer to the income derived from this extraordinary source, but only to the ordinary rents of the estate, for the truster directed the trustees to ‘reserve the timber and plantations on the estate.’ The timber was thus to remain in their hands, and the deed of 1838 contains the only direction as to the application of the produce. This special direction was not, it is thought, recalled by the general direction that the rents were not to be accumulated. It is true that the reservation of the timber would not reserve any separate feudal estate in the trustees ; but it very strongly indicates what the truster meant as to the application of the money derived from time to time from this source.

“The defenders point out that the purpose of the direction to reserve the timber was for the ‘preservation of the growing timber and plantations.’ So it was ; but this cannot, it is thought, affect the construction of the clause which disposes of the proceeds of the cut and fallen timber.

“3. The defenders pleaded that the proceeds of the timber had been *bona fide* received and consumed by Lord J. F. G. Hallyburton, and that, in consequence, they are not bound to account for them. But the Lord Ordinary thinks that the plea is not well-founded. It is certain that the trustees and Lord J. F. G. Hallyburton believed that the latter had absolute right to the proceeds of the timber ; that they entertained this belief in *bona fide*, and that, in consequence, Lord J. F. G. Hallyburton received and consumed the proceeds. But there are here no competing titles. The rights of the parties must be determined by the directions of the truster only, and any error in the construction of the trust-deed cannot affect the rights of the beneficiaries under it.

“4. The defenders also pleaded acquiescence, but, in the opinion of the Lord Ordinary, there is no foundation for this plea.”

¹ Ersk. Inst. ii. 1, 27 ; Duke of Roxburghe v. Duchess of Roxburghe, Feb. 17, 1815, F.C. ; Menzies v. Menzies, July 3, 1863, 1 Macph. 1025 ; Duke of Buccleuch v. Hyslop, March 10, 1824, 2 Sh. App. 43 ; Leslie v. Earl of Moray, Feb. 2, 1827, 5 S. 284 ; Johnston v. Johnston, July 20, 1875, ante, vol. ii. 986 ; Scott v. Heritors of Ancrum, Feb. 25, 1795, M. 15,700 ; Lord Advocate v. Drysdale, April 24, 1874, ante, vol. i. (H. of L.) 27 ; Haldane v. Ogilvie, Nov. 8, 1871, 10 Macph. 62, 44 Scot. Jur. 32 ; Carnegie v. Scott, Dec. 9, 1830, 4 W. & S. 431.

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there was a special appropriation of the proceeds of the cuttings of wood was not recalled by the deed of 1839. The truster's intention was that the heir in possession should have no pecuniary interest in the cutting of wood. The objects which the entailor had were to preserve the wood, and to pay off the burdens on the estate. (2) There was no room for the plea of *bona fide* consumption. The plea applied only where a person was ousted from an estate which he had possessed on a colourable title, and from which he, after reaping the fruits, had been evicted. There was no claim in the present case to an estate, and no competing title. What was claimed were the fruits of the subject. (3) The Marquis of Huntly never acquiesced in the heir in possession appropriating the proceeds of the wood sales. It was not shewn that the question was ever brought before him.

At advising,—

LORD PRESIDENT.—The late Lord Douglas Hallyburton, having formed the intention of settling his estate of Pitcur upon his nephew, Lord Frederick Gordon Hallyburton, and a certain series of substitute heirs, executed three deeds for the purpose of carrying that intention into effect. The first of these was a trust-deed executed in 1835, the terms of which are not material to the present question, and the other two deeds, which are deeds of instructions and explanations to his trustees, were executed respectively in 1838 and 1839. The trustees, acting under the powers conferred upon them by these deeds, had a deed of entail prepared and executed in the year 1855 conveying the estate to Lord John Frederick Hallyburton and the substitutes of tailzie, in terms of the directions of the truster.

The question raised in the present case is, whether Lord John Frederick Gordon Hallyburton, as heir of entail in possession was entitled to cut timber on the estate, and use the proceeds of the sale of that timber as his own property, or whether he was under obligation to cut only under the advice and superintendence of the trustees, and pay over the proceeds of the sale to them for the purposes specified in Lord Douglas Gordon Hallyburton's deeds of settlement. It is to be observed that the timber upon this estate was of very great extent, and there were large plantations of fir which fell to be cut at a certain age and planted over again, so that, in addition to the ordinary natural proceeds of the timber, there were occasional very large cuttings and very large sales of timber which afforded a considerable though fluctuating revenue. It is admitted, on the one hand, that Lord John Frederick Gordon Hallyburton had during his possession cut a very considerable amount of timber, but it is admitted, on the other hand, that nothing was done that was not in accordance with the fair administration of the estate, and particularly of the timber upon the estate; so that the question really comes to be, whether the timber belonged to the heir in possession, and fell to be cut by him at his own discretion, and the proceeds kept by himself, or whether there was any restriction upon him in that respect.

The summons concludes for declarator that the whole proceeds realised by him from the sale of the fallen trees or cut timber or bark on the said estate should be applied in extinction of the debts, legacies, and provisions, &c., charged upon and affecting the fee of the said estate, and that the defenders, who are the representatives of Lord John Frederick Gordon Hallyburton, should be decerned and ordained to hold count and reckoning for their whole intro-

missions with the whole proceeds realised by him from the sale of timber and bark on the said estate from the 31st of January 1856 to the 29th day of September 1878—that is to say, for the period immediately following the execution of the deed of entail to the date of Lord John Frederick Gordon Hallyburton's death. Now, the whole of this question depends entirely, in the first instance at least, upon whether there was any special provision limiting the right of the heir of entail in possession, for apparently nothing was done by Lord John Frederick Hallyburton that was not within his proper power of administration. There are two deeds that require our attention in determining this question—the deed of 1838 and that of 1839. Now, by the deed of 1838 the arrangement made by Lord Douglas Hallyburton was, in the first place, that the trustees should make provision for a great variety of purposes, jointures, and other things which had been provided for by other deeds of settlement; and then he provides:—"I hereby direct and appoint the said Hunter Gordon and Patrick Chalmers, and their successors, as soon as they shall have executed the trusts reposed in them by the said trust-disposition, and the other trusts hereinbefore specified, to denude of my said lands and estate, and to give, grant, and dispoise, heritably and irredeemably, to Lord John Frederick Gordon;" and so on. Now, according to the provisions of this deed, it is to be observed that the trustees were not to denude till all the other trust-purposes had been accomplished, and therefore the time for making the deed of entail might have been indefinitely postponed. Now, it is this deed which contains the clause upon which the pursuers specially found. It is in these terms:—"And it is hereby provided and conditioned that it shall not be lawful to the said Lord John Frederick Gordon, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of my said trustees; and that my said trustees shall not be empowered to give such consent unless the growing timber or plantations on my said estate shall require such cutting down or thinning for their better preservation; declaring also that the produce of all fallen trees or cut timber or bark shall be applied in discharge of the various burdens charged on my said estate." Now, the contention of the pursuers upon this clause is that the proceeds of the timber when cut down and sold were to be applied in discharge of the capital of the burdens charged upon the estate, and they support the contention upon the ground that the words used by the testator can have no meaning or effect unless that is their proper construction, the proceeds of the ordinary sales of timber necessarily forming part of the natural revenue of the estate, although it may be revenue varying very much in amount from year to year, and like all other natural revenue primarily applicable to the keeping down of interest on burdens, and that an heir in possession cannot receive the rents or revenue of the estate until so much of them as is necessary for that purpose shall have been so applied. It required no special provision in the deed to produce that effect, because that would be the natural and legal application of these revenues, even after the deed of entail was executed and the heir entered into possession; therefore they say if there is revenue beyond what is required for keeping down the natural burdens on the estate, in the shape of proceeds of sales of timber, that is here directly ordered to be applied to diminish the capital of the debt. I am disposed to agree with the views of the pursuers on this matter. We see very well from the nature of the plantations on this estate there would come into the hands of the trustees or the heir in possession occasionally a very

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large sum, arising from the cutting down of plantations, in the course of one year, or two years, and, in point of fact, that happened. There was a very large sum realised more than once—but certainly once—in the course of Lord John Frederick Gordon Hallyburton's possession—a sum quite beyond what could be called the average return from timber—and if the interest of the burdens had been provided for otherwise, and a large sum came into the hands of the trustees or the heir in possession from this source, I cannot imagine that the words of this clause could be read otherwise than as a direction to pay it over in discharge of burdens—that is to say, capital—the annual interest having been already provided for from the proper source, viz., from the income of the estate, and therefore, without going further into this matter, I confess that I do not entertain very much doubt that if this deed of 1838 had stood alone we should have been bound so to construe it. But this deed of 1838 must be read in connection with the deed of the subsequent year—that of 1839—which makes a very considerable change upon the arrangements of Lord Douglas Gordon Hallyburton. He had altered his mind in many respects in regard to the way in which his trustees were to deal with this estate, and among other things it is very important to observe that by the second purpose of the deed of 1839 he provides that, whereas the trustees had been directed by the previous deed to denude in favour of the heirs of entail only after the other purposes of the trust had been fulfilled, he now by this deed authorised and directed them to denude as soon as possible after his wife's decease without issue, taking care, however, when doing so, to secure heritably on the estate such of the debts and provisions or annuities as might then exist and remain unpaid. And he provides, still further, that even during the subsistence of his wife's liferent they may denude in favour of the heir, provided the same be done with the lady's concurrence, and with sufficient security for the provisions made for her. And then further, in the sixth purpose of the trust, he makes this provision:—"As the intention of keeping up the foresaid trust is merely to secure payment and fulfilment of the various provisions made by me, I hereby declare that, so far as may be consistent with that object, and under reservation always of my said wife's right to the mansion-house of Pitcur and adjoining grounds, as provided by the said deed of 1838, the whole management of the said lands and estate of Pitcur and others, situated in the counties of Perth and Forfar, shall, notwithstanding the subsistence of the said trust, be given to my said nephew, Lord John Frederick Gordon, and the substituted heirs of entail in their order, who shall have full power, under the limitations of the prescribed entail, to grant leases, to excamb grounds, and to make provisions on his or their wives and children or grandchildren, as permitted by the prescribed entail, in the same manner as if they were actually infest and possessed of the said lands and estate." Now, it is very clear that the position of Lord John Frederick Hallyburton, or any other heir of entail, after the execution of this deed of 1839, was very different from what it would have been under the deed of 1838. In the first place, they might be put in possession by the trustees at a much earlier period, and even during the subsistence of the trust, and before the deed of entail was executed they were to be allowed to deal with the estate and its administration just as if they were heirs of entail in possession under an executed deed of tailzie. I do not mean to say that through this alteration of the scheme of the testator it necessarily follows that the provision regarding the cutting of timber, and the application of its pro-

ceeds, is to be held as altered, because in the last clause of this deed the testator expressly declares that this deed shall not be held or construed to infer or import any alteration or innovation thereof, or of any of the clauses therein contained, except to the extent before specially specified and declared; and therefore if we had no more to go upon than the clause to which I have already adverted, I think that would prevent us from implying that any alteration was to be made on the clause, in the previous deed, regarding timber.

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But then we have a clause which I have not read in its order, but which now calls for particular attention—the clause that makes the first alteration on the provisions of the previous deed. It is in these words—“I declare that the principal sums of all debts, legacies, and provisions, shall be charged and chargeable upon, and affect only the fee of my said lands and estate of Pitcur and others, and that the rents thereof shall be chargeable with annual payments only; and I further declare that the free revenues of my said estates shall not be accumulated during the subsistence of this trust, nor applied in the payment of capital debts, or provisions, but, on the contrary, shall be regularly paid over to my nephew Lord John Frederick Gordon, and the heirs of entail substituted to him, as the same shall arise,—that is, the rents and revenues of these estates after deducting all public burdens, interest of debts, and provisions, jointures, annuities, and other annual charges.” Now, I think this clause is not open to construction at all. Nothing can be more clear and definite than the intention here expressed, that the principal sums of all kinds of burdens shall be charged and chargeable upon and affect only the fee of the testator's lands and estate. Under these words, unless you can say the proceeds of the sales of timber are part of the fee of the estate, I do not see how you can possibly apply them to the reduction of the capital of debt without going in the direct face of the testator's own words. The debts are to be charged upon and affect only the fee. And still further, annual debts only are to affect the income and the amount of the free revenue, no matter from what source arising, and the free revenues are not to be applied in payment of capital debts or provisions, but are to be paid over to the heir of entail in possession. Now, I think it is impossible to doubt that that completely reversed the previous deed. The one deed says, “use a certain part of the revenue of my estate to pay off debts;” the other says, “no part of the revenue of my estate shall be so applied.” And therefore it appears to me that this deed expressly, and not by implication, but by words susceptible of only one meaning, recalled entirely all those directions in the previous deed regarding the application of money arising from the sale of timber. I therefore come to a conclusion the opposite of that of the Lord Ordinary, and am for assoilzieing the defenders.

But there have been some other pleas mentioned by the defenders to which it may be right that we should advert, as this case may possibly go further, and I am therefore disposed not to withhold my opinion as to them. They are the fourth and fifth pleas. I need not read them, but may just say that they are pleas of *bona fide* perception and consumption and acquiescence.

I think the plea of *bona fide* consumption is not applicable to this case, assuming that the first deed was not altered in regard to the timber and has received its proper construction, that the income derived from the sale of timber is to be applied in discharge of capital burdens. The doctrine of *bona fide* con-

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sumption, I think, applies only to the case of a person who has possessed on an apparently good title, which is afterwards found to be invalid, and has thus lost possession, and who has been evicted from the estate and is asked to account for the rents which he has received during the period of his possession. In short, it is the possession of a subject and eviction from that subject that lets in the doctrine of *bona fide* perception and consumption. There is no eviction here at all. There is no bad title. The title of Lord John Frederick Gordon was perfectly good. He never was evicted, and never could be evicted, from any part of the subject. But supposing the deed of 1838 was to stand alone, the question would arise whether he is entitled to use the whole revenue of the estate for his own behoof or for some purpose of his own? That would not, I apprehend, be a case where the doctrine would apply, and I am therefore prepared to repel that plea.

On the other hand, and without going into any detail on the matter, I think it is right to express my opinion that the plea of acquiescence is applicable to the conduct of the next heir of entail, the Marquis of Huntly, who subsequently disentailed the estate, and that the plea of acquiescence against him is well-founded, because I think there is no doubt that by his conduct, and the conduct of all concerned, Lord John Frederick Gordon was impressed with the belief, and acted upon the belief, that the revenue arising from timber belonged to himself.

The result of my opinion therefore is, that upon a sound construction of the deed of 1839 there was no restriction upon Lord John Frederick Gordon in regard to the timber at all; but even if that were ruled otherwise, I should be inclined to repel the plea of *bona fide* perception and consumption and sustain that of acquiescence.

LORD DEAS.—The two deeds upon the terms of one or both of which this question admittedly turns are the trust-disposition and deed of entail dated 13th August 1838, and the deed of ratification and explanation dated 20th March 1839. It makes no practical difference as to the result whether we hold that the Lord Ordinary's interlocutor should be reversed in respect of the terms of the one deed or of the other, or of both. For my part, I think the first deed, if it had stood alone, would have warranted that result, and that the second deed is quite consistent with and confirmatory of the first. I think that, so far as regarded the growing timber, the whole object of the truster, when he made the first deed, was to preserve it for the amenity of the estate. He says so in that deed, in these words,—“For the preservation of the growing timber and plantations on my said lands and estate of Pitcur I hereby direct and appoint the said Hunter Gordon and Patrick Chalmers, my said trustees, to reserve the timber and plantations on my said estate when they convey the said lands to the said Lord John Frederick Gordon and the other heirs beforementioned.” And then he provides that “it shall not be lawful for Lord John Frederick Gordon, or the whole heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of the trustees, and the trustees shall not have power to give that consent unless the growing timber or plantations shall require such cutting down or thinning for their better preservation.” It is impossible to read this part of the deed without seeing that the preservation of the timber on this estate was the great leading purpose in the mind of the testator

at the time, and very anxiously provided for. The words "for the preservation of the growing timber and plantations," &c., give a clue to the meaning of the rest of the clause. Then there follows a declaration "that the produce of all fallen trees, or cut timber, or bark shall be applied in discharge of the various burdens charged on my said estate, but reserving to myself full power at any time during my life to direct and appoint my said trustees to cut down and dispose of such parts of the said growing timber and plantations as I shall think fit, the proceeds thereof to be disposed of as I shall direct." By this declaration I take it the truster meant to say that the proceeds should be applied in discharge of the various burdens in their order, annual burdens being plainly comprehended, if not exclusively contemplated. There is nothing here to indicate that the powers of the heirs of entail to deal with the proceeds of this timber as annual income were meant in any way to be restricted. The only timber which could be cut was described as timber necessary in order to thin and preserve the plantations, and it was classed along with the fallen trees and bark. All power of cutting beyond the limited power thus given was reserved to the grantor during his life, as well as the power to direct how the timber itself, and the proceeds thereof, should be disposed of. But that becomes of really very little moment, as I said at the outset, when we come to the second deed. It refers to his previous deeds, including the deed of 13th August 1838, and bears to be in trust for the purposes and under the whole conditions and declarations therein contained, "with the following explanations, alterations, and additions." These words must, however, be read in connection with the declaration "lastly," which bears—"I hereby expressly declare that these presents are granted in confirmation and explanation only of the foresaid trust-disposition and trust-disposition and deed of entail executed by me as aforesaid, and shall not be held or construed to infer or import any alteration or innovation thereof, or of any of the clauses therein contained, except to the extent before specially specified and declared."

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Now, it is certainly not specially specified and declared in this deed of March 1839 that the clauses applicable to the timber in the prior deed of August 1838 are to any extent altered or innovated upon by this later deed. The same remark applies to the other clauses in the deed of August 1838, which imported that annual burdens only, and not capital sums, were to affect and to be paid out of the income of the estate. The two deeds appear to me to be quite consistent in this respect, the second deed being only more precise and explicit than the first. Be this as it may, however, the second is of itself sufficiently explicit for the purpose. It declares "that the principal sums of all debts, legacies, and provisions shall be charged and chargeable upon and affect only the fee of my said lands and estate of Pitcur and others, and that the rents thereof shall be chargeable with annual payments only; and I further declare, that the free revenue of my said estates shall not be accumulated during the subsistence of this trust, nor applied in the payment of capital debts or provisions, but, on the contrary, shall be regularly paid over to my nephew, Lord John Frederick Gordon, and the heirs of entail substituted to him, as the same shall arise—that is, the rents and revenues of these estates after deducting all public burdens, interest of debts, and provisions, jointures, annuities, and other annual charges." And then they are to secure heritably on the estate such of the debts and provisions or annuities as may then (*viz.*, at the period of denuding) still exist and remain unpaid. I

No. 24. am therefore of opinion, with your Lordship, that the interlocutor of the Lord Ordinary cannot be allowed to stand.

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The view I take of the case leaves no room for raising the question of *bona fide* perception and consumption, and no necessity for relying on the plea of acquiescence.

LORD MURR.—Upon the construction of the deeds I have come to the same result as your Lordships.

If the case had turned upon the peculiar terms of the clause contained in the deed of 1838 relative to the preservation of the timber I should even then have had doubts whether the pursuers' claim was well-founded. But when the clause is read along with those in the deed of ratification and alteration of 1839, I think it is clear, whatever may have been the effect of the first deed on the right of the heir in possession to cut timber, that by the second deed, at all events, he had right to do so, and was thereby placed in a much more favourable position in that respect than he was under the deed of 1838. Under the deed of 1838, as I understand the general rule of law applicable to cases of this description, he was placed in a more restricted position, in the matter of cutting timber, than any ordinary heir of entail would have been, because an heir of entail is understood, in the ordinary case, to have the right to cut and dispose of timber on the estate when ripe and fit for use. The law was so laid down in the cases in this Court, which are referred to in the case of *Boyd*, March 2, 1870, 8 Macph. 637, where the question as to the right of an heir of entail to cut timber was raised, and where it was held that the heir was entitled to cut, provided it was done in the proper administration of the estate, and that he was only restricted as to the timber growing round and within certain distances of the mansion-house. Now, in this deed of 1838 the heir of entail was apparently deprived of almost all rights which an ordinary heir of entail would have had in these respects. But the second deed, and that clause in it which your Lordship has read, to the effect that the principal sums of all debts, &c., should only affect the fee of the estate, and that the rents thereof should be charged with the annual payments only, and the free revenues paid over to the heirs, appears to me to have very materially changed for the better the position of the heirs of entail in this case. Under this latter deed, and when carrying out a proper administration of the estate, the heir was, I think, entitled to apply the proceeds of the wood cut by him in the way in which he did, and that being the conclusion I have arrived at, it is unnecessary to say more in reference to this part of the case. That is enough to free the defenders from the claim here made by the pursuers.

The Lord Ordinary has had also before him the question of *bona fides*, and his Lordship's view on that point was that he did not think the plea well-founded. He says in his note, on this part of the case,—“It is certain that the trustees and Lord J. F. G. Hallyburton believed that the latter had absolute right to the proceeds of the timber, that they entertained that belief *in bona fide*, and that in consequence Lord J. F. G. Hallyburton received and consumed the proceeds. But there is here no competing title.” And on that ground—that there was here no competing title—his Lordship held that the plea did not apply. Now, I am not quite sure that the Lord Ordinary is right in holding that there can be no case of *bona fides* unless there are two sets of competing titles. I

am, on the contrary, rather disposed to think that it is enough if there are two adverse and competing rights under the same title, and that under such a title the doctrine of *bona fides* might be held to apply, as, for instance, in the case of *Boyd*, to which I have referred. I take that case as an illustration. There Boyd, the heir in possession, was cutting wood to the injury, as the next heir thought, of the estate, and instead of lying by and allowing the heir to go on cutting he interfered and insisted that he was entitled to stop that proceeding, brought an action of interdict, and in that way succeeded in his object. Now, where there are, as in that case, two adverse rights contained in the same title—one the right of the heir in possession, and another that of the next heir, and the latter is entitled to come forward and assert his right—it appears to me that he ought not to stand by and allow the heir in possession to go on cutting timber, in the belief that he has an unchallengeable right to cut the wood and to use the proceeds as his own. If in *Boyd's* case the next heir had stood by and allowed his elder brother to cut wood and consume the proceeds for a number of years, thereby lessening from year to year the annual value of the wood until the elder brother died, and thereafter raised an action against his representatives for the proceeds of the wood received and consumed, I am inclined to think that two competing titles would not have been considered necessary to entitle the representatives of the deceased heir to raise the plea of *bona fides*.

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As regards the plea itself, I find that in the passage in Erskine to which we were referred in the argument (ii. 1, 25) it is stated "that a *bona fide* possessor is one who, though he be not truly the proprietor of subjects which he possesses, yet supposes himself proprietor upon probable grounds." And then in the passage in section 27, which was founded upon by the pursuer, Mr Erskine expresses the opinion that a person in possession of a subject on a title apparently good and sufficient is not bound to restore. Now, here it is admitted that the party who cut the timber possessed upon a title apparently good. He had the opinion of counsel (the late Lord Rutherford) to the effect that he was entitled to cut the wood. The matter had been considered doubtful, and advice was taken, and that advice was followed. In the whole circumstances of this case therefore it appears to me that the plea might properly enough be raised; and although I do not give any decided opinion as to its validity I am not, as at present advised, satisfied that the plea cannot apply; for if this case does not fall within the category of cases in which the doctrine has been applied it has most of the elements necessary to raise it.

With reference to the plea of acquiescence, it appears to me to be pretty clear upon the averments and admissions of parties, and from the judicial proceedings which have been referred to, that the late Marquis of Huntly, and his son, the present Marquis, must be held to have been made aware of the leading facts connected with the history of this trust. It was known that advice had been taken as to the right of the trustees and the heir of entail to cut wood, and that the advice given had been followed and the wood cut under proper inspection. It was also known that the way in which the proceeds of the wood had been disposed of was brought under the consideration of this Court in the action of multiplepoinding, to which the Marquis was a party, and that interlocutors were pronounced on the reports of professional men, relative to the cutting of the timber and the disposal of its proceeds, without objection on the part of the Marquis of Huntly. I am therefore of opinion that there is here such a case of acquiescence

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LORD SHAND.—My brother Lord Deas has expressed very much the opinion I entertain in regard to the construction of these two deeds. We have the deeds before us, and have to construe them taken together, and taking them together I quite concur in the result arrived at by your Lordships. But I must say at the same time that if I had to determine this question upon the first deed alone, so far as I am concerned my opinion would be the same. The alternatives which are presented by way of construction are these—either that the proceeds of the wood growing upon this estate are to be applied in the ordinary way in which such proceeds are applied, in payment of the annual burdens, and belong to the heir along with the other rents and proceeds, or in the creation of a sinking fund which shall be kept and applied for payment of the capital sums with which the estate is burdened. And it appears to me to be reasonable in considering which of these two alternatives shall be adopted, that unless it is clearly declared that such a fund shall be formed, the other course shall be adopted, viz., that the proceeds of the wood shall be applied to the extinction of burdens in the same way as the rents or any part of them would be. In that view it may be observed, in the first place, that this clause does not contemplate an endurance of a long period of years and the accumulation of a considerable sum of money, but that it is limited to the ordinary fallen trees, the timber cut in the course of thinning, and the bark which may be produced and which may be in a condition for sale. In short, it is just the ordinary cropping of wood upon the estate. Then, in the next place, the purpose of the clause is really, as announced by the testator, the preservation of the amenity of the estate. There is no indication in the clause that his purpose is to reduce debts. On the contrary, the testator directs his trustees, for the preservation of the growing timber and plantations on his estate, to reserve the timber and plantations when they are conveying the estate, and he declares that the heirs shall not be entitled to cut timber without the consent of the trustees, and that the trustees shall not give such consent “unless the growing timber or plantations on my said estate shall require such cutting down or thinning for their better preservation.” The clause also discloses a necessity for keeping up the trust, for it might be necessary, with a view to the preservation of this timber, that the trustees should give their consent to the cutting of wood. Then there follow the words by which it is said the truster directed the proceeds of the timber to be applied in payment of capital debts,—“Declaring also that the produce of all fallen trees or cut timber or bark shall be applied in discharge of the various burdens charged on my said estate.” It appears to me that these words must be held to have in contemplation only such burdens as were of an annual nature. No doubt the word “annual” is not used, but, in my opinion, the fair reading of the words is that the truster contemplated the application of the proceeds of the timber to the payment of the various annual burdens upon the estate. It was asked in the course of the argument what the meaning of this expression “various burdens” was. I have no difficulty about that. The testator had said the trustees were to reserve the timber. If he had said nothing about how the money was to be applied, it might have been made a question whether it was not to be thrown into the general trust-funds and applied to purposes different from the rents of the estate.

The last purpose of the deed is a reservation to the testator of full power to himself during his life to direct and appoint his trustees "to cut down and dispose of such parts of the said growing timber as I shall think fit, the proceeds thereof to be disposed of as I shall direct." Now, if there had simply been a direction to the trustees, "You shall reserve the timber," I think the probability would have been, that without some direction about it the proceeds would have gone into the general trust-funds. But he provides that although the timber is to be reserved, the proceeds shall be applied to the discharge of the various annual burdens on the estate, for I cannot read this clause as directing the establishment of a sinking fund. And, accordingly, without saying more upon this part of the case, I am, as I have already said, of the opinion that if the deed of 1838 had stood alone it would have afforded a sufficient defence.

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But when we take the other deed the case is made perfectly clear. The clauses that there occur are not introduced in this way,—that notwithstanding what I have said in my previous deeds, directing the rents to be applied in a certain way, I now wish the contrary to be done. We have general words used, and the words "rents" and "revenues" are used repeatedly with reference to the source of payment of the annual charges on the estate. I think, therefore, that the second deed carries out the testator's purpose, and does so in terms quite unambiguous. So much for the construction of the deed.

But in case a different view should be entertained if the case goes further, I am prepared, so far as I am concerned, to say that, in my opinion, the trustees who represent the Marquis of Huntly are precluded from raising this question. The defenders rest their defence upon two grounds, viz., (1) *bona fide* perception and consumption, and (2) acquiescence, and my opinion is favourable to both of these defences. It is not disputed by the counsel for the pursuers, and cannot be disputed, that you have the elements that are usual for the support of the plea of *bona fide* perception and consumption. You are here dealing with the annual proceeds or income of an estate, you have absolute *bona fides*, you have a colourable title that cannot be questioned, because all parties acted in the belief, the reasonable belief, that the person who was drawing these proceeds and using them had a title to do so; and finally there were parties who were in the position of having a competing right, and who could have asserted it at the time. It has been said that these circumstances do not bring this case within the authority of those cases in which the plea of *bona fide* perception and consumption has been sustained. It is said such a case should have two elements, viz., eviction and two competing titles.

But are these of the essence of the plea of *bona fide* perception and consumption? I think not. Take the first of them,—eviction. The plea does not arise from or depend on eviction. Eviction occurs, and gives occasion to state the plea of *bona fides*, but is not of the essence of that plea.

In regard to the next point—in the ordinary case there are two competing interests under separate titles, here there were two adverse interests arising under the same title. In such a case as the present the next heir is in a position to consent to the act of the heir in possession, or to assert his right and stop that act. If he does not, it seems to me it should be held that he had allowed the heir to consume the fruits. I think the substance of the plea of *bona fide* perception applies to that case. I do not think that there need be competing titles such as your Lordship has referred to; for, as I have said, I agree with Lord

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But I think the case is freed from difficulty by the acquiescence of the Marquis of Huntly. What are the facts in regard to that? The pursuers here representing the Marquis of Huntly demand the proceeds of the wood from 1855 to 1878, a period of twenty-two years, while for eleven years the trust affairs were the subject of a judicial process in which the Marquis of Huntly was a party, and the very subject of this annual cutting of wood and appropriating the proceeds was prominently brought before the parties, and particularly by the reports of the Auditors of this Court, to whom the case was remitted, one of these being by the late Mr Hunter, and another by the present Auditor, Mr Baxter, who had succeeded to that office. I do not need to go into the details of these reports. It is sufficient to say that the Marquis of Huntly was a litigant in the cause, and allowed the reports to be approved of. The heir was thus entitled to assume that his right was recognised, and great injustice would be done to him and his representatives if, after having acted with the consent and acquiescence of all interested, the Marquis of Huntly or his representatives should afterwards be entitled to demand that the proceeds of all of these wood cuttings should be repaid, and not merely for the last period of eleven years, but for the first period of eleven years, when the trust matters were in Court and were approved of, and which approval plainly authorised the heir to go on as he had been doing. Upon these grounds I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and the defenders assoilzied.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against: Assolzie the defenders, and decern: Find the defenders entitled to expenses, and remit," &c.

HENRY & SCOTT, S.S.C.—LINDSAY, HOWE, TYTLER, & Co., W.S.—Agents.

No. 25.

WILLIAM FERGUSSON (Vans Dunlop's Trustee), First Party.—
Graham Murray.

Nov. 5, 1880.
Best v. Uni-
versity of
Edinburgh.

ANDREW VANS DUNLOP BEST, Second Party.—*Graham Murray.*
SENATUS ACADEMICUS OF THE UNIVERSITY OF EDINBURGH, Third Parties.—
D.-F. Fraser—Kirkpatrick.

Succession—Implied revocation of codicil by subsequent codicil.—A testator died leaving a settlement, dated 8th February 1879, by the eighth purpose of which he bequeathed £18,000 to his nephew. By his eighth codicil, dated 17th November 1879, he reduced this legacy to £16,000. A twelfth codicil, dated 5th February 1880, provided—"In addition to the legacy or legacies left to my nephew . . . in the eighth purpose of my trust-disposition and settlement, which was executed by me in February last, I hereby leave him two thousand pounds stg. if my estate can afford it." In a question between the nephew and the residuary legatees, *held (dub. Lord Justice-Clerk)* that the twelfth codicil, in referring to the eighth purpose of the original deed, had restored the bequest there given to its original amount, and had given £2000 in addition thereto.

2D DIVISION.
1.

THE late Andrew Vans Dunlop, sometime surgeon in the service of the Honourable East India Company, died on 27th February 1880, leaving a trust-disposition and settlement dated February 8th, 1879, and fourteen codicils thereto.

By the said trust-deed Dr Dunlop conveyed to trustees, of whom the first party to this case was the sole acceptor, his whole means and estate, for the purposes mentioned in the deed. No. 25.

The eighth purpose of the deed, after making various provisions, bore—Nov. 5, 1880.
Best v. Uni-
versity of
Edinburgh.

“To the said Andrew Vans Dunlop Best, my nephew, if he survives me, or to his lawful issue if he predeceases me leaving lawful issue, the sum of eighteen thousand pounds sterling, declaring that in case the said Andrew Vans Dunlop Best shall predecease me without leaving lawful issue, the said sum of eighteen thousand pounds shall revert to and form part of my general estate at his death; and also declaring that the representatives of the said deceased Doctor Alexander Vans Best, and the said William James Best, and Andrew Vans Dunlop Best shall not be bound to repay to my estate or representatives any sums which I may have advanced or lent to the said deceased Doctor Alexander Vans Best, or to the said William James Best, or Andrew Vans Dunlop Best, during my life, and the legacies hereby bequeathed to the children of the said Doctor Alexander Vans Best, and to the said William James Best, and Andrew Vans Dunlop Best, shall be held to be in addition to any such advances, which are hereby discharged.”

The deed, after making various other provisions, finally constituted the *Senatus Academicus* of the University of Edinburgh residuary legatees.

On 17th November 1879 the testator executed the following (his eighth) codicil:—“With reference to the eighth purpose of my trust-disposition and settlement, which was executed by me in Edinburgh on the 8th day of February 1879, I hereby instruct my trustees and executors that I hereby reduce the sum of £18,000 sterling to £16,000 sterling, which I left in that eighth purpose to my nephew, Andrew Vans Dunlop Best, and this I have done from a cause with which he is well acquainted.”

On 5th February 1880 he executed the following (his twelfth) codicil:—“In addition to the legacy or legacies left to my nephew, Andrew Vans Dunlop Best, in the eighth purpose of my trust-disposition and settlement, which was executed by me in February last, I hereby leave him £2000 sterling, if my estate can afford it, and I have no doubt that it can do so.”

A question having arisen with regard to the construction of these codicils, this special case was submitted for the opinion and judgment of the Court.

Dr A. Vans Dunlop Best, the second party, contended that by the terms of the codicil of date 5th February 1880 the restriction imposed by the codicil of 17th November 1879 was impliedly revoked, and that he was therefore entitled to payment in all of £20,000, viz., £18,000 in respect of the eighth purpose of the trust-disposition and settlement, and £2000 in respect of codicil of 5th February 1880.

The University of Edinburgh, the third party, contended that the restriction imposed by the codicil of 17th November 1879 was not revoked, and that the second party was therefore only entitled to £18,000 in all, viz., £16,000 in respect of the eighth purpose of the trust-disposition and settlement, as restricted by the codicil of 17th November 1879, and £2000 in respect of the codicil of 5th February 1880.¹

The following questions of law were stated for the decision of the Court:—“Upon a sound construction of the trust-disposition and settlement and codicils thereto of the late Dr Dunlop, is the party hereto of

¹ *Green v. Tribe*, June 18, 1878, L. R., 9 Chan. Div. 231.

No. 25.

Nov. 5, 1880.
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versity of
Edinburgh.

the second part entitled to payment of £20,000 from the party of the first part? or, is he entitled to a payment of £18,000?"

LORD YOUNG.—This case, as Mr Murray stated it, is very simple, and does not admit of much argument. It is more a question of impression. The facts may be stated in a sentence. A testator left a legacy in his original trust-deed of £18,000; by a codicil he reduced that to £16,000, and then he increased it by a subsequent codicil in these terms—"In addition to the legacy or legacies left to my nephew, Andrew Vans Dunlop Best, in the eighth purpose of my trust-disposition and settlement, which was executed by me in February last, I hereby leave him £2000 sterling, if my estate can afford it, and I have no doubt that it can do so," the question being whether the legacy here referred to as the legacy left by the eighth purpose of the settlement is that legacy as diminished by the codicil of November. It is impossible to have a very confident opinion as to what was intended, as there is doubtless ambiguity. The inclination of my own opinion,—I do not give it with confidence, but as the true legal result and not contrary in all probability to the wishes of the testator,—is that he wished to revert to the original legacy, and to increase the amount of it by £2000. I do not wish to suggest anything approaching to a general rule as to the effect of a subsequent codicil on a former one. I think it is clear enough that if the first codicil had simply cancelled the eighth purpose, and then the last codicil had left £2000 in addition, then without doubt the revocation would have been superseded and the legacy restored with the addition of £2000. The case here, however, is not so clear. As Mr Murray put it there is some improbability in the argument that the testator first meant to leave a legacy, then to deduct from it, and then to add just what had been deducted. I think that the true meaning and legal effect of the last legacy is that the testator must be held to have said, The legacy which at one time I intended to diminish I now wish to increase by £2000; and I cannot well read the last codicil as a simple cancellation of the reduction. I quite understand the argument and views of the other side, and they are not light; but putting them in the opposite scale I think the views to which I propose to give effect are the heaviest. I should suggest that we should answer the question by saying that the second party is entitled to get £20,000 from the first party.

LORD GIFFORD.—This case, though short, is a difficult one. It turns on two considerations very nearly balanced. There is certainly some difficulty in getting at the will of the testator, as he made no less than fourteen codicils in one year. He was, in fact, perpetually doctoring his settlement. Now, when he came to make the last of these two codicils, I am by no means sure that I can hold that he had all the former codicils distinctly in his mind, for if he had I cannot think that he would have expressed himself as he did. He had, I think, resorted to the eighth purpose, and read it over so far as concerned his nephews, and deals with it as if he had said, "having reconsidered the eighth purpose of my settlement, I now want to make an addition to its provisions." That, I think, is a fair paraphrase of the codicil of 5th February, and, though with much hesitation, I have come to the same conclusion as Lord Young.

LORD JUSTICE-CLERK.—The point here is so short that I am not disposed to make any lengthened remarks on your Lordships' opinions, nor even to enter a

formal dissent. My hesitation would have led me in another direction from your Lordships had I been left to myself. I read the codicil as referring to all the settlements made for his nephews, and that the testator meant by the first codicil to deduct £2000, and by the second to add it on again. Still I do not formally dissent, and agree in answering the question as your Lordships have suggested.

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Best v. University of
Edinburgh.

THE COURT answered the first question in the affirmative.

TODD, MURRAY, & JAMIESON, W.S.—W. & J. COOK, W.S.—Agents.

MEIKLE AND WILSON, Defenders and Reclaimers.—*Rhind.*

No. 26.

JAMES POLLARD (Smith's Trustee), Pursuer and Respondent.—*Guthrie.*

Nov. 6, 1880.
Meikle & Wilson v. Pollard.

Retention—Accountant's right to retain his employer's documents—Implied contract—Law-agent's lien.—A merchant placed certain documents in the hands of a firm of accountants to enable them to collect debts due to him. Shortly after he became insolvent, and granted a disposition *omnia bonorum* in favour of a trustee for behoof of his creditors. The trustee applied to the accountants for the documents, but they refused to give them up till their account for charges and outlay incurred in collecting the debts was paid. *Held* that they were entitled to retain the documents on the ground of implied contract.

Opinions that this was not a proper case of lien, but simply of right under a contract.

IN January 1880, James Smith, merchant, Kirkliston, became insolvent, and upon 6th February he granted a trust-disposition *omnia bonorum* to James Pollard, chartered accountant, Edinburgh, for behoof of his creditors.

2D DIVISION.
I.

In January 1880, previous to executing this disposition, James Smith had gone to Messrs Meikle & Wilson, accountants and business agents, 10 Nicholson Street, Edinburgh, and consulted them as to outstanding accounts which were due to him, conform to a schedule which he produced. They accepted employment to recover these debts, and thereafter applied to the several debtors for payment. To enforce delivery of these debts two books and relative documents belonging to Smith containing the particulars of the several accounts were delivered to Meikle & Wilson.

Messrs Meikle & Wilson's account for work performed for Smith amounted to £16, 1s. 10d., for which decree was subsequently obtained in the Sheriff Court.

Shortly after the trust-disposition of 6th February was signed Mr Pollard applied to Messrs Meikle & Wilson requesting them to deliver up the papers, books, &c. left with them by Smith. This the defenders refused to do until their account was paid.

Thereupon Mr Pollard raised an action against them in the Sheriff Court at Edinburgh, praying the Court to ordain the defenders to deliver up the said documents.

The defenders pleaded, *inter alia* ;—(1) The defenders having been instructed by Mr James Smith, baker and grocer, Kirkliston, to perform certain specific matters, and having accepted his employment and executed the business entrusted to them, they are justly entitled to payment of the charges for so doing. (2) The defenders having acquired actual possession of certain books or documents from the owner thereof to carry out his instructions to them as accountants and business agents, and having done so, they have lien or retention over them for their charges.

No. 26. On 26th May the Sheriff-substitute (Hallard) repelled the defenders' plea of retention.*

Nov. 6, 1880.
Maikle & Wil-
son v. Pollard.

The defenders appealed to the Sheriff (Davidson), who, on 15th June 1880, adhered.

The defenders appealed to the Court of Session, and argued ;—The pursuer was exactly in the same position with regard to his claim for these documents as Smith himself would have been. The books were handed over to their custody to carry out a particular piece of business, and they were not bound to hand them back till they were paid for their work. Their right did not rest on any special lien, but simply upon contract. They were in exactly the same position as any artificer who was entitled to retain an article he has made or repaired until he had been paid his account.

Argued for the pursuer ;—The Court had never extended the law-agent's lien over his client's writs to the case of an accountant (see cases in Sheriff-substitute's note). This plea of retention could not be held to fall under any of the liens enumerated in Erskine's Institutes. There was no implied obligation on the pursuer to leave these documents in the defenders' hands till the account was paid ; they were put there for a definite purpose, and ought to be given back when that was carried through.

LORD JUSTICE-CLERK.—As I have more than once intimated during the course of this debate I do not think that this is a proper case of lien or retention in the sense in which those words are used in the cases we were referred to. It certainly is not a question of law-agent's lien. The real question is whether, when documents or any other article are put into the hands of a professional man to enable him to do any particular piece of business, he is bound to part with those documents or other articles until he is paid for having done the work, and that in a question with the person who employed him. The possession is not passed, without doubt, but the articles or documents come under the terms of a special contract, and the obligation on the one party is as strong

* "NOTE.—The authorities to which the Sheriff-substitute was referred at the debate in support of the proposition that an accountant has the same lien over his employer's writs as a law-agent are not sufficient to support that plea. In *Stewart v. Stevenson*, 23d February 1828, 6 Shaw, 591, the accountant who successfully pleaded the lien was an officer of Court. In *Bruce v. Irvine*, 7th February 1835, 13 Shaw, 437, the point was reserved, although it is true that in the Lord Ordinary's interlocutor there is an important observation on the case of *Stewart*. The case of *Renny and Webster v. Myles and Murray*, 8th February 1847, 9 Shaw and Dunlop, new series, p. 619, is not in point, except as illustrating the disinclination of the Court to extend the writer's lien beyond the limits assigned to it by previous authorities, Lord Mackenzie quoting the pithy maxim—*quæ contra tenorem juris fiunt non sunt trahenda ad consequentias*.

"If, therefore, the defenders' plea has any valid foundation it must be identical with that of the artificer who retains the article he has made or repaired in security of the sum due as remuneration for his work. The writs and papers of which delivery is sought in the present process are not in that position. On none of them have the defenders executed any operation which can be assimilated to an act of manufacture or repair. They are mere instruments handed over for a certain purpose, and of these, the petitioner, as trustee for the insolvent's creditors, now demands restitution.

"An order for delivery as prayed for would at once have been made, but it appears from the record that parties are not at one as to the precise list of papers and documents in question. That matter, therefore, remains over."

as that on the other. The question of property does not arise, the man was simply employed to do a piece of work, for which the possession of these documents was necessary, and we have to say whether, when he had done the work, he was bound to hand back those documents before he was paid for the work. These circumstances do not raise the general question of lien, but the general case of counter obligations under a contract, and on that consideration I am of opinion that there is no necessity for the man to give up the documents till the other party has performed his obligation under the contract.

No. 26.

Nov. 6, 1880.
Meikle & Wilson v. Pollard.

LORD GIFFORD.—I concur with your Lordship on the special ground on which your Lordship's opinion is rested. If I thought that by this decision we were extending directly or indirectly the legal right of law-agents and others, or extending the number of the old liens, I should require more argument and further consideration before I took part in it. But I agree that this is not a case of lien. It is simply a case of the retention of a subject put into a person's hands for a special purpose, and resolves itself into a case of the relative duties of parties under a contract. The one party to it is bound to perform his part of the contract just as much as the other. The counterpart here of the duty of the one party to do the piece of business is that the other shall pay the price, and I think that until the latter is done the party employed need not hand over articles which were put into his hands to enable him to fulfil his part of the contract. The effect of this judgment is not to extend general lien, and, in that view, all the law that has been quoted to us on the doctrine of retention and lien is irrelevant.

LORD YOUNG.—There is certainly here no case of general lien. If it is a lien at all it is a special one. All liens arise primarily from contract, and the name is not an inconvenient one to express the right of certain parties to keep articles belonging to a person with whom they have contracted, until he has fulfilled his part of the contract.

I confess that I cannot follow the views of the Sheriff; he appears to me to have proceeded upon an entire misapprehension. He says in his note,—“The defenders call themselves ‘accountants and business agents.’ They belong to no established or known body of authorised legal practitioners. That was admitted at the bar. If the defenders are entitled to claim the right of lien any person whatever who chooses to assume a designation to which he is not legally entitled might equally claim privileges belonging only to recognised bodies. But, further, there is no authority for holding that an accountant can plead the hypothec of a law-agent. That right is a special rule against the general rule of law, and for some years there has been a strong feeling against extending the privilege. It certainly cannot be extended to persons in the assumed position of the defenders.” It seems to me that the defenders are perfectly entitled to the designation the Sheriff objects to, but whether they have a right to retain what came into their hands under a contract does not depend upon their designation but on the contract. I am not disposed to speak sneeringly of accountants and business agents; they are carrying on a useful and legitimate business, and people may properly employ them, but then they must also pay them for what they do. A carrier or a stabler does not belong to any body of legal practitioners, but they are entitled to keep articles that have come into their hands under a contract until they are paid for their work—the stabler may keep a horse which he has

No. 26. been keeping until he is paid for its keep, or a coachbuilder may keep the carriage which he has stored until he is paid for storing it. All the people who carry on lawful businesses under which the property of others comes into their possession are not exceptionally privileged, but under the common law are entitled to retain possession of that property until the true proprietor performs his part of the contract. That is just the case here. These accountants were employed by a baker to do something which he thought would be useful to him. To that end his business books were handed over to them to enable them to collect the debts, and in the course of this employment the baker incurred debts to these accountants to the amount of £16, and the accountants got decree for that amount. On no exceptional rule, but on the ordinary rule of law, I think that these persons are not bound to part with these documents which came to them under a contract until their claim under the same contract is satisfied. There is a counterpart in every contract, and here it is that the man of business is not entitled to get his money until he gives up the books, and his employer is not entitled to get his books till he pays the money. These are obligations *hinc inde* prestable by both parties. I have come to the same conclusion as your Lordships, and I think my opinion is rested substantially on the same grounds.

THE COURT sustained the appeal.

A. NIVISON, S.S.C.—J. F. MACKAY, W.S.—Agents.

No. 27.

GRACE H. WILKINSON (Pursuer), Appellant.—*Nevay*.

PETER BAIN (Defender), Respondent.—*A. J. Young*.

Nov. 9, 1880.
Wilkinson v.
Bain.

Husband and Wife—Affiliation and aliment of illegitimate child—Wife suing without husband's concurrence—Title to sue.—A married woman raised an action in the Sheriff Court against a man not her husband, alleging that she had been deserted by her husband, and that three years after her desertion she had given birth to a child of which the defender was the father, and concluding for payment of aliment. The Sheriff assoilzied the defender, on the ground that the pursuer had failed to prove that he was the father of the child. The Court adhered.

Opinions (per Lord Justice-Clerk and Lord Young), that the pursuer had no title to sue.

2d DIVISION.
Sheriff of Ross
and Cromarty.
R.

GRACE HELEN STEWART OR WILKINSON, wife of George Wilkinson, London, on 22d May 1880 presented a petition in the Sheriff Court at Stornoway praying the Court to grant a decree ordaining Peter Bain, preventive-man of Inland Revenue, residing at Stornoway, to pay to the pursuer inlying charges attending the birth of an illegitimate child of which she alleged he was the father, and the sum of £8 per annum for ten years for its aliment.

The pursuer alleged that she had lived with her husband in London from November 1871, the date of her marriage, till the spring of 1876, when he had deserted her; that in June 1876 she had returned to her father in Scotland, and that she had not seen or heard of her husband for four years; that on 1st November 1879 she had given birth to an illegitimate child, of which the defender was the father.

The pursuer pleaded, *inter alia*;—The pursuer's husband being dead, or otherwise having deserted her, she is entitled to pursue this action in her own name, and grant a valid discharge for the sum sought to be recovered.

The defender denied the paternity.

On 3d July the Sheriff-substitute (Spittal) assoilzied the defender, on the ground that the pursuer had failed to prove that he was the father of the child.

No. 27.

Nov. 9, 1880.
Wilkinson v.
Bain.

The pursuer appealed to the Sheriff.

On 12th August the Sheriff (Pettigrew Wilson) adhered.

The pursuer appealed to the Court of Session, and maintained (1) that the proof of paternity was sufficient; and (2) that as she had tried to find her husband to get his concurrence, and had failed, she was entitled to sue the action in her own name.

LORD JUSTICE-CLERK.—(After expressing his concurrence in the judgments of the Sheriffs on the merits)—There is a preliminary question in this case which was not founded on by the defender, but as it is of great importance I do not know that it is not our duty to give an opinion upon it. This is the case of a married woman pursuing an action without the concurrence of her husband, and without any evidence that the husband's consent cannot be obtained, and the doubt is whether she has any title to do so. Whether she could sue without that concurrence with a *tutor ad litem* is another question, but I am certainly not aware of any case where it has been held that a married woman can sue an action concluding for a money payment without the concurrence of her husband. I am not sure that there is not another greater question in the case, that is, whether the *onus* is not on the wife to prove that her husband could not have been the father of the child. On that I give no opinion, but I am not satisfied that there was any title to sue in this action.

LORD GIFFORD concurred on the merits, but gave no opinion on the legal question.

LORD YOUNG.—(After concurring on the merits)—The interesting and important point in this case is that to which your Lordship has adverted. My view goes deeper than the mere question of title to sue. The case regards the child of a married woman, and the child of a married woman *prima facie* belongs to her husband. He is entitled to have it if he so wishes, and is bound to support it. What he may be at liberty to establish to relieve himself of the burden it is not *hujus loci* to say, but he is not trying to relieve himself, and it certainly is a new proposition to me that if the husband were here, desiring to gain possession of this child, the offspring of his lawful wife, another man might come forward and say, "No, I have a right to the child, because I begot it;" or that a mother can hand over the child to another man than her husband, and say, "That is yours." As I have said, it is not *hujus loci* to say what the husband is entitled to establish to get rid of a disreputable wife, or of a child of which it is impossible that he should be the father. All I know is that this is the child of a married woman, and we have no reason for saying that the husband is trying to get rid of the burden of this child. I am clearly of opinion, that, irrespective of the merits, this action is not maintainable.

THIS interlocutor was pronounced :—"Find that the appellant (pursuer) has failed to prove that the respondent (the defender) is the father of her child libelled: Therefore dismiss the appeal, affirm the judgment appealed against, and decern," &c.

No. 28.

JOHN WISHART AND OTHERS (Galletly's Trustees), Pursuers.—

D.-F. Fraser—Lorimer.

Nov. 12, 1880.
Galletly's
Trustees v.
Lord Advocate.

LORD ADVOCATE, Defender.—*Lord-Adv. M'Laren—Sol.-Gen. Balfour—Rutherford.*

Revenue—Repayment of Inventory-Duty—5 and 6 Vict. c. 79, sec. 23—Companies Act, 1862, 25 and 26 Vict. c. 89, secs. 74, 75, and 76.—Executors gave up an inventory of the personal estate of the deceased, in which stock of a bank was entered as an item at the market price of the day. Before the stock was realised the bank stopped payment, and having gone into liquidation large calls were made in respect of the stock far in excess of the whole estate left by the deceased. *Held* (1) that the fact that the stock turned out to be worthless did not entitle the executors to a repayment of inventory-duty, as the stock was properly valued in the inventory at the market price of the day; (2) that a repayment of inventory-duty fell to be made in respect of the calls paid by the executors, as these were payments of debts due by the deceased; (3) that the executors were entitled to no other return of inventory-duty either in respect of the assignation of the shares to the liquidators, when they were of no value, or in respect of the whole executry estate having been lost.

1ST DIVISION.
Ld. Curriehill
C.

THIS was an action by John Wishart and others, as executors of the late David Galletly, against the Lord Advocate, for repayment of inventory-duty, under section 23 of 5 and 6 Vict. c. 79 (quoted in the opinion of the Lord President).

David Galletly died on 17th January 1878, and his executors gave up an inventory of his personal estate, amounting to £29,444, 16s. 4d. and in March 1878 paid £400 as inventory-duty to the Inland Revenue. This inventory included £2400 stock of the City of Glasgow Bank, which was entered at the value of £5738, being the selling price of the day. The bank having stopped payment in October 1878, and gone into liquidation, calls to the amount of £66,000 were made in respect of the stock held by the testator. After a litigation,¹ it was held that the executors were not personally liable for calls, and they paid £19,650 from the executry funds to the liquidators on account of calls, and admitted their liability to pay the whole of the remainder as soon as it was realised.

The Lord Ordinary pronounced this interlocutor:—"Finds (1) that according to the sound construction of the Joint Stock Companies Act of 1862, section 75,* the calls on the City of Glasgow Bank stock held by the deceased David Galletly were a debt accruing due from the said David Galletly from the time when he became a partner of the bank, and were payable by law out of his personal estate: Finds (2) that the calls already paid or accounted for to the liquidators of said bank by the pursuers as executors of the said deceased David Galletly greatly exceed the amount or value of the

¹ Wishart, &c., v. City of Glasgow Bank, July 19, 1879, *ante*, vol. vi. p. 1341.

* By the Joint Stock Companies Act, 1862, sec. 74, it is enacted "contributory" shall mean "every person liable to contribute to the assets of a company under this Act in the event of the same being wound up." By sec. 75 it was enacted that "the liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability."

By the 76th section it was enacted that "if any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned his personal representatives, heirs, and devisees, shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees, shall be deemed to be contributories accordingly."

estate and effects of the deceased, as realised by his executors, and that his estate is insolvent, and that the pursuers, as executors foresaid, are entitled to a return of the inventory-duty paid thereon, in whole or in part; but before further answer as to the amount of the duty to be returned, appoints the cause to be enrolled: Grants leave to the defender to reclaim." * No. 28.
Nov. 12, 1880.
Galletly's
Trustees v.
Lord Advo-
cate.

* "NOTE.—The question raised in this action is whether the calls made by the liquidators of the City of Glasgow Bank (which is being wound up under the Companies Act of 1862) upon the executors of David Galletly, a shareholder who died before the winding up commenced, or the calls were made, is to be held as a debt due by the deceased, or simply as a debt due by the executors.

"The question depends upon the construction which is to be put upon section 75 of the Companies Act of 1862, which is quoted on the record; but along with that section it is necessary to read sections 74 and 76. By section 74 the term 'contributory' is declared to mean 'every person liable to contribute to the assets of the company under this Act in the event of the same being wound up.' Now, as I read these words, they truly mean that a shareholder becomes a contributory by the very fact of his becoming a partner of the company, and that his liability commences as soon as he signs the contract, because from that moment he becomes liable to contribute to the assets of the company in the event of its being wound up.

"Section 75 declares that 'the liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability.' The effect of this section, when read in connection with section 74, is that the liability of the contributory, which commences at the time he becomes a shareholder, creates a debt due by him as from that time, although the amount of the debt may not be ascertained or enforced until long afterwards. That this is the sound construction of these clauses of the statute cannot, I think, be disputed after the cases of *ex parte Harding in re Williams*; *ex parte Carsewell in re Vaughan*, 33 L. J. Bankruptcy, p. 26, and Eng. and Ir. App. p. 9, (L. R.); and *Wishart v. the City of Glasgow Bank*, 6 Ret. 823.

"Then section 76 provides that 'if any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company, in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly.' The effect of this section, in the case of a contributory dying before a list of contributories is settled, and before a call is made, is not to extinguish the liability of the deceased contributory, but merely to declare that his personal representatives shall pay the calls out of his personal estate as a debt due by him, and shall for that purpose be themselves placed upon the list of contributories.

"In the present case David Galletly died on 17th January 1878, leaving a trust-disposition and settlement in favour of certain persons, of whom the pursuers are the acceptors and survivors, as trustees, and to whom he conveyed his whole estate, heritable and moveable, in trust for the purposes therein specified, and, *inter alia*, for payment of all his just and lawful debts, deathbed and funeral expenses. The pursuers gave up an inventory of the personal estate, which was recorded in the books of the Commissariat of the county of Edinburgh on 6th March 1878, the amount being given up at £29,444, 16s. 4d., and the inventory-duty corresponding thereto being £400, which was duly paid by the pursuers. The said sum of £29,444, 16s. 4d. included £2400 consolidated stock of the City of Glasgow Bank, as of the value of £5738 at the date of the oath to the inventory. On 8th March 1878 the agent of the trustees and executors, Mr John Galletly, who was himself one of their number, sent the confirmation, with the certificates of the stock, to the bank's manager in Edinburgh,

No. 28. The defender reclaimed, and argued ;—(1) The debt in respect of which a return of inventory-duty is claimed must have been due by the de-

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and requested him to send new certificates in name of the executors, which request was complied with, and the names of the executors were entered as holders of said stock in the stock ledger which the bank kept as its register of members.

"The bank suspended payment on 2d October 1878, and went into liquidation on 22d October, and it is now in course of being wound up. The pursuers had not sold the stock before the bank failed, and the liquidators, on 7th November following, placed their names on the first part of the list of contributories as liable personally for calls. Various calls were from time to time made, the total amount being £66,000. Some time thereafter the First Division of the Court (on 19th July 1879) transferred the names of the pursuers (except John Galletly) from the first part of the list of contributories to the second part thereof, and directed their names to be entered on the second part as executors of the deceased David Galletly, liable as such to make his executry estate forthcoming in a due course of administration."

"It is admitted that almost the whole of the estate has been realised and paid over to the liquidators of the bank to account of the calls ; the amount so paid or accounted for being £19,650, and the remainder of the estate, including any sum which may be recovered in the present action, will as soon as possible be paid over to the liquidators. In any view, it is certain that a large part of the £66,000 of calls will remain unpaid, and that the estate is therefore insolvent. In this state of matters the pursuers have raised the present action for return of the sum of £400 paid by them as inventory-duty. Their demand is based upon the Act 5 and 6 Vict., cap. 79, section 23, which provides that 'when it shall be proved by oath and proper vouchers to the satisfaction of the Commissioners of Stamps and Taxes that an executor hath paid debts due and owing from the deceased and payable by law out of his or her personal or moveable estate to such an amount, as being deducted from the amount or value of the estate and effects of the deceased which shall be included in an inventory duly exhibited and recorded after the 31st day of August 1815 in a Commissary Court in Scotland, shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate and effects, would have occasioned a less stamp-duty to be paid on such inventory than shall have been actually paid thereon, it shall be lawful for the said Commissioners, and they are hereby required, to return the difference, provided the same shall be claimed within three years after the date of recording such inventory as aforesaid.'

"Now, there is no doubt whatever that the calls paid by the pursuers out of the personal estate of the deceased have practically reduced that estate to *nil*, so that there is nothing upon which inventory-duty could be demanded, except the nominal value of the City of Glasgow Bank stock, which it is hardly necessary to say has realised, and can realise, nothing at all. And the only question is, whether these calls were debts due and owing from the deceased David Galletly's estate within the meaning of section 23 of the Act 5 and 6 Vict. cap. 79 ? The cases referred to in the early part of this note leave me no alternative but to return an affirmative answer to that question, and to hold that the pursuers are entitled to a return of inventory-duty. The defender, however, maintains that the whole duty claimed by the pursuers should not be returned, in respect that the whole estate has not been absorbed in paying these debts, and in particular that the value of the stock itself (£5738), which was included in the inventory, has not been applied to that purpose. It has undoubtedly been lost, and the estate has realised nothing from it, but still it remains in the inventory as of the value of £5738, and I therefore think it is subject to inventory-duty. It is no answer to the argument of the Crown for the pursuers to say that if they had sold the stock before the stoppage of the bank the price would have all been absorbed in paying the debts of the deceased in the form of calls. The fact is, that neither the stock, nor its inventory value, nor any part thereof, has been applied to any such purpose.

"The whole amount, therefore, of duty cannot be returned, and as there still

ceased. No doubt under the 75th section of the Companies Act of 1862 the deceased was liable for the calls, but they never were due by him. Until a call was made there was only liability. The calls were therefore not "due and owing from the deceased," as required by the 23d section of 5 and 6 Vict. c. 79.¹ (2) The stock was included in the inventory at its market value, and no repayment should be made for the depreciation in value.

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Argued for the pursuers;—(1) It had already been decided in the case of *Wishart* that calls fell under section 76 of the Companies Act, and that liability attached before the failure of the bank. Therefore they were debts of the deceased.² (2) The stock was valued at the market price in the inventory, but in point of fact was valueless, and a repayment should be allowed for it.

At advising,—

LORD PRESIDENT.—The testator died on the 8th of January 1878, and the inventory of his personal estate was given up by the executors on the 6th of March of that year. The amount of the estate so given up was £29,444, 16s. 4d., and the inventory-duty corresponding to that amount was £400, which was paid by the executors to the Inland Revenue. That sum of £29,444, 16s. 4d. included, among other items, consolidated stock of the City of Glasgow Bank which belonged to the deceased—£2400 of that stock—and which in the inventory was valued at the then selling price in the market, £5738. In October 1878—that is, seven months afterwards—the City of Glasgow Bank stopped payment and went into liquidation, and in consequence calls were made by the liquidators upon the executors as holders of this stock, the amount of the calls being in all £66,000. The liquidators had placed the executors upon the first part of the list of contributories as partners in their own right and interest, but upon a petition being presented to the Court we ordained the liquidators to transfer their names from the first to the second part of the list of contributories, and to enter them as liable as executors to make the executry estate forthcoming in a due course of administration. The account between the executors and the liquidators has not yet been settled, but it appears that the liquidators have received £19,650 on account of those calls, and we are told that the executry estate has now been almost all realised, and as soon as this action is decided, and certain shares held by the deceased, which are at present unrealisable, can be disposed of, the remainder of the estate will be paid to the liquidators, but there will be a large part of the £66,000 of calls unpaid, the executry estate being insufficient to pay them.

Now, in these circumstances the executors demand repayment of the whole £400 of inventory-duty which they paid in March 1878. The Crown resist this demand *in toto*, and contend that the debt which has been paid by the executors was not a debt of the deceased David Galletly, but only a debt of his executry estate, and therefore they say the case is not within the Act 5 and 6 Vict. c. 79.

remains part of the estate to be realised and applied in payment of the calls the cause is ordered to the roll to have the precise amount of return ascertained."

¹ *Ex parte Gressell in re Overend, Gurney, and Co.*, 1866, E. R. 1 Ch. App. 528; *Lord Advocate v. Pringle*, June 12, 1878, *ante*, vol. v. p. 912.

² *Wishart*, March 14, 1879, *ante*, vol. vi. 823; *Williams v. Harding*, March 11, 1866, 1 E. and I. App. 9; *ex parte Harding*, April 20, 1864, 33 L. J. Bankruptcy, 26; *Act 55 Geo. III. c. 184*, sec. 40.

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The 23d section of that statute provides,—“When it shall be proved by oath and proper vouchers, to the satisfaction of the Commissioners of Stamps and Taxes, that an executor hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as, being deducted from the amount or value of the estate and effects of the deceased, which shall be included in an inventory duly exhibited and recorded after the 31st day of August 1815 in a Commissary Court in Scotland, shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate and effects, would have occasioned a less stamp-duty to be paid on such inventory than shall have been actually paid thereon, it shall be lawful for the said Commissioners, and they are hereby required, to return the difference, provided the same shall be claimed within three years after the date of recording such inventory as aforesaid.”

Now, it is contended that this is not a debt which was due and owing from the deceased within the meaning of this clause. It is said that the debt arose only when the bank went into liquidation and calls were made, and therefore it is a debt due only by the executry estate. I think this contention is hopeless after the case of *Wishart*,¹ because it was there decided that a lady who possessed City of Glasgow Bank stock before her marriage, and was married before the liquidation of the bank, was indebted in the whole liabilities which came upon her in liquidation after her marriage; that that was, in the sense of a certain statute then in question, an antenuptial debt—that is to say, a debt contracted before marriage, although not enforced or enforceable till after the marriage. And so here I am of opinion, upon the same ground, that this was a debt which was due and owing from the deceased, although it was not enforced, and did not require to be enforced, till after his death.

But although that part of the case is, I think, abundantly clear, there is another question which raises greater doubt. The amount in the inventory is £29,444. The amount which has been actually paid is £19,650, and although there is still something more to be had from the executry estate, as we are given to understand, there appears to be no doubt that it will not amount to £29,444. Therefore, *prima facie* at least, the executors have not paid away the whole amount in the inventory in discharge of debts due and owing by the deceased, but have only paid away a certain portion of that. They have not been able to realise any more, and they have paid away certainly all that was realised. But there was one very important item in the inventory which has turned out entirely unproductive, and that was the £2400 of City of Glasgow Bank stock. But they contend that that has turned out to be of no value, and therefore it is not to be taken into account in this question—that it must in this question be struck out of the inventory as an item that should not be there. The stock, they say, although apparently of the value of £5000 odds, was in reality of no value at all, and therefore the amount of the executry estate, instead of being taken at the sum contained in the inventory, must be taken at that sum *minus* this item of the inventory which has turned out to be valueless.

Now, I cannot say I am prepared to adopt that view of the case. It is a mistake to say that that City of Glasgow Bank stock was in March 1878 of no value at all. It was of the value set down in the inventory, for that was its selling price at the time, and if the executors had sold that stock in the month of March 1878 they would have got that money for it. And the question there—

¹ March 14, 1879, *ante*, vol. vi. p. 823.

fore comes to be, whether, under the clause of the statute with which we are dealing, we must not take the actual amount of the valuation in the inventory as fixing distinctly what the amount of the executry estate was for the purposes of this question? I think we must do so, unless it could be shewn that there was some mistaken valuation or estimate. There would be a remedy for that. If it could be shewn, for example, that there was an item in the inventory which had no ascertained value, and the value or estimate of which was therefore conjectural—that it turned out to be stated at a high value, when in reality as at that date it was of a less value than the sum embraced in the inventory—then I think there might be a great deal to be said for the contention of the pursuers, and that case would probably fall within the operation of the statute which the Dean of Faculty referred to—I mean the 40th section of the 55 Geo. III. c. 184. But that is a very different case from the present. One can quite understand that many things must enter an inventory the value of which is quite unascertained and very uncertain. We had a remarkable example of that in the case of the *Lord Advocate v. Pringle*, in which an expectancy was set down in the inventory as of the value of £20, and it turned out to be many thousands. That was a case the other way. There are many assets of an estate the value of which at a particular date it is quite impossible to take with anything like accuracy or in any way but conjecturally, and these conjectural estimates are to be set right when the facts are ascertained. But this was not a conjectural estimate. This was an asset of the estate which had a present market value, and it would never do to say that because the executors had not realised that asset and got the present market value for it, but had chosen to hold it until, it might be, years afterwards, when it comes to be depreciated in value, that is to affect the amount of the executry estate as at the date of the inventory. I think that would be against the meaning and spirit of this Act of Parliament.

I therefore think that we must take the inventory as it stands, and the question comes to be, what amount of that £29,444 the executors have paid away in extinction *pro tanto* of the debts of the deceased? And the answer to that comes to be, not £29,444, but £19,650 *plus* so much more as may hereafter be realised and paid over to the liquidators.

It was said, no doubt, that this stock is to be handed over to the liquidators as an asset of the executry estate, or rather that there is to be an assignation by the executors to the liquidators of any value that may attach to this stock hereafter in respect of the surplus assets of the bank—any claim which the executry estate may have to surplus assets after the whole creditors have been paid—and that therefore this stock has really been paid away or handed over in payment to a certain extent of the deceased's debt. The question is, not what has been done with this presently worthless stock, but how much of the £5738, which was its value in March 1878, has been paid away in extinction of debt? and the answer must be—not one farthing. No part of that asset of the executry estate has been paid away in extinction of the deceased's debt.

The conclusion, therefore, to which I come is substantially that which has been arrived at by the Lord Ordinary—that while the pursuers are entitled to succeed in obtaining repayment of inventory-duty corresponding to the amount that they have actually paid away in extinction of the deceased's debt, they are not entitled to any more, and particularly they are not entitled *per aversionem* to claim the return of the whole inventory-duty paid upon a total of £29,444, because that is much in excess of what they have actually paid in extinction of

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debt. The inventory-duty was quite accurately and correctly charged as at March 1878. The value of the estate was then £29,000, and consequently £400 was properly paid upon it, but the drawback must be, not the total amount of the lost executory estate, but the total amount of that portion of the estate which has been paid in extinction of the deceased's debts.

LORD DEAS.—I am very clearly of opinion that those calls were a debt due by the late Mr Galletly. That is clear, I think, both upon principle and upon the facts. That leads to this, that the executors are entitled to a return of the inventory-duty to the extent which has been stated by your Lordship. I am also of opinion, however, that they are not entitled to a return of the inventory-duty to any farther extent. We have no way of estimating it—no right to estimate it—except in the way in which it was estimated at the time, when it was quite rightly taken at the market value. I therefore entirely agree with your Lordship, both as to this being a debt of the late Mr Galletly, and likewise as to the result to which that leads, upon the amount to be returned to the executors.

LORD PRESIDENT.—Lord Mure concurs in this judgment.

LORD SHAND.—I am of the same opinion on both points. With regard to the large sum of £19,000 odds paid in respect of calls, it is to be observed that the payment made was in the ordinary course of executory administration by the executors. If the case had been one in which the executors had retained the stock over a period of years, and the result of their trading had been that large liabilities had been incurred which were not liabilities existing when the testator died, a very different question would have been raised. It would then, I think, have been fairly represented that the calls were not in any true sense debts due and owing by the testator, but debts due and owing by the executors, which had been the result of their trading, and were properly their debts only. The bank failed within nine months after the testator's death. The calls were made in respect of trading that had occurred during his life. They were made upon shares which the executors were, we must presume, in the course of realising, and they were therefore not debts due and owing by the executors from any actings of their own, but due and owing by the deceased in respect of the stock left by him. I have therefore no doubt that the Lord Ordinary is right on that point.

On the second question, whether the pursuers are entitled to receive back the inventory-duty paid upon the sum of £5738, there are two arguments urged. The first was that this stock, having been valued at £5738 at the date of the confirmation, had been subsequently handed over to the liquidators of the bank really in payment of debts due and owing by the testator to the bank—I mean towards the extinction of the calls that had accrued upon the shares. Now, in regard to that question, if it had appeared that at the time when the liquidators stipulated that this stock should be handed over to them, the stock, although for a time worthless, had again acquired a value in the market, and had been valued accordingly as between the executors and the liquidators at a certain sum, and given over as at that value in extinction of calls, I should have found it difficult to distinguish between that sum and the larger sum in dispute between the parties; for I think it might then have been very properly represented that this stock, taken as of the value of whatever the sum fixed might have been, had been given to the liquidators as a payment towards debt due and owing

by the deceased at the time of his death, that debt being the calls which had accrued upon the shares. But the fact is not so. These shares were not, at the time when the liquidators demanded the surrender of this estate, treated as an asset of known value. The liquidators simply stipulated that taking them at what they might be worth they must be thrown in with the rest of the estate;—and it must be kept in view that the possessors of those shares might have been liable for future calls for aught that anybody knew at the time this surrender was demanded. I do not think the facts of this case as presented to the Court raise what is necessary to entitle the party to a return of the duty, viz., that the assets were of value, and were valued accordingly, and taken over at that value. Accordingly that argument fails.

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Another point maintained by the pursuers was that at all events they are entitled to correct what was an erroneous value put upon those shares. They were valued at £5000 odds, whereas it appears by the result that they were worthless, and it is said the amount of the erroneous valuation must be deducted from the gross amount on which duty was paid. I agree with your Lordships in thinking that in questions of this kind, between executors and the Revenue, what must be looked at is the market value of shares of this description. The case is not like one in which a body of private trustees have to wind up a testator's business which he has been carrying on alone—where they put a high value upon it, and in the course of realisation it is found there is no such value, because it is swept away. That, I think, would present a very different question, because there you would have a valuation of a speculative character tested by the result, and the result would shew that it had no such value. But here, and in reference to a joint stock company, you have another criterion—the market value. The executors could have sold this stock at the value they put upon it in the inventory, and it appears to me that we cannot go back upon that market value to correct it by the result, in the same way as you could do in the case of a private estate and private business with an estimated valuation such as I have referred to. Accordingly, I agree with your Lordship in thinking that the Lord Ordinary is right in reference to this branch of the case also.

THE COURT pronounced this interlocutor:—"Adhere to the first finding in the Lord Ordinary's interlocutor: *Quoad ultra* recall the said interlocutor: Find that the pursuers (respondents) are entitled to a return of so much of the inventory-duty paid by them in March 1878 as corresponds to the amount of executry funds which they have applied to payment of debt due by the deceased David Galletly, and decern: Find no expenses due to or by either of the parties since the date of the Lord Ordinary's interlocutor."

J. & J. GALLETLY, S.S.C.—DAVID CROLE, Solicitor of Inland Revenue.—Agents.

JOHN CLARK, Pursuer.—*Trayner—Watt.*
ARCHIBALD MELVILLE, Defender.—*J. P. B. Robertson—Dickson.*

No. 29.

Process—Exhibition of Titles.—When in an action of exhibition the Court is satisfied that the titles called for should be produced, the proper course is to ordain them to be exhibited in the hands of the clerk of Court.

Nov. 16, 1880.
Clark v. Melville.

THIS was an action by John Clark, farmer, Banffshire, against Archibald Melville, W.S., concluding for exhibition, production, and delivery of the titles of a property 11 Davie Street, Edinburgh.

1st Division.
Ld. Craighill.
C.

The pursuer averred that he was the grandnephew of George Andrew

No. 29. and the cousin of John Andrew, son of George Andrew, and was heir-at-law to both of them; that George Andrew died on 14th March 1819, and John Andrew died "many years ago;" that the defender had succeeded to the business of Mr Imlach, S.S.C., who was agent for the Andrews, and so had got possession of the titles of 11 Davie Street, which belonged to George Andrew and after his death to John Andrew.

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The defender denied that the property 11 Davie Street belonged to George Andrew or John Andrew, but he admitted that he had the titles of the property in Davie Street. He averred,—“The pursuer has no interest therein, at least he has not yet shewn that he has any interest.” The defender did not state for whom he held the titles.

The pursuer pleaded;—(1) The pursuer being entitled to succeed as heir to the property in question, the defender is bound to produce and exhibit the titles as concluded for. (2) Upon the pursuer satisfying the Court, by making up a title or otherwise, that he is the proprietor of the subject, he is entitled to decree in terms of the alternative conclusion of the summons.

The defender pleaded;—(1) No title to sue. (2) The conclusions of the summons are incompetent. (3) The pursuer is not entitled to call for exhibition or delivery of the titles asked for until he establishes his alleged propinquity to the ancestor to whom he claims to be heir, and also that he is their heir. (4) The allegations of the pursuer being unfounded in fact, the action should be dismissed, with expenses. (5) In any event the defender is entitled to be satisfied by the pursuer producing a service or other *habile* title before exhibiting the titles called for. (6) *Separatim*, The heritable subjects mentioned not having been the property of either George Andrew or John Andrew, the pursuer, even supposing him to be their heir, is not entitled to exhibition or delivery of the titles. (7) The defender being barred from parting with said titles until an *ex facie* right thereto is exhibited by the pursuer, he is entitled to expenses.

The Lord Ordinary pronounced this interlocutor:—“In respect that though the defender admittedly held the titles of the property in question only for those who are in right of John Andrew, mentioned in the record, he will not even in his own presence exhibit the titles to the pursuer, or pursuer's agent, nor produce them to the clerk, that in the clerk's hands these may be examined by the pursuer or his agent, without formal proof, first, of the death of the said John Andrew, and, in the next place, of the propinquity and apparency of the pursuer, before further answer allows the pursuer a proof of his averments *hinc inde*, and to the defender a conjunct probation,” &c.

The pursuer reclaimed, and argued;—He was entitled to exhibition without a proof. The defender admitted he had titles in his possession and did not say for whom he held them. He was not entitled to prevent the only person who alleged right from having access to them.

LORD PRESIDENT.—My opinion is that if we are satisfied that the titles should be produced the regular and proper course is that they should be exhibited in the hands of the Clerk of Court. I do not mean that they should be put into process, or form a step of process.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT pronounced this interlocutor:—“Recall the said interlocutor, and ordain the defender to exhibit the title-deeds of the property in question, so far as in his possession, in the hands of

the Clerk of Court, and decern : *Quoad ultra* continue the cause : No. 29.
Find the defender liable in expenses since the date of the Lord
Ordinary's interlocutor," &c.

Nov. 16, 1880.
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ALEXANDER MORISON, S.S.C.—J. & A. HASTIE, S.S.C.—Agents.

MRS AGNES SCOTT OR DEWAR OR MILNE, with consent of WILLIAM
MILNE, Pursuers and Respondents.—*Lord-Adv. M'Laren—Dickson.*

No. 30.

WILLIAM SCOTT, Defender and Appellant.—*Guthrie Smith—J. A. Reid.*

Nov. 17, 1880.
Dewar or
Milne v. Scott.

Succession—Cumulative provisions—Donation mortis causa.—A father bequeathed £400 to his daughter A, £400 to his daughter B, and directed his trustees to invest £400 for behoof of his daughter C in liferent allanarly, and of her children in fee. After the death of C's husband her father took her to live with him, and gave her from £40 to £50 a-year for her support. He subsequently lent £400 on the security of local rates, the destination in the bond being to C and her heirs. The bond was found in the father's repositories at his death. The Court, looking to the terms of the deeds and to the circumstances of the case, found that it was the testator's intention that his daughter C should receive both the provision under the will and that under the bond.

WILLIAM SCOTT, merchant, Strathaven, died on 13th May 1870, leaving a trust-disposition and settlement, dated 7th December 1866, under which his son William was executor. His other children were Mrs Morton, Mrs Dykes, James Scott, and Mrs Dewar, the last of whom had in March 1866 entered into a marriage of which her father disapproved. By his settlement Mr Scott took his executor bound to pay a legacy of £400 to each of Mrs Morton and Mrs Dykes. In regard to Mrs Dewar he provided that his trustees should invest a sum of £400 "on good heritable security in Scotland in their own names as trustees foresaid, and apply the annual income and produce, deducting necessary expenses, for behoof of my daughter, Agnes Scott or Dewar, wife of Alexander Dewar, teacher, Strathaven, in liferent, for her liferent alimentary use allanarly; hereby providing and declaring that the said trustees shall be entitled to apply the whole or such part of the said principal sum of £400 as they may think proper, and of which they shall be sole judges, for the alimentary support and benefit of the said Agnes Scott or Dewar and her children after-mentioned; after the death of the said Agnes Scott or Dewar the said trustees shall realise said capital sum of £400, or such portion thereof as may then be remaining, and, after deducting necessary expenses, they shall divide the same among the children of the said Agnes Scott or Dewar in such proportions, at such terms, and subject to such conditions . . . as the said Agnes Scott may appoint by any writing under her hand, and failing such writing, then to the children of the said Agnes Scott or Dewar equally." Failing issue of Mrs Dewar the fund was at her death to be paid equally to Mrs Dykes and Mrs Morton. The residue of the estate of the testator amounted to about £2000.

1ST DIVISION.
Sheriff of
Lanarkshire.
M.

Mrs Dewar's husband died in November 1867, without leaving any adequate provision for his wife. She subsequently lived partly with her father, and he supplied her with money and necessaries to the extent of from £40 to £50 a-year till his death. At his request she had given up a right to a share of a policy of insurance for £150 on her husband's life, and also to a share of his furniture.

In October 1868 Mr Scott handed £600 to his son James to be invested with the Local Authority of the Uddingston Special Drainage District. £200 was invested in his own name. The remaining £400 was

No. 30. taken in name of Mrs Dewar. The Local Authority bound themselves to repay it to Mrs Dewar or her heirs and assignees, and in security assigned to her in security the assessments authorised to be levied in their district. Nov. 17, 1880. Dewar or Milne v. Scott. The two half-yearly interests on this bond falling due before Mr Scott's death were paid to him, and the bond was found in his repositories after his death. Thereafter the half-yearly interest was drawn by Mrs Dewar.

In December 1878 Mrs Dewar was married to Mr William Milne, and she subsequently, with consent of her husband, brought this action against Mr William Scott, her father's executor, for delivery of the above-mentioned bond by the Uddingston Local Authority which he had in his possession.

The pursuers pleaded;—(4) The bond in question being in effect a *donatio mortis causa* in favour of the pursuer, and the same having been held by the deceased as natural custodier or agent for the pursuer, must be held to have been delivered. (5) *Esto* that the bond in question was neither a donation *inter vivos* nor *mortis causa*, it must be held to be a legacy to the female pursuer which does not require delivery.

The defender pleaded;—(6) The deed in question not being a delivered deed, absolvitor falls to be pronounced, with expenses. (7) On a true construction of the settlement referred to, the pursuer is only entitled to the sum of £400; and having received payment of that amount out of her father's estate, she cannot insist in the present action.

There were other defences, but to these it is not necessary to advert.

The Sheriff-substitute (Birnie), after a proof, made findings in fact to the effect narrated above, and found further in law "that the bond was not delivered to the pursuer during the lifetime of her father, but that it was an additional provision by him to her, and did not require delivery," and he therefore ordained delivery of it.*

* "NOTE. . . .—2d, I do not think the bond was *surrogatum* for the £400 in the settlement. Provisions by a parent to a child are presumed to be in addition to, not in lieu of, each other—*Menzies on Conveyancing*, p. 441; *Erskine*, iii. 3, 93. The pursuer also was at the time a widow, dependent upon her father. She had given up at his request a right to a share of a policy of insurance for £150 on the life of her husband, and also to a share of her husband's furniture. She had received from her father, since her husband died, £40 to £50 each year, a sum larger than the interest which could be obtained from the two sums of £400. Her sisters were both married and in good circumstances, and her father's residue, it is admitted by the defender, exceeded £2000. It is also matter for observation that the pursuer, by her father's settlement, had only a *liferent*, whereas the bond was taken in her name absolutely.

"3d, I do not think the bond was a donation requiring delivery. There is no reason why her father should have given her a donation, and especially of such a sum. She had no present need for it, as he was supporting her, while, on the other hand, she might marry again and not require it.

"4th, I do not think the bond was delivered, but I think it was a provision by a father to a child, and did not require delivery. . . . But it seems to me the most probable reading of what took place was that he intended the bond as an additional provision to the pursuer on his death. Provisions by parents to children may be taken in the shape of bonds from third parties—*Hamilton v. Hamilton*, Jan. 9, 1741, M. 11,576; *Munro v. Munro*, Dec. 16, 1712, M. 5052; *Spence v. Ross*, Nov. 17, 1826, 5 S. 17; and whether they are or are not revocable, and the date on which they came into force, will depend on circumstances—*Spence v. Ross*, *supra*; *Berry v. Henderson's Trustees*, June 24, 1836, 14 S. 1008. They do not require delivery—*Menzies on Conveyancing*, p. 173; *Munro v. Munro*, *supra*."

Upon 10th June 1880 the Sheriff (Clark) adhered with a slight variation. No. 30.

The defender appealed, and argued ;—It could not be said that the bond in question was delivered.¹ In Scotland no doubt there was no presumption against double portions as there was in England.² But the will was here prior to the bond. It was thus more easily presumed that the fund thereby conveyed was in satisfaction of the bequest under the will than if the bond had preceded. The question was really one of intention. In arriving at that it must be taken into account (1) that the same sums had been given to the three daughters, and that that in the bond was of the same amount; and (2) that though Mrs Dewar and her father had been living together, there was nothing to shew that the subject of the bond had been mentioned to her, as would have been expected.

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The pursuers argued ;—If the provisions had been both testamentary they would have both been payable.³ Here the quality of the provisions was different. The one was testamentary, the other was immediate and *inter vivos*. In such cases as *Kippen*, where the settlement came first and the obligatory provision later, Lord Colonsay in this Court, and the House of Lords afterwards, held that the maxim *debitor non presumitur donare* did not apply. Here, reading the bond, what was the obligation which it could be held to satisfy? The will was entirely latent, and only known to the testator and his agent. There was no foundation for the doctrine of satisfaction. There was no expectation in the daughter's mind by a promise having been made to her. If considerations were to be founded on the form of the gift there was no obligation on the father's part. The obligation was that of the Uddingstone Local Authority.

A father by inserting a child's name in a bond or conveyance made the child a grantee without delivery.⁴ The defender had failed to shew why Mrs Dewar should not have the bond, or that it was in satisfaction of a prior debt. Looking to the intention, the presumption was that both provisions should stand.

LORD PRESIDENT.—In this case I am quite satisfied with the judgment of the Sheriff-substitute on all points. I think he has disposed of it in a most satisfactory way, and on very sound and solid reasoning.

The only question of importance or difficulty is what may be called the question on the merits, viz., as to whether the £400 bond which was taken by Mr Scott in favour of his daughter, Mrs Dewar, was intended to form an additional provision to her, or to be in substitution of the provision he had made for her and her children in his settlement. Such questions are always more or less difficult, and must be decided on a review of the whole circumstances of the testator and his family, and, in particular, of the situation of the person who would be favoured beyond others by the double portion.

The provision made by Mr Scott in his will, which was dated 7th December 1866, in favour of Mrs Dewar, is a different one from that in favour of his other

¹ Walker's Executor v. Walker, June 19, 1878, *ante*, vol. v. 965.

² Kippen's Trustees v. Kippen, July 3, 1856, 18 D. 1137, 28 Scot. Jur. 565, H. of L., 3 Macq. 203; Lord Chichester v. Coventry, 1867, H. of L., L. R., 2 Eng. and Ir. App. 71, Lord Colonsay, p. 97; Cowan v. Dick's Trustees, Nov. 1, 1873, *ante*, vol. i. 119.

³ Horsburgh v. Horsburgh, May 4, 1845, 9 D. 324.

⁴ Hamilton v. Hamilton, 1741, M. 11,576; Creditors of David Turner, 1783, M. 11,582; Hill v. Hill, 1755, M. 11,580; Gilpin v. Martin, May 25, 1869, 7 Macph. 807.

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daughters. The other daughters were each to get a similar sum of £400, but their provisions were given to them absolutely, whereas the £400 set aside for Mrs Dewar is settled in this way, that it is to be paid to trustees and is to be invested on heritable security, and the annual income paid to Mrs Dewar during her life for her lifeerent alimentary use allenarly, the fee to be given after her death to her children, and, failing them, to her sisters. Now, there may have been various reasons for this difference in the terms of the two provisions, and it has been suggested that one reason was that the testator had a want of confidence in Mrs Dewar's husband, who was then alive, and that he arranged the terms of the bequest so that his rights should be excluded. That is not, I think, perfectly clear, and we are not entitled to assume it; the exclusion of the husband's rights is only one part of the conditions of the settlement. Another motive was to secure that the fee should go to the children independently of the husband and also of the wife, and the children's rights remain secure under the deed of settlement, unless a subsequent testamentary writing should deprive them of these rights.

Now, the other provision is in the form of a bond for money advanced by Mr Scott to the Local Authority of the Uddingston Special Drainage District, but though the money was advanced by him the bond is in the name of Mrs Dewar—the granters having “borrowed and received the sum of £400 sterling from Mrs Agnes Scott or Dewar,” bind themselves to repay to her, or her heirs and assignees, and they assign to her in security the special assessments which they are authorised to raise. Some parole evidence was referred to, as to conversations between the testator and his sons William and James Scott, but I attach no value to it; it is quite loose and imperfect as to what may have been Mr Scott's intention in taking the bond in this form.

In favour of the contention that the two provisions cannot stand together, and that the bond was intended to be substituted for the provision in the will, the most important consideration is that Mrs Dewar had received under her father's settlement a sum equal to that of each of her sisters, and that the sum in the bond is precisely the amount which is settled on her by the will. But these considerations, though undoubtedly of some weight, must yield to others which seem to me to counterbalance them. Mrs Dewar stood in a different position from her sisters; they were well married, and had husbands alive and prosperous. Mrs Dewar after her husband's death was in a different position, living with her father and being dependent on him. At his desire she had given up her interest in a policy of insurance on her husband's life, and her interest also in his furniture, and Mr Scott maintained her in family with himself, and at an expense of about £40 or £50 per annum. The interest of the two sums—that under the will and that under the bond—would not be so much as he was actually paying for her. She was perfectly dependent on him, and if after his death she was to have nothing but the one sum of £400 by the will or under the bond, she would be in a state of extreme poverty; and so it seems reasonable, and consistent with the condition of affairs, that he should have provided for this daughter to a larger extent than for her sisters. These are very important considerations in reaching the intention of the testator in this matter. He was also possessed of quite sufficient means to make the larger provision for Mrs Dewar, if he so wished, besides fulfilling the other purposes of his will. Taking these circumstances into view, and the fact that the bond was taken in the terms in which it was, and was kept in his custody until his death, I think the natural infer-

ence is that it was meant to take effect independently of the provisions of the will. No. 30.

And there are two considerations beyond those I have named which strongly fortify this view. The first is that the gift in the will is to different persons from those in whose favour the bond is taken. The trustees under the will are to settle the £400 in fee upon the children of Mrs Dewar, and failing these, upon her sisters. She has only a liferent interest. Under the bond the gift is absolute to herself. The second is, that if Mr Scott's intention had been what it is assumed by the defender to have been, and if his purpose was to substitute an absolute gift for the provision in the will, it was certainly an odd method he took of effecting his purpose. It is said that in consequence of Mr Dewar's death it was no longer necessary to tie up the money in any way. If we assume that to be so, his natural course would have been to make a codicil to his will. I cannot help thinking that, if he really had the intention which is ascribed to him, he might have revoked that part of his will which deals with Mrs Scott's provision, and might have given her an absolute gift, putting her in the same position as her sisters. The form he used was sufficient to create great doubt even on the face of the documents themselves, apart from the surrounding circumstances to which I have adverted, whether he did not make a separate provision for her.

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On the whole of this question I entirely agree with the Sheriff-substitute and the Sheriff.

LORD DEAR.—In regard to the question, whether Mr Scott intended to give a double portion to his daughter or not, there is a great deal of parole testimony bearing in both directions. I doubt the relevancy of some of it. But, to my mind, the terms of the formal written bond, as contrasted with the terms of the formal written will, are conclusive. It is quite clear, if we take the writings *ex facie*, that the one provision is not substituted for the other, but that they are quite separate provisions to separate and distinct parties. The provision in the will is limited to a liferent to Mrs Dewar, the fee is given to her children. By the bond the fee is vested in Mrs Dewar; it is payable to her and to no one else. It is no doubt possible that, notwithstanding the difference in the terms of the two documents, the intention may have been to satisfy the one provision by the other. But the second cannot be said to be a fulfilment of the first, the investment being, as I have stated, for behoof of a different party altogether. Whatever doubt there may be with regard to the matter of fact, I am quite clearly of opinion that, in point of law, the two provisions must be held to be separate.

LORD MURE.—I have not felt much difficulty in coming to the conclusion that the bond for £400, which is taken to Mrs Dewar or her heirs and assignees, is not to be held as operating a discharge of the provision for £400 in favour of Mrs Dewar and her children under the will. The sum in each is the same, but in other respects it appears to me that the terms of the documents are very different. The provision in the will is declared to be for Mrs Dewar's "liferent alimentary use allenary," and for the support of her children with a destination over, in the event of her having no children, in favour of the other daughters of Mr Scott. The trustees under the settlement are directed to invest this provision in their own names on good heritable security, in order that the money may be applied in terms of the settlement, which are clear and distinct. The terms of the bond are altogether different. It is taken to Mrs Dewar, her

No. 30. heirs and assignees. None of it is secured for the children, or even for Mrs Dewar herself, as against her creditors. In these circumstances the presumptions are, I think, against the supposition that the sum in the bond was given in substitution for that settled under the will, and I am not disposed to infer that Mr Scott meant so to act, in the absence of any clear evidence of his intention to do so. There are other strong reasons, moreover, for inducing one to hold that both provisions were to receive effect. Mrs Dewar was in poor circumstances as compared with the testator's other daughters. It is clear that at the date of her husband's death, which occurred after the execution of the will in question, she was in great pecuniary difficulties, and would not have been able to support herself and her children had it not been for the assistance she might receive from her father. The gift of the money in the bond was thus the more intelligible, and was, I think, intended to be distinct and separate from the provision made by the settlement, and cannot be held to be in substitution for it.

LORD SHAND.—I have felt this question to be attended with considerable difficulty. One has to balance the considerations on both sides in arriving at a conclusion on the question of intention, and it is not without some doubt that I have come to agree with your Lordships. On the one hand, the sums in the testamentary disposition and in the bond are the same. Secondly, there is this to be said against the theory of a double portion, that exactly the same sum has been bequeathed under the will to the other two daughters. In the third place, it is remarkable that, although Mrs Dewar was living in the house with her father, nothing was said by him as to the additional provision he had made for her, or proposed to make for her, by the deed in question. On the other hand, however, there was a distinct change in Mrs Dewar's circumstances in life after her husband's death. The other sisters were comfortably married, and in a good position pecuniarily and otherwise, while Mrs Dewar had little or no means, and at her father's request had given up the claims she had on her husband's estate. There was thus an obvious and strong reason for treating her in an exceptional manner, and giving her a portion larger than her sisters. In the second place, the sum in the bond was settled on Mrs Dewar herself, and not upon her children, as was the case in the testamentary disposition. In the third place, the difference in the form of making the two provisions is not to be left out of view, though I do not attach so much importance to that consideration as I think your Lordships are inclined to do, for if the second provision had been contained in a codicil to the will, the case for the double provision would, I think, have been equally strong. Finally, the silence of Mrs Dewar's father appears to be accounted for by the fact that he was very reticent about his affairs, for he seems to have said nothing to any one about his testamentary arrangements. On the whole, I agree in thinking the sum in the bond was an additional provision in favour of Mrs Dewar.

THE COURT pronounced an interlocutor in which, *inter alia*, they found "in law (2) that the bond was not delivered to the pursuer during the lifetime of her father, but that it was an additional provision by him to her, and did not require delivery."

ADAMSON & GULLAND, W.S.—JOHN GILL, S.S.C.—Agents.

THE CALEDONIAN RAILWAY COMPANY, Appellants.—*Kinnear—
R. Johnstone.*

SPECIAL COMMISSIONERS OF INCOME-TAX, Respondents.—*Lord-Adv.
M'Laren—Sol.-Gen. Balfour—Rutherford.*

No. 31.

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Income-Tax—Deductions for Wear and Tear—Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100, schedule D, case i. rule iii.—Customs and Inland Revenue Act, 1878 (41 Vict. cap. 15), sec. 12—Finality of Commissioners' decision on questions of fact.—Sec. 12 of the Customs and Revenue Act, 1878, provided that the Commissioners should, "in assessing the profits or gains of any trade . . . chargeable under schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern." The Commissioners in assessing a railway company under schedule D of the Income-Tax Act, 1842, for income-tax, allowed a deduction from income of sums expended or set aside for renewal and repairs of plant during the year. The company demanded a further deduction under sec. 12 of the Act of 1878, of a sum representing the diminished value by reason of wear and tear of new additional plant purchased within five years which had hitherto required no repairs. The Commissioners refused the additional deduction, holding that the deduction allowed to the railway company from year to year for actual renewal and repairs of the plant was all to which they were entitled.

In an appeal by the railway company, upon a special case stated by the Commissioners, the Court held that there was no ground for altering the determination of the Commissioners.

Observations on the form of Special Cases.

AT a meeting of the Special Commissioners of Income-Tax, held at 2^d Division. Glasgow on the 26th February 1880, for the purpose of hearing appeals Exchequer Cause. I. under the Income-Tax Acts against assessments for the year ending on the 5th April 1880, the Caledonian Railway Company appealed against an assessment in respect of the profits of the concern carried on by the said company.

The Commissioners having heard parties, confirmed the assessment appealed against, whereupon an appeal was taken, and a case stated by the Commissioners on behalf of the railway company under sec. 9 of the Customs and Inland Revenue Act, 1874 (37 Vict. c. 16).

The case set forth:—

"(2) The Special Commissioners in estimating the amount of assessable profits for 1879-80 based their charge on the profits of the preceding year as shewn by the company's printed accounts for the two half years ended 31st July 1878 and 31st January 1879. . . .

"(6) The Special Commissioners found that in estimating the amount of profits chargeable the company have claimed and have been allowed the following sums as deductions: *—

July 1878.	'Locomotive power'—		
	Repairs and renewals,	£49,100	
Jan. 1879.	Do. do.,	55,887	
	Carry forward,	_____	£104,987

* Income-Tax Act, 1842, 5 & 6 Vict. c. 35, sec. 100, schedule D, First case.

Rule Third.—"Third. In estimating the balance of profits and gains chargeable under schedule (D), or for the purpose of assessing the duty thereon, no sum shall be set against, or deducted from, or allowed to be set against or deducted from such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any

No. 31.	Brought forward,						£104,987
Nov. 18, 1880.	Repairs and renewals of carriages						
Caledonian	and waggons—						
Railway Co. v. July 1878, .	.	.	.	.	.	.	£74,843
Special Com- Jan. 1879, .	.	.	.	.	.	.	73,559
missioners of							£148,402
Income-Tax.							£253,389

"(7) 'Renewals' means the substitution of new locomotives, carriages, and waggons for those worn out, and in the year ending 31st January 1879 24 new locomotives were supplied, also 38 carriages and 1028 waggons. These new locomotives, carriages, and waggons were of better quality and more expensive than those of which they were renewals.

"The 'repairs and renewals' under the heads 'locomotive power' and 'carriages and waggons' include a sum of £20,837 set aside out of profits for renewal of plant not yet applied for that purpose but at present at the credit of the rolling stock renewal fund. The sum now claimed by the company as a deduction from the profits for income-tax, to which the present case refers, is not deducted or set aside from profits in the printed accounts of the company.

"(8) By this expenditure of £253,389, according to the certificates of the company's locomotive superintendent, the company's property and plant have been maintained in good working condition and repair." . . .

The claim of the company was set forth in the following articles:—

"(12) The company claimed as a deduction from the assessable profits, in addition to the deductions claimed and allowed in bringing out the sum of assessable profits by virtue of section 12 of the Customs and Inland Revenue Act, 1878, the sum of £185,391 on account of depreciation upon rolling stock, machinery, &c.

"(13) The mode in which the said sum of £185,391 was arrived at is as follows:—

On plant at 31st January 1878, £4,806,012,
 5% on 75% thereof, £3,604,509 £180,225."
 Other deductions on the same principle were stated, bringing out the sum of £185,391.

This claim was abandoned by the railway company at the bar.

"(14) Or at all events, the company made an alternative claim for deduction of the sum of £49,344, being 4½ per cent of the cost of additional new plant added during the last 5½ years. It was stated that the average life of their plant was about 22 years, and on this basis the Caledonian

sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes, according to an average of three years preceding the year in which such assessment shall be made, nor on account of loss not connected with or arising out of such trade, manufacture, adventure, or concern, nor on account of any capital withdrawn therefrom, nor for any sum employed, or intended to be employed, as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest, nor for any debts except bad debts, proved to be such to the satisfaction of the Commissioners respectively, nor for any average loss beyond the actual amount of loss after adjustment, nor for any sum recoverable under an insurance or contract of indemnity."

Company submitted that a sum at the rate of $4\frac{1}{2}$ per cent of the cost would represent the annual depreciation. Whereas the sum allowed by the Commissioners therefor was only the amount charged in the company's accounts for plant worn out or renewed during the year, which only amounted to $2\frac{1}{2}$ per cent of the cost, and that this arose from the fact of the large amount of new plant having been added (not replaced), which new plant, although actually depreciating at the rate of $4\frac{1}{2}$ per cent per annum, required little or no repair during the first $5\frac{1}{2}$ years of its existence. The whole plant is kept up to the standard of its being worth 75 per cent of its original cost, but until the new plant has depreciated to the extent of 25 per cent (that is, during the first $5\frac{1}{2}$ years of its life), it requires no substantial repairs. The cost of additional new plant during the $5\frac{1}{2}$ years prior to 31st January 1879 was £1,096,534, and $4\frac{1}{2}$ per cent of that sum amounts to £49,344.

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"(15) The company contended that they were entitled to the deduction claimed under the 12th section of the Customs and Inland Revenue Act of 1878,* it representing the diminished value by reason of wear and tear during the year."

The determination of the Commissioners was set forth in the following articles:—

"(18) The Special Commissioners having duly considered the company's claim, confirmed the assessment in the sum of £1,323,304.

"(19) They considered that, in arriving at the amount on which the assessment was to be made, by reference to the company's printed half-yearly accounts for the year preceding, the full sums stated in the accounts for the two half years ended 31st July 1878 and 31st January 1879, to have been expended in the maintenance, repair, renewal, and reconstruction of the company's machinery and plant, had been admitted as deductions therefrom, as well as a sum of £20,837 set aside from revenue on account of plant not yet renewed, carried to the credit of the rolling stock renewal fund, for value of plant not replaced at 31st January 1879.

"(20) That the whole of the sums stated to have been thus expended year by year in maintenance, repair, and renewals, have been duly allowed as deductions in estimating the profits liable to be assessed from year to year, as well as the full sum at the credit of the rolling stock renewal fund, and will hereafter continue to be yearly allowed in estimating the assessable profits.

"(21) That inasmuch as any diminution in value by reason of wear and tear during the year upon which the assessment was founded has been met by the allowances before detailed, it is not just or reasonable that any further deduction should be allowed by reference to the pro-

* "Notwithstanding any provision to the contrary contained in any Act relating to income-tax, the Commissioners for general or special purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade chargeable under schedule (D), or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on; and for the purpose of this provision, where machinery or plant is let to the person or company by whom the concern is carried on, upon such terms that the person or company is bound to maintain the machinery or plant, and deliver over the same in good condition at the end of the term of the lease, such machinery or plant shall be deemed to belong to such person or company."

No. 31. visions contained in section 12 of the Customs and Inland Revenue Act, 1878.

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"The assessments of railways are, according to the terms of No. III. schedule A, of the Act 5 and 6 Vict. cap. 35, by computation of the profits of the preceding year.

"It is the diminished value, by reason of wear and tear for the year, to which section 12 of the Customs and Inland Revenue Act, 1878, relates. The year referred to in that section, so far as respects a concern assessable on the profits of the preceding year, must be the preceding year, and the comparison, in order to arrive at the diminished value of the machinery and plant, is between the value thereof in that year and the value in the year before it.

"(22) That the statement in the railway company's accounts of the value of the machinery and plant must be held as the company's estimate of the actual value of such as a going concern; that the effect of the allowance by the Commissioners for repairs and renewals is to keep up the value to the same amount; and this being so, diminished value by reason of wear and tear does not exist. If a percentage on the value were to be allowed as a deduction from the profits and gains as representing the diminished value by reason of wear and tear of the machinery and plant, then the deduction for repairs and renewals should not be allowed. To allow deduction of the cost of renewals and repairs as in this case, and also a percentage for diminished value by reason of wear and tear, would be to allow twice deduction for the same thing.

"Section 12 of the Customs and Inland Revenue Act, 1878, allows such deduction as the Commissioners shall think just and reasonable, as representing the diminished value, by reason of wear and tear during the year, of any machinery or plant used for the purposes of the concern. Diminished value would seem to be fact, and the judgment of what is a just and reasonable deduction in respect of it is committed to the Commissioners."

When the case came on for hearing in the Court the railway company did not ask a judgment on the first alternative claim.

Argued for the appellants (on second alternative claim);—Until the Act of 1878 was passed railways were assessed under schedule D of the Act of 1842. Under that Act no deduction was allowed for renewals of and repairs on rolling stock and machinery except in regard to sums actually so applied.¹ The Act of 1878 was passed to remedy this, and by the provisions of that statute deductions for depreciation by wear and tear were allowed. Now, in the present case, it was admitted as matter of fact that though stock for the first $5\frac{1}{2}$ years of its existence required no repair, still, during that time it was in fact deteriorating through wear and tear at the rate of $4\frac{1}{2}$ per cent each year. This was exactly the case contemplated in sec. 12 of the statute of 1878, and the deduction claimed, i.e., $4\frac{1}{2}$ per cent of the cost of additional new plant added during the last $5\frac{1}{2}$ years, fell to be allowed under its provisions. Under the words of that section the Commissioners were bound to make such deduction as they thought "just and reasonable," but they had made none.

Argued for the respondents;—The Court had no jurisdiction to entertain this question, as the words of the statute of 1878, "the Commissioners . . . shall allow such deduction as they may think just and reasonable" make the decision of the Commissioners final. Diminished value during the year, and the amount of deduction in respect thereof,

¹ Addie v. Solicitor of Inland Revenue, Feb. 16, 1875, *ante*, vol. ii., 431; Knowles v. M'Adam, Dec. 5, 1877, L. R. 3 Exch. Div. 23.

were matters of fact. Assuming the jurisdiction of the Court—to let in the deduction now claimed it would be necessary to shew that the machinery and plant were of less value for the purpose of earning income at the end of the year than it was at the beginning.¹ This admittedly was not so, as the machinery and plant were always kept up by repairs and renewals for which deduction was allowed to the value of them in the year preceding, upon which year the income-tax assessment was computed. The case of *Knowles (supra)*, was not an authority in this Court, as in the case of *Miller v. Farie* the Court had disregarded it, and followed the rule of *Addie v. The Solicitor of Inland Revenue*. No. 31. Nov. 18, 1880. Caledonian Railway Co. v. Special Commissioners of Income-Tax.

At advising,—

LORD JUSTICE-CLERK.—This is a case stated by the Special Commissioners of Income-tax in a question as to the assessment for income-tax of the Caledonian Railway. The Commissioners having confirmed the assessment, and the Caledonian Railway Company having demanded a case, the case now before your Lordships has been prepared and presented for that purpose. The kind of question that we have to decide in regard to the mode in which the income derived from carrying on a trading concern like the Caledonian Railway Company is to be estimated is one of course with which we are not generally familiar, and that fact has rendered the discussion and the consideration of it somewhat difficult. But I am sorry to say that the difficulty has been a great deal increased by the way in which this case has been presented. I think it would have been very desirable, and for the future I trust it will be so considered, to follow the injunctions of the statute in the stating of cases of this kind. The statute directs in the 9th section of the Customs and Inland Revenue Act (the 37th of the Queen), that immediately upon the determination of any appeal under the Acts relating to income-tax by the Commissioners for Special Purposes, or of any appeal under the Acts relating to the inhabited house duties, the appellant or the inspector or surveyor may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction to the Commissioners; and then the Commissioners are to state and sign a case. The case is to set forth the facts and the determination; and the party receiving the same is to lay it before the Court. Then it is provided that the Court shall hear and determine the question or questions of law arising on the case transmitted under the Act; and the 3d sub-section is, that the Court shall have power, if they think fit, to cause the case to be sent back for amendment, and thereupon it shall be amended accordingly.

When I come to look at the case which is now before us I find that it states neither the law nor the facts. It neither states the facts as matter of fact, nor does it state the question of law in any shape whatever which we are required to decide; and if I had had more difficulty upon the substance of the question raised before us I think it would have been essential to send it back and have it put into a form consistent with the provisions of the statute. What the case does is to narrate at considerable length the process by which the Caledonian Railway Company have made up their accounts, and, secondly, the process by which the ultimate result is attained. But these matters are not stated as matter of fact, they are stated in the way of narrative. And then the conclusion at which the Commissioners have arrived is set out, and substantially, I

¹ *Miller v. Farie*, Nov. 29, 1878, *ante*, vol. vi. 270; *Coltness Iron Co. v. Solicitor of Inland Revenue*, *ante*, vol. vi. 617.

No. 31. suppose, they mean to say to us that they did not proceed on any question of law at all, but entirely upon a question of fact.
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Now, I have made these observations because I must say the form of it has rendered the consideration of the case somewhat perplexing. But as it is, I am prepared to give my judgment upon it, finding in it sufficient matter of fact stated to enable us to consider the question, although it is not very easy to find the real question that is at issue between the parties.

The case stated by the Special Commissioners for our opinion, divested of arithmetical details, which do not affect the matter, raises a very simple issue. The object of the calculations explained in the case is to exhibit the process by which the amount of assessable income realised by the Caledonian Railway Company for the year 1879-80 has been ascertained. The principle which underlies the process is of course to ascertain the amount of clear profit realised by this commercial concern within the year, and to determine this (which really is at the very root of the matter) all the outgoings which are necessary to attain the sum of gross profit must of course be deducted from that sum before the clear or assessable value of the income for the year can be arrived at. The material appliances used by this trading company in order to create nett income or profits, which are the subjects of the tax, are (apart from the general expenses of management), first, permanent way, stations, and other fixed property, forming what is popularly called the line of railway; and secondly, the plant or rolling stock, consisting of locomotive engines, carriages, waggons, implements, and the like. The present case relates entirely to the mode of estimating the amount which ought year by year to be deducted from gross profits, as representing the outlay on plant necessary to enable the company as a trading concern to realise them. This was originally regulated by schedule D of the Income-Tax Act of 1842, which provided what deductions were, and what were not, to be allowed in the case of expenditure on plant. The clause of the statute is printed, and I need not read it at length. It was contained in the original Income-Tax Act of 1842, and provides in the 3d sub-section that in estimating the balance of profits and gains chargeable under schedule D, or for the purpose of assessing the duty thereon, "no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of any sum expended for repairs of premises, &c., . . . nor for any sum expended for the supply or repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade . . . beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made." That substantially is the principle upon which from 1842 down to 1878 this calculation was made.

The statement contained in the case exhibits in some detail the process by which the Commissioners of Income-Tax endeavoured to apply practically the statutory provisions. Railway profits cannot be realised without the constant use of the rolling stock, and as this use necessarily deteriorates the plant and diminishes its value as a means of producing profit it requires repair and renewal. The Commissioners have allowed deductions for repairs and renewal. The only complaint now made by the Caledonian Railway Company to which their claim is restricted relates to additional plant said to have been furnished during the five years prior to January 1879, and is founded on the provisions of the 12th section of the Income-Tax Act of 1878. What they now demand is that they shall be allowed the value of what they allege to

be the wear and tear upon additional plant furnished by the railway company for No. 31.
the five years prior to the year 1879. That, they say, has not been allowed for by
an allowance for repairs or renewals, because there have been no repairs or re- Nov. 18, 1880.
newals, but they say the plant is older than it was, and therefore its value must Caledonian
be depreciated by the use for the five years; and they found that upon the 12th Railway Co. v.
clause of the statute of 1878—the 41st of the Queen, c. 15—which runs thus:— Special Com-
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“Notwithstanding any provision to the contrary contained in any Act relating to income-tax the Commissioners for General or Special Purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade chargeable under schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on; and for the purpose of this provision, where machinery or plant is let to the person or company by whom the concern is carried on upon such terms that the person or company is bound to maintain the machinery or plant and deliver over the same in good condition at the end of the term of the lease, such machinery or plant shall be deemed to belong to such person or company.”

Unquestionably this was a clause intended to alter and to extend in favour of the person or company assessed the provisions of the Act of 1842, and of schedule D thereto annexed. About that there can be no doubt at all, because it allows and enjoins the Commissioners to make a deduction which certainly was not allowed by the original Income-Tax Act. It is, however, to be such a deduction as they may think just and reasonable, as representing the diminished value by reason of wear and tear. Now, that being the nature of the claim, which arises simply in this way, that neither repairs nor renewals of plant are the foundation for it, but additional plant contributed or furnished during the five years prior to January 1879, the question is, whether the Commissioners were bound to make allowances for the wear and tear on that plant. The railway company complain that as far as this plant is concerned, while its value has been diminished by wear and tear during the five years in question, no allowance has been made on this head by the Commissioners in terms of the statute. As a matter of fact, I take the last statement to be true. The Commissioners have made no allowance for the diminution of the value of this plant during the five years in question, while it cannot be disputed that after a period of use the engines and carriages are not and probably cannot be as valuable a commodity for sale as they were when new. There are some grounds to which the Commissioners have appealed as supporting their determination in the confirmation of the assessment to which I attach no importance at all, and I think it is unfortunate that they are stated as grounds for judgment—if they are so stated, about which I have some doubt. The first was, that a sum of £20,000, to which we were referred, was an equivalent allowance on this head; but it seems to me that that sum has no connection whatever with the question raised in this case. That sum of £20,000 was properly made a subject of deduction upon its own merits. It was a sum withdrawn from profits, and therefore not clear profits, and set apart to meet a prospective demand for renewal, and was not therefore an allowance for past wear and tear in any sense whatever. Neither do I think it could be successfully contended that this 12th section was sufficiently carried out by the allowance already referred to for renewals, if it

No. 31. appeared as matter of fact that there had been a diminution of value in regard to any part of the plant which these allowances did not cover ; for the clause in question certainly meant to go beyond the deductions allowed in the Act of 1842. But I am nevertheless unable under this case to give the Caledonian Railway Company the redress which they ask for. I think the Commissioners were entitled to hold, and that their judgment proceeds on that footing, that the value of the additional plant in question was not diminished by wear and tear during the five years in question, and they do so find in express terms in the words of their judgment, and I am not prepared to review or alter their decision on that question of fact. The ground on which the Special Commissioners seem to have proceeded is the alleged and assumed fact that during the first five years of the life of a railway locomotive or carriage it requires no repairs, and is therefore of the same value—that is, capable of earning the same amount of income as when it was new. That manifestly is a principle quite capable of being maintained, and, in my apprehension, it is sound. The view seems to be this—the whole expenditure in repairs and renewal of old plant has been allowed for, and as there is no diminution by wear and tear in the value of new additional plant for the first five years in the sense of producing profit, that is to say, the plant requires no repairs to enable it to produce the same amount of profit that it did at first, then it is clear that from first to last the plant has been in the position that it was at starting, and is capable therefore of producing the same amount of profit by the same outlay and no more. If the Commissioners assumed that the expression “diminished value” in the 12th section of the Act of 1878 signifies value for the purpose for which it was intended in a going concern, I cannot say they were wrong in so holding. I do not think that the words had any reference to the value of the plant as merchantable or marketable articles, because its capacity to earn income constitutes its sole value to the railway company, and is the only quality contemplated under the statutes relating to the taxation of income. I am the more confirmed in this impression by the terms of the second part of the first paragraph of the 12th section, relative to the valuation of plant in the hands of a tenant under an obligation to restore it to the owner in as good condition as it was when he received it. By the terms of the section, such plant is to be held to belong to the tenant, and is to be settled with for income-tax on precisely the same principles as it would have been if he had been the proprietor, but it is plain enough that if the plant is restored as it was by the tenant under such a contract within the first five years of its existence, assuming that no repairs or renewals are required during that period, his obligation is fulfilled, and he could have no possible interest in the marketable value of an article which he had no power to sell. But even if these things were not so, I must say that, looking to the terms of the 12th section of the Act of 1878 I should feel very great difficulty in interfering with the result at which the Commissioners have arrived. They have held, following out the wide discretion vested in them by the statute, that no wear and tear has taken place in this plant for which any allowance would be just and reasonable. I cannot see how we can review that conclusion. If, indeed, we were satisfied that the Commissioners had misread the statute, and had not applied their minds to the question, we might have sent the case back to them for consideration, obviously. But I am satisfied that they have applied their minds very directly to the question, and have come deliberately to the conclusion that the plant had suffered no diminution in value in the sense intended by the statute, but was of as much

value to the company, and was capable of producing with the same outlay the same amount of profit as it had been at any former period. The plant, it will be observed, was not five and a half years old at the termination of the period.

I am therefore disposed to refuse the appeal, and confirm the judgment of the Commissioners. It may be asked, in this view, what is the real meaning and intendment of this 12th section of the statute? I do not know that I should be able to give a very clear response to that question without more practical knowledge than is disclosed or is to be derived from this case. But I can understand that there may be plant deteriorated after the five years by wear and tear, on which no sum has been expended for repairs or renewals within the period of assessment; and probably the Income-Tax Commissioners had felt themselves hampered before the passing of the statute by the very stringent words of schedule D of the Act of 1848. But that is more speculative than anything else. Meantime, I am not prepared to alter, and therefore I propose that we should confirm the judgment of the Commissioners.

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LORD GIFFORD.—I concur in the opinion which your Lordship has expressed, and will confine myself to a very few additional or supplementary observations.

This is an appeal against a determination of the Special Commissioners under the Income-Tax Acts assessing the profits of the Caledonian Railway Company for the year 1879–80 at the sum of £1,323,304. The appeal to this Court as the Court of Exchequer in Scotland is taken under the 9th and 10th sections of the statute 37 Vict. cap. 16, known as The Customs and Inland Revenue Act, 1874. By the 9th section of that Act it is made competent to the railway company or party assessed, “if dissatisfied with the determination of the Commissioners, as being erroneous in point of law, to declare” dissatisfaction therewith, and to require the Commissioners to state and sign a case for the opinion of the Court thereon. It is provided that the case shall set forth the facts “and the determination,” and that it shall be transmitted to this Court for decision.

From these provisions it appears that it is only on proper questions of law that there is any appeal to this Court as the Court of Exchequer in Scotland. All review upon questions of fact which are to be ascertained by evidence of any kind is excluded, review being allowed only upon pure and proper questions of law; and, in order that the law and the fact may be kept entirely separate, it is provided that the case to be stated by the Commissioners shall “set forth the facts”—that is, shall specify all the matters of fact upon which the legal determination proceeds—and shall also set forth “the determination”—that is, the decision in law—which the Commissioners have pronounced upon the facts proved or admitted before them; and it is this determination, so far as proceeding upon grounds of law, which alone is the subject of appeal to this Court.

I cannot say that I am quite satisfied with the manner in which the present case is framed. In many of the statements which it contains law and fact are mixed with the claims and statements of the railway company, and it is difficult to ascertain and to separate what is meant to be stated as matter of fact from what is decided or inferred as matter of law, and there is no precise statement anywhere in so many words of what the legal determination is against which the Caledonian Railway Company appeal. The short but very precise direction of the statute has not been implicitly followed—That the case shall set forth, first, the facts, and, second, the determination; and under the twenty-three heads or

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I am aware of the difficulty of separating law and fact in cases like the present, and of the nicety which there must always be in setting forth categorically matters of fact which are not to be touched by the Court of review so as to bring to a point, precise and clear, the questions of law which the Court of review is to settle, so as finally to regulate all future practice, however extensive or far-reaching. But, however difficult the operation may be, the statute requires that it shall be attempted, and before any case of this kind can be satisfactorily disposed of the Court must have before it distinctly, on the one hand, the questions and matters of fact which it is to assume as finally ascertained, and, on the other hand, the question or questions of law which arise therefrom, and as to which the assessing authorities and the parties liable in the assessment have differed.

But, while I have thought it right to make these remarks, I agree with the view taken by your Lordship. I am not unwilling to gather, so far as possible, from the present case,—the true questions between the parties and what must be held to be the admitted facts out of which these questions arise. With the assistance of the statements at the bar I think this is possible, and if the real questions can be got at with sufficient clearness I think the parties are entitled to our judgment.

As explained at the bar, the whole legal question really turns upon the legal import and effect of the 12th section of the statute 41 Vict. cap. 15, known as "The Customs and Inland Revenue Act, 1878." This section 12 provides,—“Notwithstanding any provision to the contrary contained in any Act relating to income-tax, the Commissioners for general or special purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade, chargeable under schedule (D), or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern and belonging to the person or company by whom the concern is carried on.” The statute goes on to provide for cases of machinery and plant being let on lease or otherwise, or held under condition of maintenance in good condition, but the substance of the enactment is that in estimating profits deduction shall be given for tear and wear of plant and machinery—that is, an allowance spread over a reasonable number of years, which will enable the trader to keep up his plant, and replace it when it is worn out.

Now, the complaint of the railway company is that they have not received allowance or deduction from profits, or have not received sufficient allowance or sufficient deduction from profits for what they call depreciation upon rolling-stock and machinery, and they claim as additional deductions from the estimated profits for the year in question either, first, a sum of £185,391 as the deterioration of their whole plant for the year in question, 1879–80—(no doubt this first claim was given up at the bar, but it is important to keep in view that in the case before us this claim stands on the same footing as the alternative claim, which is alternatively)—second, deduction of a sum of £49,344, being $4\frac{1}{2}$ per cent of the cost of additional new plant added during the last five and a-half years. The question of law sought to be raised by the railway company is, whether they are entitled in point of law to deduction from the assessed amount

of their income and profits of one or other of the above sums in respect (I take the words of the Act) "of the diminished value by reason of wear and tear during the year of their machinery or plant." The statute requires that the diminished value shall be occasioned by reason of wear and tear, and it must be wear and tear "during the year" in question.

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Now, the first point to observe is that this special case does not state what the diminished value of the plant is by reason of wear and tear during the year in question. This is a question of fact, and was a question for the Commissioners, and not for this Court, and so, even if the railway company are entitled in law to an estimated deduction for wear and tear, there are no materials before the Court for fixing such deduction, and the reason of this is obvious. The Special Commissioners at the instance of the railway company, or at least with their consent, have fixed the deduction for wear and tear on a different principle altogether from that contemplated in the Act of 1878. Instead of attempting to fix "diminished value, by reason of wear and tear during the year," they have allowed the company deduction of the actual sums expended by them for repairs and renewals, amounting to £253,389, and, as it is stated and certified by the railway company themselves that by the expenditure of this sum the whole plant has been maintained in good working order and repair, this sum may fairly be taken as making up the whole deterioration which the wear and tear of the year has occasioned. The view taken by both parties seems to me to have been fair and reasonable. Instead of the Commissioners guessing at probable deterioration, by taking percentages or round sums, which is necessarily a rough mode of getting at the result, they have taken the company's own plan of calculating, namely, taking the actual sums expended in repairing and renewing the plant, and this although the renewed plant was better and more expensive than that which was worn out. This is perfectly fair, and the plan over a series of years will be perfectly equitable. The Caledonian Railway is a continuing company with perpetual duration, and if it receives deductions over a series of years for the actual expense of repairs and renewals, so as to keep up its plant in undiminished efficiency, this will be better than any mere guess or estimate which the Commissioners could make. The railway company will get deduction for their actual expenditure, instead of a mere estimate of what their expenditure would probably be. At all events, this is the view upon which the assessment has been made, and there are no materials for throwing this assessment aside and making it up of new upon another principle. The railway company themselves do not complain of this. They accept—indeed it appeared from the argument that they asked—deduction of the whole cost of repairing and renewing their plant, and this has been allowed, and they decline to go back upon this, but they ask an additional deduction on a different principle altogether, and they claim both deductions cumulatively.

It seems to be quite clear, as the Commissioners observe, that the railway company cannot get deduction for deterioration twice over—first, by deducting the actual expense of repair and renewal, and then by deducting an additional estimate sum for the same thing. Nor will it do, as the railway company urge, to make a distinction between old and new plant, and to deal with the old plant in one way and with the new in another. I think the same principle must be applied to both.

Still further, the assessment has been made in entire accordance with the railway company's own accounts. In striking their annual profits so as to fix

No. 31. the sum divisible as dividend, the railway company have gone upon actual expenditure, and not upon a mere estimate of probable wear and tear. I see no reason why the income-tax to Government should not be fixed upon the same principle as that which determines the dividend to the proprietors, and *prima facie* it seems very anomalous that the railway company should tell their shareholders that they have realised a certain sum as profit, which they propose to divide as dividend, and should yet maintain, as in a question of taxation, that their real profit is a much less sum. The contention of the railway company implies the admission that, for the year in question, they are paying dividend to some extent out of capital. Surely no complaint can be made if the railway company pay income-tax only upon what they themselves divide as dividend or net profit, and upon which they get back or retain from their shareholders precisely the income-tax which they have paid.

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At all events, I am perfectly clear that this case does not contain the materials necessary to enable the Court to interfere with the determination of the Commissioners. For example, there is no finding in point of fact of what the average life of the plant is, but a mere statement by the railway company that it was about twenty-two years, but if a slump or estimated deterioration is to be taken, founded upon the life of the plant, this life of the plant must be found as a matter of fact by the Commissioners. Indeed, the Commissioners must themselves, in the case supposed, fix in figures the deduction for wear and tear for the year. This they have not done, and they were never asked to do so. Without such finding the Court cannot give effect to the claim.

The statute seems to regard deterioration from wear and tear during the year as the true criterion, and this answers another objection of the railway company, that upon new or added plant there is little deterioration during the first five and a-half years of its existence. If this be so, then the statute only allows little deduction. It is actual deterioration only that is to be taken into account.

On the whole, I am for affirming the determination of the Commissioners. If the railway company want the assessment made upon a different principle—that is, upon estimated wear and tear, and not upon actual wear and tear—they may be entitled to insist on this last. Counsel at the bar stated that they did not seek to open up the assessment altogether, but only claimed an additional deduction. If the principle of the statute of 1878 is sought to be applied I think the whole assessment must be reviewed, and the question raised in a different form. I would humbly suggest for the consideration of the railway company, however, whether the actual expenditure will not give a more equitable result than any mere estimate could, especially as the actual cost is the criterion adopted in their own accounts.

LORD YOUNG concurred.

THE COURT dismissed the appeal.

HOPK, MANN, & KIRK, W.S.—DAVID CROLE, Solicitor of Inland Revenue—Agents.

MRS AIKEN OR RITCHIE, First Party.—*Gloag*.
 EDWARD WHISH, Second Party.—*Wallace*.
 MRS BLACK OR WHISH, Third Party.—*Thoms*.
 THOMAS HUTCHISON, Fourth Party.—*J. A. Reid*.

No. 32.

Nov. 19, 1880.
 Ritchie v.
 Whish, &c.

Succession—Patent ambiguity—Testamentary writing.—An old lady executed a settlement with five codicils all on one sheet of paper. She disposed a property she had to a niece whom she named her executrix and residuary legatee. By the first of the codicils she bequeathed, *inter alia*, “to Edward Whish, son of my cousin Margaret Whish, wife of Colonel Whish, five hundred pounds.” The last codicil bore,—“I revoke the legacy of five hundred pounds to my cousin Mrs Whish” (there being no such legacy), “wife of Colonel Whish, and bequeath to her in place thereof the sum of £400, and I bequeathe the £100 to T. H.” her husband’s nephew. Two other papers were found in the testator’s repositories giving directions to her executrix, and they shewed that she knew how much she possessed, and only meant to bequeath that amount, while if legacies were given to Edward Whish, Mrs Whish, and to T. H., the amount bequeathed would exceed by £500 the amount of the executry estate. A letter of a subsequent date written by the testatrix to Mrs Whish was produced; in which she stated that Edward Whish was still to be her chief legatee, “but not for so large a sum as I intended,” and then went on to bequeath her gold watch to him, and certain jewellery, &c., to other relations.

Held (1) that this letter, though not found in the testatrix’s repositories, was of a testamentary nature, and that the explanations contained in it might be read along with the will and codicils; and (2) that her intention was to revoke the legacy of £500 only to the extent of the £100, bequeathed to T. H., her husband’s nephew.

THIS special case was presented by parties claiming under the testa-^{1ST}mentary writings left by Mrs Hutchison, who died at an advanced age without issue on 31st December 1879. DIVISION.
B.

Mrs Hutchison left a settlement, dated 22d March 1879, by which she disposed a tenement belonging to her to Mrs Aiken or Ritchie, and appointed her executrix and residuary legatee under obligation to pay debts and any legacies or bequests which she might direct. On the same paper five codicils were written.

By the first of the codicils, dated 22d March 1879, Mrs Hutchison bequeathed special legacies to various legatees, and, *inter alia*, she thereby bequeathed “to Edward Whish, son of my cousin Mrs Margaret Black Whish, wife of Colonel Whish, five hundred pounds.” By the second, third, and fourth codicils, all dated 12th August 1879, Mrs Hutchison left additional legacies, and made certain modifications in her bequests. The fifth codicil, dated 1st December 1879, was expressed as follows:—“I, Mrs Catherine Anderson or Hutchison, before designed, do hereby evoke the legacy of five hundred pounds to my cousin Mrs Whish, wife of Colonel Whish, and bequeathe to her in place thereof the sum of four hundred pounds; and I bequeathe the hundred pounds to Thomas Hutchison, my late husband’s nephew, the sum of one hundred pounds, residing at Kirkcaldy, and with this alteration I confirm my name at 40 Palmerston Place.”

The legacies bequeathed by Mrs Hutchison, including the bequest of £500 in favour of Edward Whish, but not the bequests of £400 in favour of Mrs Whish, and £100 in favour of Thomas Hutchison, amounted to £1780, which exhausted the amount of her personal estate, after deduction of debts and expenses. If these legacies were to be added, the sum bequeathed would amount to £2280, being £500 in excess of the personal estate available for payment.

Mrs Hutchison left another codicil, holograph and signed by her, and

No. 32. dated 23d October 1879, written on a separate sheet of paper, which was not referred to in the present question. That codicil, along with the settlement and the five codicils written on it, were found in her repositories after her death, enclosed in an envelope, which was sealed, and which bore on the back thereof the following inscription or title holograph of Mrs Hutchison:—"Sole last will or testament of Mrs Catherine Anderson or Hutchison. To be opened by Mrs Grace Pratt Aiken or Ritchie, my sole executrix and residuary legatee. 1st December 1879."

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Two other writings of Mrs Hutchison were found in her repositories attached together by a pin, one being dated 31st March, and the other 5th September 1879. The one informed her executrix where her money was invested, and the other explained the manner in which the legacies had been left.

The following excerpt from holograph letter by Mrs Hutchison to her cousin, Mrs Margaret Wemyss Black or Whish, was printed as an appendix to this case:—"40 Palmerston Place, 12 December 1879. . . .—dear Teddy* is still to be my chief legatee, but not for so large a sum as I intended. I have been obliged to sink some of my money as the expense of boarding and keeping a nurse has been a heavy tax on me. Also I leave him my gold watch; To Dear Mae† her Grand-Papa's locket his hair, which I hope she will wear and prize, for he was an upright man, seldom to be met with on earth. Yr. mama's old cup and saucer is at Mrs Black's, Darnaway Street, keeping for you. The vase I got at yr. mama's death you can get from Mrs Ritchie, who is to have charge, when required. I am able to write no more, farewell. Many happy days we spent together. I got dear Teddy's likeness. I like the one you sent Mrs Thomson best. It was kind of the Clayton Blacks to a lone stranger. God will reward. They have been like sisters to me, the Smiths of late have been very kind and got my old Minister to come and see me. Give my best love to dear Mae and darling Teddy and trusting that you will have a happy meeting with yr. husband I am yr. affectt. Cousin,

CATHERINE HUTCHISON."

Mrs Ritchie, the executrix and residuary legatee, was the first party to the special case, and she maintained that the sum of £500 only was effectually bequeathed to Edward Whish, Mrs Whish, and Thomas Hutchison between them, and that the legacy to Edward Whish had been revoked, or alternatively, that the revocation thereof was a condition of the legacies of £400 to Mrs Whish and £100 to Mr Hutchison being effectual, and that if it should be held not to have been revoked these latter legacies must be held to have failed; and further, that if all the legacies should be held effectually bequeathed, they must suffer an abatement along with the other legacies corresponding to the deficiency of the personal estate.

Edward Whish was the party of the second part, and maintained that the legacy bequeathed to him by the first codicil, dated 22d March 1879, had not been revoked by the codicil dated 1st December, and fell to be paid to him; or otherwise, if revoked, had been revoked only to the extent of £100.

Mrs Whish was the party of the third part, and maintained that she was entitled to a bequest of £400 under the codicil of 1st December.

Thomas Hutchison was the party of the fourth part, and maintained that he was entitled to a legacy of £100 under the same codicil.

* i.e., Edward Whish.

† i.e., The sister of Edward Whish.

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LORD PRESIDENT.—The testatrix, Mrs Catherine Hutchison, executed a general disposition and settlement, dated 22d March 1879, by which she constituted the first party, Mrs Ritchie, her executrix and residuary legatee; but she added a number of codicils which had the effect very much of annulling the residuary bequest to Mrs Ritchie, and disposing of the whole estate of the testatrix. The codicils are five in number, as far as they are printed for us, and there was another which was mentioned in the discussion, with which we are not concerned, and these codicils, together with the trust-disposition, were all written on one sheet of paper, which was found in the testatrix's repositories with an endorsement in her writing in these terms—"Sole last will or testament of Mrs Catherine Anderson or Hutchison. To be opened by Mrs Grace Pratt Aiken or Ritchie, my sole executrix and residuary legatee. 1st December 1879." That date is the date of the last codicil.

But although no other papers were put up along with the disposition, there is another paper which it is impossible not to regard as in some measure a testamentary document, because it conveys certain instructions to the executrix. That is a paper in which Mrs Hutchison estimates her means and estate, and gives directions as to the way in which she expects them to be administered by her executrix; therefore it is necessary to go beyond the other papers which she herself had indorsed and described as her "sole last will or testament;" because these memoranda as to the constituent parts of her estate, and the way she expected them to be realised and apportioned, are documents which may be legitimately taken into account in ascertaining the purpose of the testatrix in the case of any ambiguities arising as to the construction of the codicils. It is undoubtedly an important fact that she estimates the amount of her estate very correctly, and by the codicils disposes of the whole of it, and apparently takes pains to avoid exceeding the amount of her estate in the total of the legacies bequeathed by her.

The codicil which has principally to be considered is the last—that of 1st December 1879—and as it professes to deal with a legacy left by a previous codicil, we must look back to that legacy, which was given in these terms—"To Edward Whish, son of my cousin Mrs Margaret Black Whish, wife of Colonel Whish, five hundred pounds." Now, the legacy thus given to her cousin's son is the largest legacy bequeathed to anyone by her, and therefore at the time that codicil was executed—in March 1879—this Edward Whish was certainly *persona predilecta*. The other codicil which subsequently deals with the same legacy is thus expressed:—"I, Mrs Catherine Anderson or Hutchison, before designed, do hereby evoke the legacy of five hundred pounds to my cousin Mrs Whish, wife of Colonel Whish, and bequeathe to her in place thereof the sum of four hundred pounds; and I bequeathe the hundred pounds to Thomas Hutchison, my late husband's nephew, the sum of one hundred pounds, residing at Kirkcaldy, and with this alteration I confirm my name at 40 Palmerston Place;" and then she signs her name. Now, no doubt this codicil causes a good deal of embarrassment. That she intended to deal in one way or another with the legacy of £500 to Edward Whish, it seems difficult to dispute, for there is no other legacy of £500 in the whole of her will; and she distinctly revokes, or professes to revoke, the legacy of £500. But then it is plain that she did not completely understand what this legacy was, or else she has written what

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she did not intend—one or other of these conclusions is inevitable. Either she mistook what was the legacy in the previous codicil, or else she did not express herself in the latter codicil as she intended to do. The original legacy was left to Edward Whish, who was a boy at the time, and then she says she revokes the legacy to her cousin Mrs Whish, and in place thereof bequeathes £400 to her. The effect of this codicil, if it is to receive effect as a revocation of the legacy to Edward Whish and a bestowal of £400 on his mother, is this—Edward Whish, her favourite in March preceding, is left without a shilling, and £400 goes to his mother, that is, in fact, to his father *jure mariti*. Now, the husband was no relation to the testatrix at all, and there is no mention of him in her settlements; therefore it is difficult to believe that such could possibly have been her intention. If she had expressed herself unambiguously to that effect of course her intention would have been given effect to; but I think we should hesitate to do so here, as it seems extremely unlikely that such was the intention, when she expressed herself in terms which denote confusion of mind in writing the codicil of 1st December. She was an old woman, and did not long survive the date of that codicil; and therefore, so far as its terms are founded on for the purpose of transferring £400 from Edward Whish to his father, I hesitate to give effect to that construction. I am persuaded that she did not intend to do anything of the kind. But as to the odd £100, she has made use of terms so distinct that I think we cannot refuse to give it to Thomas Hutchison. She says distinctly that she reduces the £500 to £400, and that for the purpose of giving him the £100. On that matter I feel no doubt; but on the other point, as to the remaining £400, I think it would be a strange result if we were bound to give effect to the contention of Mrs Whish and her husband, and therefore one turns with considerable anxiety to a piece of evidence founded on by Edward Whish as shewing that he was not intended to be deprived of the £400.

That piece of evidence is the letter of 12th December 1879. If that letter is to be looked on as extrinsic evidence, and not as a testamentary document, I think we can give no effect to it at all; we cannot look at it, for the ambiguity here is unquestionably a patent ambiguity, and, therefore, to be solved only by looking at the will or other testamentary papers. Now, is it a testamentary document or not? It is not addressed to her executrix, and was not put up along with her will. That goes against the view that it is a testamentary document, unless there is in the paper itself sufficient internal evidence that it is testamentary in whole or in part. It is so in part, undoubtedly, for it is addressed to Mrs Whish, telling her she is to have a specific legacy, and to that extent it is an effectual testamentary deed, and sufficient to convey to her the legacy in question. But it may be so far testamentary, and not so *quoad ultra*. The important question is, Whether it is testamentary to any effect as regards Edward Whish, the “Teddy” of the letter? It is testamentary as regards him to a certain extent, for it contains these words—“Also I leave him my gold watch.” But I think it may also be viewed as testamentary as regards the words preceding these, for it seems to me the gold watch was left to him because of something she says just before. The words are these—“Dear Teddy is still to be my chief legatee, but not for so large a sum as I intended. I have been obliged to sink some of my money, as the expense of boarding and keeping a nurse has been a heavy tax on me. Also I leave him my gold watch.” Now, that means—“I am obliged to reduce my legacy to dear Teddy,” and explains

why; and then to make up to him she leaves the watch. If that is so, this letter is testamentary throughout as regards Teddy, for the important words at the beginning are expressive of the inductive cause or motive of leaving him the watch. If this letter can be received as testamentary, and as explanatory of the intention of the testatrix, I come to the same conclusion as to the probable meaning of the codicil of 1st December. The statement that "dear Teddy is still to be my chief legatee, but not for so large a sum as I intended," seems consistent with the construction of the codicil as leaving £400 to him and the odd £100 to Thomas Hutchison. That conclusion I have accordingly adopted.

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LORD DEAS.—I have come to the same conclusion, and I confess I have no difficulty in giving effect to the letter of 12th December 1879 as the expression of a will or the explanation of it. I have no doubt that the letter is on its face a testamentary letter to some effects in favour of Teddy himself. Now, I know of no rule of law or of common sense to prevent a testator while bequeathing certain legacies to take the opportunity in the same writing to explain what he or she meant in a former testamentary writing. It is all very well to say that the explanation itself must be testamentary. But here the testatrix has made the explanation in a letter which is of a testamentary nature, and that is enough. I have not, therefore, the same difficulty as your Lordship seems to have in regard to the result.

LORD MURE.—The question appears to me to be one of considerable difficulty on account of the contradictory nature of the writings relating to the legacy of £500 which is bequeathed by the codicil of 22d March, and is again dealt with in that of 1st December 1879. Nothing could be more distinct than the bequest to Edward Whish in the codicil of 22d March by which £500 is made over to him as a *persona predilecta*. But the testatrix, in the codicil of 1st December, revokes a bequest of £500, and describes it as having been left to Mrs Whish, and not, as it had been, to Mrs Whish's son Edward, and she then bequeaths £400 to Mrs Whish, and £100 to Thomas Hutchison. There seems to have been here some confusion of names in the mind of the testatrix, and dealing with the two codicils by themselves it is difficult to say what the testatrix really intended to do. But having regard to the fact that in the first codicil the bequest to Edward Whish is express, and that he was evidently the person whom the testatrix intended to benefit, I am disposed to think that this discrepancy should be ascribed to a mistake, or want of recollection, as to the name of the person to whom she had left the £500, and that what she really means was to restrict that legacy to £400, leaving the £400 to the same person to whom she had left the £500, and to give the remaining £100 to Thomas Hutchison.

That is the construction I should have been disposed to put upon these documents taken by themselves, as it is a safer construction than the other, which, as your Lordship has pointed out, would leave Edward Whish without any pecuniary legacy. But then the letter of 12th December, if we can hold it to be a testamentary document, seems to remove all difficulty, for it explains what she had done. In it she says, "dear Teddy is still to be my chief legatee, but not for so large a sum as I intended;" and that is exactly what she did by the codicil of 1st December. The letter then goes on to make some bequests, and in particular she gives her gold watch to Edward. In these circumstances, I am disposed to think that this letter, although it does not bear to be testamen-

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tary, and was not found put up with her settlement, is a testamentary document in its nature, and may be read in explanation of her settlement, and so reading it I have come to concur with your Lordships.

LORD SHAND.—I have come to the same conclusion. On one point which was the subject of argument I am very clear, viz., that on no reasonable construction of the settlement can it be maintained that there is a legacy of £500 to Edward Whish, and in addition to that a legacy of £400 to his mother, and another of £100 to Thomas Hutchison. It was explained that if you substitute £500 as left by the later codicil for the £500 left by the earlier one, you precisely exhaust the estate of the testatrix, and if any additional legacies were to be paid an abatement of all the legacies would be necessary. The testatrix had, I think, made it clear that she did not intend the legacies I have referred to to be double, or in her settlement to exceed the amount of her estate, for with reference to the state of her affairs she says expressly that the sums she has willed away will exhaust the amount of her estate, and her accounts of her estate under her own hands, which are correct, correspond with this.

As to the other question, whether the legacy of £500 to Edward Whish stands good on the first codicil, or whether in lieu of this £400 is left to him or his mother and £100 to Thomas Hutchison, I think there is some difficulty. If we come to the conclusion that the final letter could not be taken into account I should have great difficulty in holding that any legacy was finally given to Edward Whish. My impression would rather have been that there was a good revocation of the original legacy given to him, and a substitution of £400 as a legacy to his mother by the words of the codicil of 1st December. The legacy revoked is, I think, sufficiently identified, and the new words of bequest seem if taken alone to give the legacy of £400 to Mrs Whish. But the confusion is cleared away when we look at her latest testamentary writing, if testamentary it can be held to be, for there she reverts to Edward Whish as her chief legatee. And I am of opinion that the document is testamentary. If the words "dear Teddy is still to be my chief legatee" had occurred in a letter by the testatrix addressed to a third party merely in the course of an ordinary correspondence they could not have been regarded in the present question. But looking at the document as a whole, and to the direct bequests it contains, I think it must be accepted as a testamentary paper. It contains a specific bequest of a gold watch to Edward Whish, and I think the preceding part of the letter referring to him must also be taken as testamentary. In this view I concur in the judgment to be pronounced.

THE COURT pronounced this interlocutor:—"Find and declare that the legacy of £500 bequeathed to the party of the second part by codicil of 22d March is revoked to the extent of £100, but subsists unrevoked in favour of the party of the second part to the extent of £400: Find and declare that the legacy of £100 in favour of the party of the fourth part is effectual."

RONALD & RITCHIE, S.S.C.—GEORGE B. SMITH, S.S.C.—Agents.

DAVID GUTHRIE AND JAMES M'CONNACHY, Complainers.—*Sol.-Gen. Balfour* No. 33.
—*Black.*

MRS SUSAN EMMA PARKER SMITH, Respondent.—*Kinnear—Keir.*

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Superior and Vassal—Payment of feu-duty—Claim by original vassal to assignation of superior's rights against insolvent disponees of former.—Held (diss. Lord Shand) that a vassal in tendering payment of his feu-duty is not entitled to require from his superior an assignation of his rights to enable him (the vassal) to recover the proportion of feu-duty applicable to part of the feu he had disposed, although the assignation were qualified with a declaration that it should not prejudice the rights of the superior.

By feu-contract, dated December 1875 and January 1876, Mrs Susan E. P. Smith feued to David Guthrie, wright and builder in Glasgow, certain subjects, being part of her lands of Whiteinch, in the parish of Govan, containing 9411 square yards in measure. There was to be a yearly feu-duty of £235, 5s. 6d., and the feuar was taken bound in the feu-contract to erect tenements of a specified description along the whole extent of the north, east, south, and west building lines of the feu, and there was a declaration that, in case the feuar "shall sell or dispose parts or portions of the said piece of ground, then the annual feu-duty of such parts or portions shall correspond and bear the same proportion to the total feu-duty after stipulated that the portion of ground so sold or disposed bears to the whole of said piece of ground hereby feued." There was a further provision that the superior "shall not be bound to admit of the said subdivision of the feu-duty until there shall be built upon each separate portion of the said piece of ground sold, as well as upon that retained, buildings of the description above mentioned, and yielding a yearly rent equal to at least double of the feu-duty, and augmented feu-duty, effeiring to such portion of the said piece of ground sold and that retained;" and also that, in the event of the feuar "selling or disposing the piece of ground above disposed, or any part or portion thereof, the foregoing personal obligation for payment of the feu-duty, interest, and penalties, shall only subsist against him and his heirs and executors until buildings shall be erected on the said piece of ground, or the part or parts thereof so sold or disposed, and on that retained, in terms of the obligation and conditions to that effect before written, any law or practice to the contrary notwithstanding."

By contract of ground-annual, dated 10th May 1876, Guthrie disposed to Messrs Peter Rae and John Clark, the partners of Rae & Clark, wrights in Whiteinch, a portion of the subjects feued as above, with a declaration that the proportion of the feu-duty payable by them was £140, 13s., and under the real burden of a ground-annual of £42, 3s. 10d. The proportion of the feu-duty was not made a real burden. The disponees erected two tenements upon their portion of the ground, and thereafter granted three bonds and dispositions in security over them. Rae & Clark subsequently became insolvent, and the holders of the two bonds entered into possession of the buildings in 1878 by decree of maills and duties. Rae & Clark failed to pay the proportion of feu-duty due by them during 1879, and Guthrie was unable to get payment from the heritable creditors. Guthrie did not build upon the ground which he retained, "the state of trade having been such that it would have been injudicious to do so."

Guthrie did not pay the feu-duty due to the superior at the two terms of Whitsunday and Martinmas 1879, and he was thereupon charged to do so.

This was a suspension of the charge by him and James M'Connachy, joiner in Port-Glasgow, in which they averred (statement 3) that M'Con-

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nachy "is, and has all along been, ready and willing, and has several times offered, with the consent and on behalf of the other complainer, the said David Guthrie, to pay to the respondent, as superior, the whole of the arrears of feu-duty and others due to her under the foresaid feu-contract (being the sums now charged for), provided the said respondent will, at his expense, execute and deliver to him a deed of assignation in his favour, in order that he may operate such relief as is competent to him, namely, a deed assigning to the complainer James M'Connachy all the remedies competent to the respondent, as superior, for recovery of feu-duties, to the effect of enabling the said complainer James M'Connachy to recover payment of the amount of said arrears and others, in so far as he is entitled so to recover payment thereof; but that always under reservation of and without prejudice to the said respondent's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to her. The said David Guthrie is willing to be a party to such an assignation in token of his consent thereto."

The respondent answered that M'Connachy had no title or interest to insist in the application, and also that she was not bound to grant the assignation demanded on payment of the feu-duties.

The Lord Ordinary repelled the reasons of suspension, and found the charge orderly proceeded, referring for his reasons to his note in the similar case of *Hinshelwood's Trustees v. Watson*, July 17, 1877.*

* NOTE BY LORD RUTHERFURD CLARK (Ordinary) in *Hinshelwood's Trustees v. Watson*.—(This was an action by Hinshelwood's trustees, as superiors, concluding for declarator that John Watson, the vassal, had incurred an irritancy *ob non sol. can.*, in which defences were lodged by Mrs Imrie, a heritable creditor, who offered to purge the irritancy, but pleaded—(2) This defender is entitled, upon purging the irritancy, to receive from the pursuers an assignation in terms of the draft, No. 11 of process; at all events, she is entitled, upon purging the irritancy, to receive from them such an assignation as will give her, in regard to the property in question, a preferable claim over the ordinary creditors of John Watson for the amount paid by her to the pursuers).—"The question in this case is whether the defender, on paying the feu-duty which is in arrear, is entitled to an assignation of the pursuer's rights as superior, but on the footing that the rights of the assignee should be postponed to all rights competent to the cedent. The pursuers are willing to assign the personal debt, but they refuse to do anything more.

"In the opinion of the Lord Ordinary the pursuers are right. They are entitled to payment of the feu-duties, and, if these were paid by the vassal, they could not be required to do more than discharge them. If the vassal could not pay them, but found any other person who was willing to pay them for him, the result, it is thought, would be the same, except that the superiors might be bound to assign the personal debt. The pursuers could not, as the Lord Ordinary conceives, be required to allow the feu-duties to remain as a charge on the feu, which would be the consequence of assigning them. They are entitled to have the subject clear of all past duties. This, indeed, seems to be a consequence of their right to irritate the feu. If the duties are not paid, to allow them to remain as a burden on the feu, even under the declaration that the rights of the creditors are to be postponed to theirs, is not to clear the subject, and is not, in the opinion of the Lord Ordinary, equivalent to payment of the feu-duties; and however the assignation may be expressed, it might prejudicially affect the pursuers in recovering the feu-duties that might hereafter become due in any future action which they may be forced to bring for tinsel of the feu. The superiors who are entitled to payment, which means that the feu is to be cleared of the *debitum fundi* created by the arrears of feu-duty, cannot, it is thought, be embarrassed by any question which might arise by allowing the burden to continue.

"The defender has an equitable right to purge the irritancy which has been

The complainers reclaimed, and argued ;—(1) There was a distinction between the case of Guthrie and M'Connachy, the latter being a complete stranger. Payment by Guthrie in his own name might operate as a total extinction of the debt *confusione*. But, in offering payment, both were in the position of cautioners, and therefore entitled to an assignation apart from the question of prejudice.¹ For instance, a cautioner paying for a tenant was entitled to the landlord's right of hypothec—Hunter on Landlord and Tenant, ii. 159. In using the landlord's hypothec there was necessarily prejudice to the landlord by the sale of the *invecta et illata*. What was asked was an assignation to the superior's rights over the land disposed to Rae & Clark only. The debt was truly one paid by Guthrie, for Rae & Clark, the owners of the ground. The superior could instruct no prejudice. The Conveyancing Act, 1874, sec. 4, sub-sec. 2, recognised the right claimed.

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Argued for the respondent;—What was asked was an assignation to the whole amount of the feu-duty. A pointing of the ground would follow if such a right were given, and the superior would be prejudiced thereby;² at least, the granting of the assignation would cause confusion, which was enough to throw a heavy onus on the complainers to shew no prejudice. On the feu-contract, the original vassal remained the proper debtor on his part of the feu, which was also liable for the whole feu-duty. He was bound, until he obtained the benefit of sec. 8 of the Conveyancing Act, 1874. Sec. 4, sub-sec. 2, merely dispensed with previous formalities; it did not alter the right. This was not a case of a cautioner; it was that of a co-obligant.

LORD PRESIDENT.—The question raised in this suspension is one of some novelty and importance in the law of superior and vassal. One of the suspenders, Mr Guthrie, has been charged to make payment of certain arrears of feu-duty, under a feu-contract executed in 1875, by which a certain urban subject was feued to him by the respondent, Mrs Smith, and he seeks suspension upon the ground that payment of this feu-duty has been tendered to the superior, by a third party on his behalf, accompanied, however, with a demand for an assignation in favour of that third party, not only of the personal debt due by the vassal, but also of the security which the superior has for enforcing that debt, under certain qualifications to the effect that the superior's rights are to be preferable to the rights of the assignee. The superior has refused to grant the special assignation, or to receive payment of the feu-duty upon condition of granting such an assignation.

The feu-contract among other provisions declares that the feuar and his forsaids are to be obliged to erect along the whole extent of the north, east, south

incurred, but, for the reasons before stated, she cannot, in the opinion of the Lord Ordinary, require an assignation of the feu-duties.

"The defender endeavoured to assimilate the case to that of a cautioner who pays rent, and who has right to an assignation of the landlord's hypothec. In the opinion of the Lord Ordinary the cases are not parallel. As a general rule the cautioner is entitled to an assignation of all the securities which the creditor holds for the debt, and in obtaining an assignation he obtains no more than an assignation to a security which the landlord would himself exhaust in recovering payment of the rent."

¹ Bell's Principles, 557 and 558; Erskine's Inst., iii., 5, 11; Fleming v. Burgess and Trustees, June 12, 1867, 5 Macph. 856 (Lord Neaves, p. 861).

² Graham v. Gordon, March 9, 1842, 4 D. 903, 2 Rob. Appa. 251; Steuart v. Ledingham, July 9, 1878, 15 S. L. R. 689.

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and west building lines of the piece of ground thereby feued, tenements of dwelling-houses of a certain specified description, and then there comes a declaration that in case the feuar or his forebears "shall sell or dispone parts or portions of the said piece of ground, then the annual feu-duty of such parts or portions shall correspond and bear the same proportion to the total feu-duty after stipulated that the portion of ground so sold or disposed bears to the whole of said piece of ground hereby feued." And it provides that "the said first party," that is, the superior, "shall not be bound to admit of the said subdivision of the feu-duty until there shall be built upon each separate portion of the said piece of ground sold, as well as upon that retained, buildings of the description above mentioned, and yielding a yearly rent equal to at least double of the feu-duty effeiring to such portion of the said piece of ground sold and that retained." And farther on there is this declaration, that in the event of the feuar "selling or disposing the piece of ground above disposed, or any part or portion thereof, the foregoing personal obligation for payment of the feu-duty, interest, and penalties, shall only subsist against him, and his heirs and executors, until buildings shall be erected on the said piece of ground, or the part or parts thereof so sold or disposed, and on that retained, in terms of the obligation and conditions to that effect before written."

Now, the effect of these provisions, taken together, seems to me to be simply this: If the feuar sells off a portion of the ground, then he is to have the feu-duty apportioned by the superior, so that each portion of the ground held by a separate proprietor shall bear its share of the feu-duty. But that is subject to this condition, that there is to be no such division, and no relief of the feuar from his personal obligation to pay the entire feu-duty stipulated for in this contract until buildings shall be erected of the requisite value and character, not only upon the part of the ground sold off, but also upon the part retained by the feuar. And it is admitted, in point of fact, that upon the part retained by the complainer, Mr Guthrie, no such buildings have been erected, and plainly there can be no division or apportionment of the feu-duty, and no relief in favour of Mr Guthrie, of the personal obligation for the whole feu-duty.

Now, in these circumstances, we must look at what the complainer says in his third statement of facts—[quoted above.]

The question is whether the complainers are entitled to make a demand for the assignation asked for in that statement as a condition of paying this money. A distinction was at first attempted to be made between the position of M'Connachy and the position of Guthrie, the vassal in the feu-contract, but I rather understood at the close of the argument that any attempt at such a distinction was abandoned, and that the case must be taken very much in the same way as if the vassal himself were making this demand upon condition of paying his feu-duty to the superior. I cannot understand for myself how any interposed person like M'Connachy could be in any better situation in that respect than the debtor would have been in to make a demand like this, and the question is whether the superior is bound to grant the assignation thus demanded. The effect of the assignation undoubtedly would be that in so far as regards the amount of the feu-duties paid to the superior under this arrangement they would continue to be a *debitum fundi* upon the lands of the feuar instead of being discharged and extinguished. That, I think, would be the inevitable consequence in ordinary circumstances, and certainly the vassal under a feu-contract is not entitled to demand anything in return for payment of his feu-duty except a simple dis-

charge. The vassal in this case has placed himself in a very awkward position, because he has sold off portions of the feu in such circumstances as disentitle him in terms of the feu-contract from obtaining any division or apportionment of the feu-duty between the portion retained and the portion sold, that is, by reason of his being unable to fulfil his obligation under the feu-contract to build upon the whole ground feued. The consequence of this is that his disponees in the portion sold have conveyed the subject in security of debt, and the vassal, Mr Guthrie, is not in a condition to obtain relief from these insolvent persons, or from their heritable creditors, of any portion of the entire feu-duty which he is bound to pay to the superior. It does not appear to me that the embarrassment in which the feuar has placed himself by his own fault should be visited in any degree upon the superior. She has nothing to do with that sale, and is not bound to give effect to it by apportioning the feu-duty until the condition of the feu-contract is fulfilled.

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Now, regarding the building there is no fault on the part of the superior. The fault is entirely on the part of the vassal; and it is in these circumstances that he makes this anomalous demand, for certainly it is anomalous, and, so far as I know, perfectly unprecedented, that a superior in discharge of a feu-duty shall grant an assignation to the vassal of his rights and remedies against the lands. I think the plain answer that the superior makes to that, and the one that carries conviction with it to my mind, is that it is an obvious disadvantage to the superior that any *debitum fundi* shall subsist upon the ground, and I have not heard it answered.

There have been various speculations as to how that would work practically hereafter. It has been said that the complainers are willing to insert in the assignation a clause that it is granted without prejudice to the rights and remedies of the superior for future feu-duties. That may be, but the superior says, with great cogency and force—I got this feu-contract which is the constitution of the rights and liabilities of two parties, superior and vassal, in relation to one another, and that, and that only, is the deed which regulates our rights and liabilities, and fixes them. The only *debitum fundi* in this feu was to be a *debitum fundi* belonging to the superior, and she refuses her consent to the creation of any other *debitum fundi*, or the reservation of a *debitum fundi*, and in so far as she is concerned she is entitled to have her feu-duty paid by her vassal in terms of the obligations in the feu-contract, and discharged, not kept up as a *debitum fundi* in the subject by an assignation. That, I think, is a final and conclusive answer to any such demand as is here made by the complainers.

No doubt a party paying a debt in ordinary circumstances is entitled to ask for an assignation to the creditor's rights and remedies against the debtor, provided it can be shewn clearly that no prejudice of any kind can be done to the rights of the creditor granting the assignation; and it always lies upon the party asking that assignation to shew that such prejudice will not and cannot be done, and that, I think, he has entirely failed to shew in the present case, and therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS.—I do not think it necessary to say more than this: From my early study of authoritative writers on the feudal law I derived it as a principle more than fifty years ago that a superior getting payment of his feu-duty from a third party, a party not in possession of the lands, is not bound to grant an assignation. I do not mean to travel over the grounds of that opinion. No

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case or authority has been referred to to shake me in it. This may not be enough for others, but is enough for me. It is said the party here offers to bind himself not to use the assignation in competition with the superior. But who is to judge whether the use made of it is in competition with the superior or not? That question might of itself lead to a law-suit or repeated law-suits. The superior is not bound to submit to the risk of such inconvenient questions. Must there be a list of actions to which the usual rule shall not apply, that an assignee may pursue in name of his cedent? In short, the contention of the proposed assignee is full of embarrassment. I concur in the result at which your Lordship has arrived. I have no hesitation in applying the law as I have stated it to the circumstances of this case.

LORD MURE.—It appears to me that the Lord Ordinary's judgment in this case proceeds upon sound views of the law. The grounds of his Lordship's judgment are not fully stated in his note, but parties have been referred to a note appended to his interlocutor in another case in which he decided the same question, and in which the grounds on which he proceeded are thus stated—The pursuers (that is, the superior) cannot “be required to allow the feu-duties to remain as a charge on the feu, which would be the consequence of assigning them. They are entitled to have the subject clear of all past duties. This indeed seems to be a consequence of their right to irritate the feu. If the duties are not paid, to allow them to remain as a burden on the feu, even under the declaration that the rights of the creditors are to be postponed to theirs, is not to clear the subject, and is not, in the opinion of the Lord Ordinary, equivalent to payment of the feu-duties; and however the assignation may be expressed, it might prejudicially affect the pursuers in recovering the feu-duties that might hereafter become due in any future action which they may be forced to bring for tinsel of the feus. The superiors who are entitled to payment, which means that the feu is to be cleared of the *debitum fundi* created by the arrears of feu-duty, cannot, it is thought, be embarrassed by any question which might arise by allowing the burden to continue.”

This reasoning appears to be based upon the law as laid down by the institutional writers, and in decided cases. Mr Erskine says (iii. 5, 11), “that no creditor can be compelled to assign a right to his own prejudice. Hence though a creditor who has got a pledge from his debtor in security of his debt may be forced to transmit his right of pledge to the cautioner upon payment made by him of the debt; yet if the creditor hath the same individual subject impignorated to him in security also of another debt, in which the cautioner is not bound, equity will not compel him to transfer it, and thereby run the hazard of losing the other debt, unless the cautioner shall likewise pay off that debt for which he did not interpose his credit.”

That doctrine is, I think, applicable to the present case, and we have here only to consider whether there would be any hazard to the superior by his granting this assignation. The Lord Ordinary has explained that by so doing he will run the risk of bringing in another creditor in competition with himself in a question of recovering the feu-duties that may hereafter become due. The rule to that effect seems to have been applied in many cases, although, as Lord Deas has remarked, there may have been no actual judgment upon the point in a question with a superior. But there have been cases of a third party paying rent to a landlord and claiming an assignation of the landlord's right of hypothec.

There is an old case of *A v. B*, decided in 1744, M. 6228, where it was held that a landlord was not in such a case bound to assign, but only to discharge on payment; and in the case of *Graham v. Gordon*, March 9, 1842, 4 D. 903, this Court held that it had been decided by the House of Lords in a previous branch of the same case (3d May 1841, 2 Robinson, 251), that a landlord was not bound to assign a sequestration of his tenant's crop and stock to a third party paying the rent. I therefore concur with the views your Lordships have expressed.

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LORD SHAND.—I take a different view of this question, and am unable to agree with your Lordships and the Lord Ordinary in the decision arrived at. I think that in the circumstances in which the vassal, Mr Guthrie, was placed, he was entitled to the assignation he asked, guarded, as it was, by the offer to accept it “always under reservation of and without prejudice to the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to her.”

It is admitted that the complainer, M'Connachy, interposed merely as a friend or nominee of the complainer Guthrie. It was explained that M'Connachy's name was put forward as that of a third party by way of precaution in case a payment by Guthrie in his own name on an assignation by the superior might operate as a total extinction of the debt *confusions*, so that no part of it could be recovered from Guthrie's disponees, or by diligence against the rents due to them. This view appears to be unsound. I take the case on the footing on which it has been presented and argued by the suspenders' counsel, viz., that while the complainer Guthrie is willing to pay the total feu-duty of £235, 5s. 6d., thereby discharging the debt in a question with the respondent, he maintains his right to an assignation of the superior's rights and remedies for recovery of the sum of £140, 13s., being the proportion of the *cumulo* feu-duty for which his disponees are liable, and which is properly chargeable against the property belonging to them.

The matter in dispute is one of some general importance, for although in this case the controversy arises under the special provisions of the deed, the same question may frequently arise in cases where an original feuar having no express power to allocate a feu-duty has conveyed away part of the property, and is afterwards obliged to pay the total feu-duty, or in other cases where a feuar having for a time failed to avail himself of the provisions of section 8 of the Conveyancing Act of 1874 has been required to pay the total feu-duty to the superior.

The complainer Guthrie has an obvious and material interest to obtain the assignation he demands. His disponees are bankrupt, and a mere personal claim for payment of the feu-duty is of little value. The property is in the possession of heritable creditors who have obtained decree of mails and duties in virtue of heritable securities granted by the bankrupts. The right of the superior to the feu-duty is of course preferable to the heritable securities granted by the bankrupts, and should the complainer obtain the assignation he claims he may by diligence secure payment out of the first rents. If, however, the assignation be not granted, the complainer will not only be deprived of the means of making his claim for relief of the feu-duty effectual, but the benefit will accrue to the heritable creditors, who will draw the rents of the property, getting rid of the feu-duty to the superior, which in ordinary circumstances is a charge prior to all other securities, and which, in this instance, they must have

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known to be a burden to be met in ordinary course before the rents could be available to them, and payment of which could be enforced by the superior by means of diligence against the subjects.

The original feu-disposition granted in this case was one for building purposes, and in its terms recognised the right of the vassal in the execution of these purposes to grant rights by conveyances to others who, by virtue of the Conveyancing Act of 1874, must, by the act of registering the conveyance in their favour in the Register of Sasines, become entered vassals of the superior. There is a provision in the original feu-right directly to the effect that in case the feuar shall sell parts or portions of the ground, then the annual feu-duty of such parts or portions shall correspond and bear the same proportion to the total feu-duty stipulated that the portion of ground sold bears to the whole of the ground thereby feued. It is admitted that in the conveyance which the vassal Guthrie granted in favour of the parties now bankrupt the correct proportion of feu-duty was allocated on the part of the property conveyed. The total feu-duty being £235 odds, the feu-duty on the part conveyed was fixed at £140, leaving the original vassal debtor, so far as his own property was concerned, in £94 only. It is quite true that the original vassal, in a question between him and the superior, still remains liable for the whole feu-duty, and will do so until he erects buildings on the part of the property he retains, and it may be also till he records a memorandum of allocation in terms of section 8 of the statute. But while he is primary obligant for the whole, he has a right of relief for the greater part of the feu-duty against those who have taken a disposition from him, and who are now to all effects the owners of that part of the property conveyed. The superior has a co-obligant for his feu-duty. He has the original vassal bound to him for the whole, and he has also the disponees who took the conveyance bound for the whole feu-duty, or at least for the annual sum of £140, for immediately upon infestment being taken on the conveyance there was an entry creating the relation of superior and vassal between these parties. He is entitled to make good his feu-duty from the rents of any part of the property feued. That being so, it appears to me that the case is one in which the complainer Guthrie has right, on payment of the whole feu-duty, to an assignation of the superior's remedies for recovery of that part of the feu-duty which is the proper burden of the part of the property no longer belonging to him, provided always, I quite admit, that the superior shall not be thereby prejudiced.

It has been said that the law is that a superior is never bound to assign a right to his feu-duty. I know of no authority to warrant that statement, and I do not agree in thinking that the practice of granting assignations in circumstances like the present has not been followed. In the ordinary case where a vassal simply pays his own debt, without having a right of relief of a proportion of the feu-duty, I agree that an assignation cannot be demanded, and that as in the case of a sequestration for rent, even if a third party should interpose and pay the debt, the superior is not bound to grant an assignation which would keep up the real security on the property. In such cases I agree also that there could be no practice of granting assignations. But on a principle of general application I think the case is different and the rule is different, where, as here, the debtor has a right of relief, and is one of two obligants liable for the debt. There is nothing in the relation of a superior which places him in an exceptional position, and exempts him from the operation of the ordinary rules of law which apply between creditors and their debtors bound as co-obligants, or as principal and surety.

The ordinary rule is stated in Bell's Principles, section 558,—"Payment made by one interested in the debt (as co-obligant or surety) will take away the right of the creditor, but will not extinguish the debt of the principal obligant. The person so paying is entitled to an assignation to the effect of operating his relief." The right to an assignation which will carry the creditor's rights and remedies is based on equity, but is effectual and has always been recognised by the law. The creditor getting payment of his debt has no farther interest, while the surety or co-obligant may be in the position, as in the present case, that unless he acquires the creditor's rights and remedies his right of relief would be of little or no value. The right is always qualified by this (as stated by Bell, section 557), that the assignation demanded shall not prejudice the creditor, or, as it is expressed by Professor Bell, that it "shall not interfere with any other interest of the creditor."

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I take it, therefore, that the respondent, as superior, is bound to grant the assignation in this case, unless it can be shewn that the deed, qualified by the broad reservation proposed as part of it, would in some way be to her prejudice, and indeed I rather understand that your Lordships, or at least a majority of your Lordships, do not differ from this view.

Now, for my part, I see no possible prejudice the superior can suffer by this assignation, and this is my ground of judgment. What is the prejudice? It is said to be that the assignation which is asked only to the extent of the portion of the feu-duty payable by the disponees of the original vassal may prejudicially affect the superior in the recovery of feu-duties to become due hereafter. It is explained, on the other hand, that this assignation is simply to enable the complainer by real diligence, which shall be preferable to the bondholders in possession, to obtain relief of the amount due by the vassal's disponee, and it is conceded that no such diligence would be competent or could be used which it could be shewn would in any way compete with the superior in following out his remedies for payment of future feu-duties. It is said that unless this feu-duty is entirely extinguished the part of it assigned will remain as a *debitum fundi*. I fail to understand what prejudice the superior will suffer, for, while a *debitum fundi* in a question between the complainer and his disponees, it will not remain a *debitum fundi* in a question with the superior. If it can be represented as remaining a *debitum fundi* at all in a question with the superior, it must be in name only and not in substance, for the assignation asked is always under reservation and "without prejudice to the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due" to her. The effect of this provision certainly is that if diligence of any kind done by authority of the assignation should in any way come into competition with proceedings by the superior for recovery of future feu-duties, it must undoubtedly be stopped.

The Lord Ordinary has explained what appears to him would be the prejudice which the superior would suffer. He says—"However the assignation may be expressed it might prejudicially affect the pursuers in recovering the feu-duties that might hereafter become due in any future action which they may be forced to bring for tinsel of the feu." It appears to me that that is not so. If any future action were brought for tinsel of the feu it would be because the future feu-duties had got into arrear for two years. In such an action the superior would be entitled to decree of forfeiture of the feu, which would be the remedy he asked, unless payment of the arrears were at once made, and the proposed

No. 33. assignation could not in any way interfere with that remedy. The real diligence to which the superior might resort is to enter on possession by an action of mails and duties, and there again the assignation could not possibly be a bar to the superior's proceedings. The only other remedy would be by personal action against the disponees, and it cannot be disputed that even without the assignation the complainer has the same remedy for recovery of the part of the feu-duty for which these disponees are liable. The Lord Ordinary says farther, after the passage I have already read—"The superiors, who are entitled to payment, which means that the feu is to be cleared of the *debitum fundi* created by the arrears of feu-duty, cannot, it is thought, be embarrassed by any question which might arise by allowing the burden to continue." As I have already said, the *debitum fundi* would have no real existence in a question with the superior; and as to any embarrassment which might arise, I can only say that I do not understand what is here referred to. I do not see what embarrassment could arise with an assignation in the terms asked, and the counsel for the respondent were, I think, unable to suggest any embarrassment which could arise to the prejudice of their client. It therefore appears to me that the complainer, Mr Guthrie, on payment of the total feu-duty, is entitled to have an assignation in the terms asked.

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I am fortified in the view I take of the question in dispute by the provisions of sub-section 2 of section 4 of the Conveyancing Act of 1874. By that sub-section it is provided that if a party in right of a property held in feu conveys the property to another, the disponee by taking infestment upon his disposition becomes liable for the feu-duty payable for the property. But there is a provision at the same time that until the original vassal gives notice of the conveyance to the superior he shall remain liable also for the feu-duty. That is substantially the position of the parties in this case. The statute provides that the superior's remedies against the former vassal shall be "without prejudice to the superior having all his remedies against the entered proprietor under the entry implied by this Act, and without prejudice also to the right of the proprietor last entered in the lands and his foreshaids to recover from the entered proprietor of the lands all feu-duties which such proprietor last entered in the lands or his foreshaids may have had to pay in consequence of any failure or omission to give such notice; and for this purpose all the remedies competent to the superior for recovery of the feu-duties shall by virtue of this Act be held to be assigned to the proprietor last entered in the lands, and his foreshaids, to the effect of enabling them to recover payment of any sums so paid by them as aforesaid, but that always under reservation of and without prejudice to the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to him." Now, it appears to me that the statute recognises the existence of a right in equity to an assignation such as is here demanded in circumstances substantially the same. It not only recognises that right, but gives effect to it in a remarkable way, for it renders any deed of assignation by the superior unnecessary. Assuming the existence of the right to an assignation in circumstances like those which occur in this case, by the force of the statute an assignation is implied in favour of the party paying the feu-duty, which will enable him to use all the superior's remedies, but that under reservation of and without prejudice to the superior's rights and remedies for future feu-duties in the very terms proposed by the complainer in this case. This provision appears to me simply to give effect to the principles of common

law, with this difference only, that it provides that a deed of assignation shall not be necessary now, as the statute itself operates as an assignation. No. 33.

I have only to add that the case of *Graham v. Gordon*, and the other authorities of that class referred to, appear to me to have no application, because there the payment was offered, not by a co-obligant or surety having a right of relief giving him an equitable right to an assignation. The only object for which the assignation was asked in the case of *Graham v. Gordon* was to keep up the whole debt, so that it might still come into competition with the landlord's future claims and diligence, and there was no reservation offered as in this case which would secure the landlord against injury or prejudice. Nov. 19, 1880.
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THE COURT adhered.

DOVE & LOCKHART, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

THE NORTH OF SCOTLAND BANKING COMPANY, Petitioners and Respondents.—*Kinnear—Moncreiff.*

JOHN IRELAND, Defender and Appellant.—*Rhind—Strachan.*

No. 34.

Nov. 20, 1880.
North of Scot-
land Banking
Co. v. Ireland.

Bankruptcy—Sequestration—Mode of voting for winding up by deed of arrangement—Bankruptcy (Scotland) Act, 1856, secs. 35, 38, and 101.—In a sequestration the claimants who vote at a meeting under the 35th section of the Bankruptcy Act, 1856, for a winding up by deed of arrangement must support their claims by affidavits and vouchers, as in the election of a trustee, and no one is entitled to have his vote reckoned in number whose claim does not amount to £20.

THE estates of the deceased William Ireland, hardware merchant, Dundee, were sequestrated under the Bankruptcy (Scotland) Act, 1856, in the Sheriff Court of Forfarshire on 29th April 1880. 1st Division.
Sheriff of
Forfarshire.
C.

At the meeting appointed to be held for the election of a trustee, upon 8th May following, it was resolved by a majority in number and four-fifths in value of the creditors present or represented at such meeting that the estate should be wound up under a deed of arrangement, and that an application should be presented to the Sheriff to sist proceedings in the sequestration for a period not exceeding two months, in terms of sec. 35 of the Bankruptcy Act, 1856.* The sist was accordingly granted, there being no opposition.

After intimation of the production of the deed of arrangement to the non-concurring creditors, several of them, including the North of Scotland Banking Company, lodged objections, stating that the proposed deed was not "reasonable" within the meaning of the Bankruptcy Act, sec. 38, and that the claims of some of the creditors who had voted at the first meeting were unvouched, and their grounds of debt invalid.

Objections were taken to these claims:—(1) For £43, 7s. 6d. by William Thoms, mason, for cash advanced in loan on 26th May 1871, with interest; (2) for £53, 10s. 3d. by John Ireland for cash lent on same day, with interest; and (3) for £53, 0s. 1d. by John Duff, for cash advanced on 23d

* The Bankruptcy (Scotland) Act, 1856, sec. 35, provides,—“At a meeting for the election of the trustee, or at any subsequent meeting to be called for the purpose, a majority in number and four-fifths in value of the creditors present or represented at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, and that an application should be presented to the Lord Ordinary or the Sheriff to sist procedure in the sequestration for a period not exceeding two months, and on such resolution being carried it shall not be necessary to elect a trustee.”

No. 34 September 1873, with interest. No vouchers for these were produced, and the petitioners contended that they fell to be disallowed. If that were so, it would bring the majority in number of the creditors below four-fifths, which was required by section 38 of the statute for subscription to such a deed of arrangement.*

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The Sheriff-substitute (Cheyne) refused to approve of the deed of arrangement, and appointed a meeting for election of a trustee.†

John Ireland appealed to the Court of Session, and argued that as the claimants in question had lodged affidavits they were entitled to vote without question at the meeting for the election of a trustee. Further, claims under £20 ought to be taken into account in estimating the number of creditors for voting purposes.‡

The respondents were not called upon.

LORD PRESIDENT.—Two points are raised in this appeal. The first is, that in computing the number of creditors who have signed the deed of arrangement the claims of John Duff, John Ireland, and William Thoms have been disallowed, and that that having been done the number is under the four-fifths in number and value required by the statute. Now, as I understand the contention of the appellant, it amounts to this, that any one who lodges an affidavit, and whose name is given up by the bankrupt, is entitled to vote under the 35th section of the statute and to sign the deed of arrangement—at any rate to do the latter. That seems a very extravagant contention. The meeting at which such a resolution to wind up under a deed of arrangement may be brought forward is that for the election of a trustee, and the creditors assembled for that purpose may, if they see fit, resolve to wind up by a deed of arrangement. The procedure must surely be the same in the one case as in the other.

* Sec. 38.—“If the sequestration shall be sisted, the creditors may at any time within the period of such sist produce to the Lord Ordinary or the Sheriff a deed of arrangement subscribed by or by authority of four-fifths in number and value of the creditors of the bankrupt, and the Lord Ordinary or the Sheriff may consider the same and make such intimation thereof as he may think proper, and hear parties having interest, and make any inquiry he may think necessary. . . .”

† “**NOTE.**—The objection which I have found it impossible to get over relates to the claims of John Duff, John Ireland, and William Thoms. These claims were all for loans of money, alleged to have been made to the bankrupt years before his death, but it was conceded that in none of the cases was there any writing, either of the bankrupt or of the executrix, tending to instruct the loan, and also that in none of them has any interest ever been paid. It may be that on fuller investigation the trustee may see his way to admit them as good claims against the estate, but in the circumstances above stated I am not satisfied as to their validity, and I must therefore strike them out of the computation; but the result of doing so is to bring the majority, so far as the creditors entitled to be reckoned in number are concerned, below the statutory four-fifths, for the remanent subscribers of such creditors (*i.e.* creditors having debts above £20) are only ten out of fourteen; and this being so, it follows—assuming that I am right in throwing the claims in question out of view—that I must decline to approve the deed of arrangement, and allow the sequestration to take its natural course.”

‡ The Bankruptcy (Scotland) Act, 1856, sec. 101, provides,—“All questions at any meeting of creditors shall be determined by the majority in value of those present and entitled to vote, unless in the cases herein otherwise provided for; and when, for the purpose of voting, the creditors are required to be counted in number, no creditor whose debt is under £20 shall be reckoned in number, but his debt shall be computed in value.”

Those who are entitled to vote at the election of a trustee are certainly not creditors who merely lodge their affidavits, but those who accompany these affidavits with the grounds of their respective claims. The claims in this case are as thoroughly unvouched as it is possible to imagine. They are claims for borrowed money, borrowed too at a period long before the death of the bankrupt, on which no interest has been paid, and of which no vouchers have been produced. It is settled law that a loan of money cannot be proved without writing, and if there had been any writing it surely would have been produced. It is clear that these gentlemen cannot vote, and cannot rank upon the estate,—in short that they have no interest in the sequestration unless they produce proof in support of these alleged loans. To allow such creditors to take part in the proceedings as belonging to the general body of creditors would just be to give to the bankrupt the power of regulating his own sequestration.

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With regard to the other point which has been raised, I am equally clear. The 101st section of the Act of 1856 enacts that only those creditors whose debts are not under £20 shall be entitled to vote, when for the purpose of voting the creditors are required to be counted in number. Under the interpretation clause "vote" means not only voting at a meeting but includes a "consent to any offer of composition and to a discharge of the debtor, and also a dissent from such offer or discharge." Now, confessedly, this proposed deed of arrangement is a contract of composition; it is an offer upon the one side and an acceptance upon the other in the form of a deed of arrangement. That is "voting" within the meaning of the Act.

I think this appeal should be dismissed.

LORD DEAS and LORD MURE concurred.

LORD SHAND.—It appears to me that the procedure here applicable is to be gathered without difficulty from sections 35 and 38 of the statute. Section 35 provides—(reads as above). By that section the creditors present or represented at the meeting who are entitled to vote, with the result of sisting proceedings in view of the preparation of a deed of arrangement, must be duly qualified to vote by having claims on the estate supported by affidavit and by the necessary vouchers. The right to vote at this meeting depends on the same considerations as the right to vote in the election of a trustee.

But assuming that creditors to the requisite extent in number and value have procured a sist, the next matter is the deed of arrangement. There is no meeting of creditors necessary for the purpose of sanctioning or adopting such a deed. The creditors sign the deed severally, and then it is produced to the Sheriff. When that takes place, the Sheriff has very wide powers as to what may be done. Section 38 provides—(reads as above). Now, I do not say or think that in the ordinary case it is necessary to produce with the deed of arrangement affidavits and claims by the persons signing it. When the Sheriff, on the evidence before him, including the bankrupt's state of affairs, shewing who are, according to his statement, the creditors, is satisfied, and there is no opposition, I think there would be no need of affidavits and claims. But it was obviously intended by the Legislature, and it is, I believe, the present practice, that the Sheriff shall order intimation to non-concurring creditors, and if they enter appearance, and opposition is made, inquiry is necessary, and the production of the affidavits and claims and vouchers, so far as necessary, may be required.

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Assuming that to be the course of procedure, what is the case here? The creditors, whose concurrence in the deed of arrangement is objected to, after having had an opportunity, cannot shew that they have the necessary vouchers or other evidence requisite to support their alleged claims, and accordingly their votes have been disallowed. If they were in a position to produce satisfactory evidence in support of their claims they would still be in time to maintain the validity of their concurrence in the deed of arrangement; but it is admitted that they are not in a position to instruct their claims by the evidence which is necessary to give them a voice in the question, or, indeed, in any matter to be determined by the votes of the creditors in the sequestration.

Then the appellant contends that creditors under £20 in value are to be counted in the number of the votes. That is an extraordinary view with reference to the acceptance of a composition, which this arrangement really is. The spirit and the letter of the statute alike shew that in order to a person having his vote counted his debt must be greater than £20.

I think the Sheriff-substitute's judgment was quite right.

THE COURT refused the appeal.

CARMENT, WEDDERBURN, & WATSON, W.S.—ROBERT MENZIES, S.S.C.—Agents.

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Nov. 24, 1880.
Gibb v. Com-
missioners of
Inland Re-
venue.

WILLIAM GIBB, Appellant.—*Keir*.

THE COMMISSIONERS OF INLAND REVENUE, Respondents.—
Lord-Adv. M'Laren—Rutherford.

Revenue—Stamp Act, 1870 (33 and 34 Vict. c. 97)—Discharge (on redemption) of feu-duty.—By feu-contract, which had been duly stamped with the *ad valorem* duty chargeable at its date in respect of the feu-duty, the vassal was bound to pay an annual feu-duty of £500, but it was provided that it should be in his power at any time to redeem the said feu-duty, or any part thereof, at the rate of twenty years' purchase, and that he should be bound, if required, to redeem the feu-duty at the said rate to the extent of at least £200, £100 within five years and another £100 within ten years from the term of entry under the feu-contract.

Held that the discharge granted by the superior in respect of the redemption of the feu-duty to the extent of £100 under the above obligation was chargeable with the duty imposed in the schedule appended to the Stamp Act, 1870, upon a "Release or Renunciation" of any right or interest in any property in any other case than "upon a sale," or "by way of security," viz., 10s., and not with the *ad valorem* conveyance on sale duty.

2D DIVISION.
I.

By feu-contract dated 14th, 15th, and 17th January 1870, William Gibb acquired from Francis Edmond, trustee on the sequestrated estate of Sir Alexander Anderson of Blelack, certain lands in consideration of a yearly feu-duty of £500 per annum.

The feu-contract was stamped with the leading duty of £30, being the amount of the *ad valorem* duty chargeable under the Act 17 and 18 Vict. c. 83 (the Stamp Act then in force), in respect of a Charter, Disposition, or Contract containing the first original constitution of a Feu Right in Scotland.

There was contained in the feu-contract the following provision:—

"And it is hereby expressly provided and declared that it shall be in the power of the said William Gibb and his foresaids at any time to redeem the said feu-duty, or any part thereof, at the rate of twenty years' purchase, but the said William Gibb hereby binds and obliges himself

and his foresaids, within five years from the said term of entry, if so required, to redeem the said feu-duty to the extent of at least £100 sterling of feu-duty at the said rate, and within ten years from the said term of entry to redeem the said feu-duty to the extent of at least another £100 of feu-duty, making together £200 of feu-duty at the said rate, which feu-duty of £500 and which conditions as to the redemption thereof to the extent of at least £200 within the respective periods above mentioned shall be real burdens affecting the said piece of ground hereby disposed."

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In virtue of this provision William Gibb was called on in 1875 to redeem the first £100 of feu-duty, and did so by payment of the capital sum of £2000. In 1880 he was called upon to redeem the feu-duty to the extent of at least another £100, and accordingly made payment of the further sum of £2000, being the redemption price of the said feu-duty to that extent. Thereupon the superiors granted him a discharge of the feu-duty to the extent of £100, and declared the lands to be disburdened to that extent of the real burden created by the feu-contract.

When this discharge was presented to the Commissioners of Inland Revenue to have the stamp-duty chargeable adjudicated upon, the Commissioners assessed the stamp-duty at £10, being the *ad valorem* conveyance on sale duty payable under the Stamp Act, 1870 (33 and 34 Vict. c. 97) (the Stamp Act then in force), in respect of the sum of £2000, being the redemption price of the feu-duty to the extent of £100.

William Gibb thereupon paid the stamp-duty so assessed, and having declared himself dissatisfied with the determination of the Commissioners on the ground that the duty payable was not the *ad valorem* conveyance on sale duty, but the duty payable in terms of the schedule appended to the Stamp Act, 1870, either (1) under the head "MORTGAGE," &c., sub-section 4, "Reconveyance, Release," &c., viz., at 6d. for every £100, . . . 10s. or (2) under the head "RELEASE OR RENUNCIATION of any property," &c. in any other case than upon a sale or by way of security, . . . 10s. or (3) under the head "DEED of any kind whatsoever, not described in this schedule," . . . 10s. he required the Commissioners to state a case for appeal to the Court of Exchequer under the 19th section of the Stamp Act, 1870.

The question submitted for the opinion of the Court was:—"Whether the said instrument is liable to be assessed and charged with the said *ad valorem* conveyance on sale stamp-duty, in terms of the Act 33 and 34 Vict. cap. 97; or, if not, what other stamp-duty it is liable to be assessed and charged with." *

* The Stamp Act, 1870, 33 and 34 Vict. c. 97, contains the following provisions bearing on the question submitted in this case:—

Section 3. "From and after the commencement of this Act, and subject to the exemptions contained in the schedule to this Act, and in any other Acts for the time being in force, there shall be charged for the use of Her Majesty, her heirs and successors, upon the several instruments specified in the schedule to this Act, the several duties in the said schedule specified, and no other duties."

Section 70. "The term 'Conveyance on Sale' includes every instrument and every decree or order of any Court or of any Commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."

Section 73. "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the

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It was maintained on behalf of the appellant that the judgment of the Court in the case of *Belch v. Commissioners of Inland Revenue*, Feb. 24, 1877, *ante*, vol. iv. p. 592, with reference to the discharge on redemption of a ground-annual under a power to redeem ruled the present case of a discharge on redemption of a feu-duty, under an obligation as well as a power to redeem.

It was argued for the Commissioners of Inland Revenue that there was a distinction between the present case and that of *Belch*, in respect that here there was a separation of the feudal estate, and that the effect of the discharge in question was really the conveyance of an estate of superiority to the value of £100 a-year from the superior to the vassal for a price paid, and that it was therefore as much a conveyance on sale as if it had been a conveyance of the same subject to a singular successor in the superiority.

LORD GIFFORD.—This is a case bringing up a general point of some practical importance which the Commissioners of Inland Revenue wish to have determined. It was contended that there was a distinction between the present case and that of *Belch*, and that the decision in the case of *Belch* does not apply to the circumstances of the present case. It was urged that this is a case of redeeming a feu-duty, and that different principles rule the cases of ground-annuities and of proper feu-duties, which last constitute a separate feudal estate. Now, I am not able to draw any distinction between this case and the case of *Belch*. No doubt, feudally speaking, in the case of a feu, there is a *dominium directum* and a *dominium utile*—there is a proper separation of estates, which does not occur in the case of a ground-annual, which is more of the nature of a burden. But in reality this does not affect the present question as to the proper stamp required for the instrument. The release of a ground-annual is, so far as it goes, the release of a burden, and the release of a feu-duty

consideration in respect whereof the conveyance is chargeable with *ad valorem* duty."

SCHEDULE.

"CONVEYANCE OR TRANSFER on sale,

"Of any property (except such stock or debenture stock or funded debt as aforesaid),

Where the amount or value of the consideration for the sale does not exceed £5, £0 0 6

Exceeds £5 and does not exceed £10, 0 1 0

For every £50, and also for any fractional part of £50 of such amount or value, 0 5 0"

"MORTGAGE, BOND, DEBENTURE, COVENANT, WARRANT OF ATTORNEY to confess and enter up judgment, and foreign security of any kind."

"(4) Reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured:—

"For every £100, and also for any fractional part of £100 of the total amount or value of the money at any time secured, £0 0 6"

"RECONVEYANCE, RELEASE, OR RENUNCIATION of any security. *See Mortgage, &c.*"

"RELEASE or RENUNCIATION of any property, or of any right or interest in any property—

"Upon a sale. *See Conveyance on sale.*

"By way of security. *See Mortgage, &c.*

"In any other case, £0 10 0"

or of part thereof (the two estates remaining as before) is no more. In the one case the feu-duty is restricted or taken away altogether, in the other a burden is restricted or taken away. I think they both fall under the same principle; and the reason of the rule is the same. It is quite plain that this piece of ground, laid out for feuing purposes, was sold for a price; and it does not make any difference whether the price was to be paid down or stated as a feu-duty calculated at a percentage of what would otherwise have been the price. Here the superior stipulates that he shall get part of the price in money within a certain number of years. £100 of the feu-duty is to be redeemed in five years, and another £100 within other five years. That in substance is just a stipulation for payment of the price, and though the vassal pays the price instead of continuing to pay the interest or feu-duty the transaction is not a transaction of sale properly so called. It is all embraced in and provided for, and is really a part of the original transaction (as your Lordship observed in *Belch's* case), and it is solely in virtue of the original agreement that the vassal now redeems the feu-duty, which is just the interest of the price, by paying off a part of the capital. I think that is a proper case for Release, Renunciation, or Discharge, not upon a sale or by way of security, but that it falls under the heading in the schedule, "in any other case, ten shillings."

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In the present case the superior expressly stipulated that part of the feu-duty should be redeemed by the vassal at the dates specified. This just means that part of the original price, instead of constituting and remaining an annual burden, that is, an annual feu-duty, over the property, should be paid up and discharged at the stipulated and specified terms. The original deed or feu-contract is duly stamped with an *ad valorem* duty applicable to the full price or full feu-duty. Now, I think it is clear that when, in terms of the contract itself, payment is made of the price or of part thereof at a postponed term or terms, such payment is not a payment as on a sale, and does not require a new *ad valorem* stamp as on a price. To exact this would be to exact two *ad valorem* duties on the same transaction. The principle of the case of *Belch* clearly applies to the case before us.

I think the appeal should be sustained, and the duty fixed at ten shillings.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

THIS interlocutor was pronounced:—"The Lords of the Second Division of the Court of Session, acting as Her Majesty's Court of Exchequer, having heard counsel on the case, are of opinion and find that the stamp-duty payable on the instrument in question is 10s.: Therefore ordain the Commissioners of Inland Revenue to repay to the appellant, William Gibb, the sum of £9, 10s. sterling, being the sum paid by him in excess of the said duty of 10s., and decern: Find the said Commissioners liable in payment to the appellant of the costs incurred by him in relation to the appeal, and remit to the Auditor," &c.

MITCHELL & BAXTER, W.S.—D. CROLE, Solicitor of Inland Revenue—Agents.

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THE MAGISTRATES AND TOWN-COUNCIL OF FORTROSE AND OTHERS,

Complainers.—*Asher—J. P. B. Robertson.*

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JAMES MACLENNAN (Collector for the Heritors of Rosemarkie Parish).—
Kinnear—Low.

Church—Union of Parishes—Effect of Decree of Teind Commissioners in 1670 uniting “Kirks.”—In 1455 Chanonry was erected into a burgh and united with the burgh of Rosemarkie, the two being called in combination the burgh of Fortrose. There was a church in each, the cathedral church of the diocese being in Chanonry, and the parish church in Rosemarkie.

In a proceeding by “the Bishop of Ross v. the Parishioners of Rosemarkie,” the Commissioners of Teinds, after opposition, pronounced the following decree, dated 2d February 1670:—“The Lords unites the Kirks of Chanonrie and Rosemarkie, and appoints the minister of Rosemarkie and his successors to serve the cure at both kirks Sunday day about. The Lords, of consent of the Bp. of Rosse, declares the parishioners of Rosemarkie free of the support of the kirk of Chanonrie *et e contra*.”

In an action seeking to enforce liability upon the heritors of Chanonry for repairs of the church, manse, and other ecclesiastical buildings of Rosemarkie, held that the meaning of the decree was that, while uniting the two kirks, the heritors of the two districts were to be separately liable each for the support of their own church, viz., the heritors of Chanonry for support of the cathedral church, and the heritors within Rosemarkie district for support of the parish church, and that looking to the decree and what followed upon it the heritors of Chanonry were exempt from assessment for the repairs to the church of Rosemarkie, although liable in so far as regarded the manse and other buildings.

Church—Stat. 7 and 8 Vict. cap. 44, sec. 8—Liability of heritors of quoad sacra parish.—Held by Lord Curriehill (Ordinary) that lands and heritages disjoined from a parish *quoad sacra* are not thereby freed from liability for the parochial burdens to which they were previously liable.

1st Division.
Ld. Curriehill.
M.

THIS was a suspension of a charge given to the Magistrates and Town-Council of Fortrose and others, as owners of lands and heritages in the burgh of Fortrose or Chanonry, for payment of an assessment according to their real rents for repairs upon the church, churchyard wall, manse, and offices of the parish of Rosemarkie. They objected, on the grounds (1) that their lands were situated in the ancient parish of Chanonry, and that by a decree of the Commissioners of Teinds in 1670, by which Chanonry or Fortrose and Rosemarkie were united, the parishioners of each were exempted from the burden of supporting the church or any of the ecclesiastical buildings of the other;* (2) that assuming them to be liable with the heritors of Rosemarkie proper, the assessments had been improperly imposed upon the real rents instead of upon the valued rents of their lands; and (3) that in 1873 a *quoad sacra* parish of Fortrose

* “Extract decree of Commissioners of Teinds, dated 2d February 1670”—(Here followed the sederunt)—“The Bp. of Rosse agt the parishioners of Rosmarkie. Thores repeated his summonds and productions. Andersone answered that Rosmarkie is a parish since Christianitie, and hath their owin church and minister abundantle provided, and the parish is numerous, and a part of it farre distant. Chanonrie was always served by the bishop or his chapter, and it was more proper to unite with Avach. The Lords unites the kirks of Chanonrie and Rosemarkie, and appoints the minister of Rosemarkie and his successors to serve the cure at both kirks Sunday day about. The Lords, of consent of the Bp. of Rosse, declares the parishioners of Rosemarkie free of the support of the kirk of Chanonrie *et e contra*.”

was formed, and a separate church built in it, which fact relieved the lands and heritages thereby disjoined from the liability now sought to be imposed upon them. No. 36.

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Mr MacLennan, the collector, answered that there never were two separate parishes of Chanonrie and Rosemarkie, "that the kirk of Chanonry (which was the cathedral church of the diocese of Ross, and was served personally by the bishop) was never a proper parish church, and was united with the kirk of Rosemarkie solely to the effect of ordaining the minister of Rosemarkie to officiate on alternate Sundays at the two kirks; that the decree of 1670, containing the exemption founded on, had never been acted upon to the effect of exempting the heritors of Chanonry from the proper parochial burdens effeiring to them as heritors of Rosemarkie; that the assessments on the present occasion had been properly imposed according to the real rents; and that in any view they were liable for the expenses charged for other than the portion thereof incurred in repairing the church."

They pleaded;—(1) The complainers not being heritors within the parish of Rosemarkie, or liable for the assessment made upon them as aforesaid, have been wrongously and unjustly charged, or threatened to be charged as aforesaid, and the said charges and threatened charges, as well as said decree, ought to be suspended as craved. (2) *Separatim*, The foresaid assessment having been improperly made, according to the real rents of the heritors instead of according to valued rent, and the same being therefore unjust, the said charges and threatened charges, as well as said decree, ought to be suspended as craved.

The respondent pleaded, *inter alia*;—(3) The complainers, being heritors within the parish of Rosemarkie, were and are liable to assessment for the expenses in question; and the parish being partly burghal and partly landward the assessment fell to be imposed in respect of the real rent. (4) The respondent being entitled to charge for the sums libelled, the note should be refused, with expenses. (5) *Separatim*, At least the complainers are liable for the expenses charged for other than the portion thereof incurred in repairing the church.

The burghs of Fortrose or Chanonry and Rosemarkie were situated about a mile apart, near the shore of the Moray Firth. They were united by royal charter of King James II. in 1444 under the common name of Fortrose, and that charter was afterwards confirmed by King James VI. in 1592, and again in 1612. Fortrose was often termed Chanonry, owing to the fact that the cathedral church of the bishopric of Ross, the bishop's palace, &c., were situated within its bounds. There was another church at Rosemarkie. The bishops were in use to serve the cure of the cathedral church, and to serve Rosemarkie by means of a vicar.

After a proof, the evidence in which was entirely documentary, and the purport of which sufficiently appears below, the Lord Ordinary, on 14th October 1879, pronounced this interlocutor:—"The Lord Ordinary . . . Finds (1) that the complainers have failed to prove that, before, at, or since the date of the decree of 2d February 1670, . . . there existed a parish of Chanonrie separate and distinct from the parish of Rosemarkie: Finds (2) that by the said decree whereby the kirks of Chanonrie and Rosemarkie were united, the parishioners of Rosemarkie were exempted from the support of the kirk of Chanonrie, *et e contra*: Finds (3) that the term 'the parishioners of Rosemarkie' in said decree included all the parishioners of the parish of Rosemarkie, except those residing or owning lands and heritages within a district immediately adjoining the old kirk of Chanonrie, including the old burgh of Fortrose, as distinguished from the old burgh of Rosemarkie, and that the persons referred to by impli-

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cation in said decree as the 'parishioners of Chanonrie,' were the said old burgh of Fortrose and the owners of lands and heritages within said burgh, and the district adjoining the said old kirk as aforesaid : Finds (4) that no evidence has been adduced to shew what were the boundaries of said district in 1670 : Finds (5) that in 1820, when a new church was erected at Rosemarkie, the heritors of the parish of Rosemarkie agreed that the district delineated within red lines on the plan No. 44 of process should be held to be the district exempted by the said decree of 1670 from the support of the kirk of Rosemarkie : Finds (6) that the lands of the complainers all lie within the said district, and that from 1670 to the present time no assessment in connection with the church of Rosemarkie has been exacted from the burgh of Fortrose or from the proprietors of the subjects now belonging to the complainers in respect of any lands within said district : Finds (7) that for the purposes of this action the exemption in the decree of 1670 must be held to extend to and include all the complainers in respect of lands and heritages belonging to them within the limits of said district : Therefore finds (8) that the complainers are entitled to have the charge for the present assessment, in so far as the same is imposed in respect of repairs upon the church of Rosemarkie, suspended ; and before further answer as to the remainder of the assessment, appoints the cause to be enrolled, that parties may be further heard on the points specified in the latter part of the note appended hereto : Reserves all questions of expenses."*

* "NOTE.— . . . The first and most important question is, was there ever a parish of Chanonrie (or Fortrose) distinct from the parish of Rosemarkie ? The complainers consider the decree of the Commissioners of Teinds of 2d February 1670 to be conclusive in favour of their contention that the parishes were distinct. The decree was pronounced in a proceeding at the instance of 'the Bishop of Ross against the parishioners of Rosemarkie.' After opposition by these parishioners, 'the Lords unites the kirks of Chanonrie and Rosemarkie, and appoints the minister of Rosemarkie and his successors to serve the cure at both kirks Sunday day about. The Lords, of consent of the Bp. of Ross, declares the parishioners of Rosemarkie free of the support of the kirk of Chanonrie, *et e contra*.' The complainers found upon the use of the word 'parishioners' in this decree as establishing conclusively the fact that prior to the date of the decree there were two distinct parishes, and that this was a union of parishes as well as kirks. It appears to me that the language of the decree is not inconsistent with the plea of the respondent, that there never was a separate parish of Chanonrie, and that the kirk of Chanonrie was within the parish of Rosemarkie, and was merely united with the kirk of Rosemarkie to the effect of placing both congregations under the same pastoral superintendence. It is therefore necessary to investigate the previous history of this district in order to arrive at the sound construction of the decree."

(After quoting the evidence afforded by the *Origines Parochiales Scotiæ*, the Scots Acts for 1639 and 1649, &c.)—

"On the whole, therefore, on this branch of the case, I am of opinion that the complainers have failed to establish the existence of a separate parish of Chanonrie prior to 1670. They have not attempted to say that since that date there has been any disjunction or erection of such a parish, but they refer to sundry title-deeds between 1690 and the present time, in which lands lying both within and without the boundaries of the alleged parish of Chanonrie are described as within 'parochias de Chanonrie et Rosemarkie,' or the parish of Chanonry and Rosemarkie. But I need hardly say that such words occurring in titles granted recently after 1670 must be held as referring to the union by the decree of that year, and must be interpreted according to the true meaning of the decree.

The next question is, what is the legal effect of the decree of 1670 ? and

On 29th December 1879, after a further hearing, the Lord Ordinary No. 36. found that the complainers, "who are heritors of lands originally in the

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with that question is closely involved this other, viz., what effect has been given to the decree in actual practice? I can see no anomaly in the union of two kirks (only one of which is a true parish church) to the effect of making both available to the whole parish, and placing them under one pastoral superintendence. It cannot now be ascertained whether during the twenty years which elapsed between the date of the decree and the final suppression of Episcopacy the decree was implemented by the minister of Rosemarkie conducting divine service in each of the united kirks on alternate Sundays. I am inclined to think that during these twenty years the duties were divided by the bishop and the minister of Rosemarkie officiating alternately in each church." (His Lordship then quoted (1) a deed of mortification by the provost of Fortrose in 1692; (2) a petition by the burgh of Fortrose in 1695 for an allocation of the rents of the bishopric of Ross to repair their kirk; (3) certain minutes of the town-council of Fortrose in 1720 and 1723, according to which the town-council appeared to have provided temporary accommodation for religious ordinances in various parts of the municipal buildings). "The magistrates of Fortrose thus clearly recognised the duty incumbent on them of supplying a suitable place of worship for the inhabitants, and to that extent, and so far as they were concerned, the decree of 1670 was fully acted upon. And this leads me to remark that I cannot but think that in point of fact the minister of Rosemarkie must have continued to supply divine ordinances on stated days, and that the piteous language of the petition to Parliament in 1695 was prompted (1) by the desire to relieve the burgh of the burden of repairing the kirk, and (2) by a feeling of wounded pride in being placed under the same pastoral superintendence as the rival though twin burgh of Rosemarkie.

"Whether or not the heritors of Rosemarkie proper had lost sight of the decree between 1730 and 1820 is not very clear. During that period various repairs on the church and manse of Rosemarkie were executed, and the expense was defrayed by an assessment upon the heritors according to their valued rent as appearing in the cess-book of Ross-shire. Several of the lands assessed lay within the bounds assigned by the complainers to the alleged old parish of Chanonrie, but none of the lands now belonging to the complainers were so assessed, and for the obvious reason that none of them were entered in the cess-book of the county. The fact, however, that no attempt was made to impose any part of the assessment upon the 'burgh of Fortrose' as a community would point to this, that the heritors were aware that whatever may have been the extent of the district exempted by the decree of 1670 the burgh was certainly included within the exemption.

"In 1820, however, a new church was erected in Rosemarkie, the assessment being imposed upon all the heritors in the whole parish according to their real rents; among the heritors assessed were sundry 'minor heritors,' as they are called, in the old burgh of Fortrose, in other words, proprietors of tenements and small subjects within the burgh, upon each of which the proportion of the assessment was comparatively small. These minor 'heritors' objected to be assessed as upon real rent, and maintained that the assessment could only legally be imposed upon the valued rent, and in the course of the discussion the old decree of 1670 came to the knowledge of the parties, after having been lost sight of for a long time. The 'minor heritors' then claimed entire exemption, the opinion of Sir John Connell was taken, and the result was that the landward heritors conceded that a certain portion of the land within the parish was entitled to exemption from assessment. The idea then was that the decree of 1670 had effected an union of parishes, not, as I think, a mere union of kirks, and the question was, what were the boundaries of the two parishes? That a certain portion of the district was exempted from assessment was undoubted; the difficulty was to decide which portion was exempted. I confess that, had the question now

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parish of Rosemarkie, and now disjoined from this parish, and erected into the church and parish of Fortrose *quoad sacra*, are liable *pro rata*, along with the heritors of the lands of Rosemarkie not so disjoined and erected, for the expense of repairing the manse of Rosemarkie, and the offices and garden-wall connected with the manse," &c.*

occurred for the first time, I should have been inclined to limit the exempted district to the bounds of the old burgh of Fortrose proper. But in my opinion the area of exemption was, in 1820, fixed by the parties interested, and has ever since, until the present question arose, been held to have been so fixed. That area includes all the subjects now belonging to the complainers. . . . The original boundaries of the exempted area were, in 1820, and are now, merely matters for conjecture, but I think that, after these were deliberately fixed by the main body of heritors in 1820, nearly sixty years ago, it is too late now for these heritors to attempt to curtail these limits by a process which must be as conjectural as that of 1820. I therefore think that the complainers are entitled to prevail in so far as they seek relief from the assessment for the repair of the church.

"Their claim for relief as to the churchyard wall, manse, and offices, stands in a different position. As regards the churchyard wall, I think it would be important to know whether, as matter of fact, there is a churchyard annexed to the old kirk of Chanonrie, and used and kept in order by the inhabitants of that burgh? If there be such a cemetery, then much might be said in support of the claim for exemption, in respect both of kirk and kirkyard wall.

"But as regards the assessment for manse and offices the case appears to me to be a very much more difficult one. I think it is impossible to extend the exemption to such buildings. From and after 1670, the whole parish was placed under the pastoral superintendence of one and the same minister; only one manse with offices therefore was required, and the burden of supplying these falls, in my opinion, upon the whole parishioners, *i.e.*, heritors. It is true that hitherto the expenses have been borne by the larger heritors in proportion to their valued rents, and thus no part was thrown upon the complainers or their ancestors who had no valued rent. But as the burden is one legally effeiring to all owners of land in the parish, according to the real rents, there is a *prima facie* liability attaching to the complainers. As regards those of them whose properties are within the burgh it may be that not they as individuals, but the burgh as a community, is the proper party to be assessed, as was held in the case of *Lockhart v. The Magistrates of Lanark*, 10 Sh. 243. That, however, is a matter which will admit of easy adjustment after that which appears to me to be the real difficulty in the case is settled.

"It appears that in 1873 a district nearly though not altogether coinciding with the alleged old parish of Chanonrie was erected by the Teind Court into the church and parish of Fortrose *quoad sacra*; and the question thus arises purely for decision, *viz.*, whether the proprietors of lands within such a *quoad sacra* parish are liable for the maintenance and support of the manse and offices of the parish from which their district has been disjoined. In the recent *Jedburgh* case (D. of Roxburghe, 3 Ret. 728, H. L., 4 Ret. 76), an analogous question regarding the church of the old parish was expressly left open, and before deciding it I should like to be favoured with a fuller argument than that which was submitted towards the close of last session, and which was directed mainly to the existence or non-existence of two ancient parishes."

* "NOTE.—The question which in the interlocutor of 14th October last was reserved for consideration is the important one, whether, where lands have been disjoined from one or more parishes and erected into a *quoad sacra* parish under the Act 7 and 8 Vict. chap. 44, their owners remain liable for the parochial burdens of the original parish or parishes, such as building and repairing the manse, manse offices, garden and churchyard wall, to which, but for the disjunction and erection, they would unquestionably have been liable? In the *Jedburgh* case (the Duke of Roxburghe, 3 R. 728, and 4 R., H. L. 76), the question

A joint minute was afterwards put in for the parties agreeing to hold that, to the extent of three-fourths, the assessments complained of applied

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of the liability of the heritors of lands so disjoined for building, maintaining, and repairing the church of the original parish was reserved; but opinions in favour of the continuing liability of the heritors were indicated by more than one Judge, and were decidedly expressed by Lord Deas, who entered very fully into the whole question.

"The case of *Drummond*, M. 7920, which at first sight appears to be an authority the other way, so far as regards the maintenance of the church by the heritors of lands annexed to another parish *quoad sacra*, was, I think, very satisfactorily shewn by Lord Deas to have been an entirely exceptional case (as regards the church), and to have been decided on the very peculiar circumstances which there occurred. But although the heritors of the disjoined lands were there found liable to repair the church of the parish to which these had been annexed, and to be free from the repairs to the church of the parish to which they had originally belonged, the Court expressly declared that these heritors must remain liable for all other parochial burdens in their original parish. The final interlocutor of the Court was,—'The Lords find that the heritors of lands annexed *quoad sacra* are liable in their proportion of upholding the fabrics of the kirks to which they are annexed, and in no other parochial burdens: Find that they are not liable to contribute for upholding the fabric of the parish kirks from which they were disjoined; but that they remain liable in all other parochial burdens in these parishes.'

"This decision is entirely in accordance with the judgment in the earlier case of *Park*, M. 8503, which is referred to by Erskine (ii. 10, sec. 64) as an authority on this branch of the law. Speaking of annexations *quoad sacra* which were in use to be made by the Teind Court long before the Act of 1844, he says,—'Such annexation affects only the inhabitants; the lands continue in all civil respects part of the old parish, and therefore they remain burdened with the payment of the stipend to that church from which the inhabitants were disjoined, and it was adjudged that the owners of those lands do not by the annexation become liable in any part of the expense necessary for upholding the manse or even the church of the parish to which they are annexed, and which the inhabitants constantly resort to for divine service, but that they continue even in that respect to be accounted part of the old parish.'

"Now, such being the law prior to the passing of the Act 7 and 8 Victoria, c. 44, the question arises, whether that statute has made any change upon the liabilities of the heritors of lands disjoined and erected into a parish *quoad sacra*? I confess that I am unable to discover in the statute any indication that any such change was intended. On the contrary, I think it was intended that the rights and liabilities of the heritors of the lands disjoined and erected should remain unaffected by the disjunction and erection *quoad sacra*. It is quite clear that the burden of maintaining the manse, &c., is not *inter sacra* but *inter civilia*, quite as much so as the payment of stipend, which in all such cases continues to be paid by the heritors of the lands disjoined *quoad sacra* to the minister of the parish from which they have been so disjoined. It is true that before the lands can be disjoined and erected *quoad sacra* the statute requires a church to be erected or provided for the district, and provision to be made for a sufficient stipend to the clergyman, and for a suitable manse, or for an addition to the stipend in lieu thereof, and for the maintenance of the fabric of the various buildings. The stipend, however, is not payable out of the teinds, and the church and manse are not to be provided at the expense of the heritors of the disjoined and erected lands. All these things are to be done or provided by the parties promoting the disjunction and erection, not one of whom may be the owner of any of the disjoined lands; nay more, the 8th section of the statute expressly provides that the proceedings may take place without any concurrence of the heritors, and the result of sustaining the present contention of the complainers as to their non-liability for parochial burdens in the original parish would simply be to exempt them from all the parochial burdens in connection

No. 36. to the repairs of the manse, offices, and garden wall, and, to the extent of one-fourth, to those of the church, and the Lord Ordinary, on 22d May 1880, sustained the reasons of suspension to the extent of one-fourth, and, *quoad ultra*, repelled them.

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The respondent reclaimed.

The arguments on both sides sufficiently appear from the opinion of the Lord President.¹ No argument was submitted against the interlocutor of 29th December 1879, which dealt with the liability of the heritors of the disjoined lands.

LORD PRESIDENT.—In this case the Lord Ordinary has held that the heritors of Chanonry are not liable for repairs on the church of Rosemarkie, but that the assessment complained of must stand good as to the other ecclesiastical buildings. The ground upon which the complainers claim exemption from the ordinary liability of heritors as respects the church is that when the two parishes of Rosemarkie and Chanonry were united in the year 1670 by decree of the Commissioners of Teinds, it was provided in the decree that the heritors in the Rosemarkie district of the parish should maintain the church of Rosemarkie, and that the heritors in the district of Chanonry should maintain the church which then existed there. Now, that assumes that there was a union of parishes effected by the decree of the Commissioners of Teinds in 1670, and in that respect I think that the contention of the complainers is not well founded, and that the Lord Ordinary has rightly held that there were not two parishes existing prior to that decree which were united by virtue of it.

The burgh of Rosemarkie is a very ancient burgh. We have the authority of

with that parish, without imposing upon them any corresponding burden in the newly erected parish. In short, they would, without any equivalent on their part, be entirely exempted from a parochial burden which attaches to every other owner of land in Scotland. I cannot think that that result was contemplated by the Legislature; and, so far as I can see, there is nothing in the language of the statute to give any countenance to the contentions of the complainers; indeed, it is in my opinion impossible to read the whole statute without observing the marked contrast which is exhibited between the 8th and 14th sections on the one hand, which deal with 'disjunctions' and erections *quoad sacra*, and the 4th and 15th sections, on the other hand, which deal with disjunctions and erections *quoad omnia*. In the latter the heritors of the disjoined lands are assumed or declared to be liable to provide and maintain the churches and manses of the new parish; in the former it is assumed that they are not liable in any such burdens, and the inference to my mind is clear that in the latter case they still remain liable for the parochial burdens of the original parish.

"If I am right in these views, it follows that the complainers are not entitled to be relieved of the assessments for repairing the manse, manse offices, and garden wall of Rosemarkie. . . .

"A subordinate question may also arise, viz., whether as regards the disjoined and erected lands, in so far as situated within the boundary of the burgh of Fortrose (or Chanonry), the assessment is to be imposed on the magistrates, as representing the community, or on the individual owners of the lands. This also is a matter for the parties themselves to adjust.

"I should add that the churchyard is not noticed in the foregoing remarks, because I was informed during the last debate that no part of the expense assessed for had been incurred in connection with that wall."

¹ *Authorities quoted in addition to those quoted by the Lord Ordinary.*—Act 1572, cap. 54; Connel on Parishes, 19, 22, 47, 222; Forbes on Tithes, 414; and Connel on Tithes, Appendix, ii. 191.

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Bishop Leslie for saying that Rosemarkie is the oldest town in what he calls "the province of Ross," and we see from a charter (of which we have a translation) in 1455, that Rosemarkie must have been a royal burgh so far back as the thirteenth century, because it is stated in that charter, which is by James II., that it had been erected into a burgh by King Alexander. Which of the Alexanders is meant we cannot of course ascertain, but even supposing it to be the last (Alexander III.), it must have been as early as the thirteenth century, for he died in 1285. But by the charter of King James II. in 1455, Chanonry, as it was then called, was erected into a burgh and united with Rosemarkie, and from that date downward there has been but one burgh, the burgh of Rosemarkie and Chanonry, or, as they are called in combination, the burgh of Fortrose. Now, it would certainly be something very singular if at that early period there had been two parishes within so small a burgh as the burgh of Fortrose. The ordinary case is that a burgh forms a parish of itself, although it very often combines a landward district with it in one parish. The notion of a small royal burgh at such an early date having within itself two parishes is a novelty altogether. But it is needless to pursue this part of the case further, because it seems to me that the whole evidence is against the notion that there ever was a separate parish of Fortrose or Chanonry. The Lord Ordinary has gone over very fully the evidence which leads to that result, and I do not repeat it.

But although there were not two parishes anterior to 1670 there is no doubt there was some kind of a union effected by the operation of that decree, and it is necessary that we should understand, if possible, what the Commissioners of Teinds intended to do, both as regards the matter of the union, and also as regards the arrangement for the maintenance of the two churches with which they were dealing. We have an extract-decree which is extracted from the minute-book of the Teind Commissioners under date 2d February 1670; and all that we learn from that is that the Bishop of Ross pursued a summons against the parishioners of Rosemarkie, and that the object of that summons was to procure a union of the kirks of Chanonry and Rosemarkie, and the decree which appears to have been pronounced according to the minute was this:—"The Lords unite the kirks of Chanonry and Rosemarkie, and appoint the minister of Rosemarkie and his successors to serve the cure at both kirks Sunday day about." And then follows this further declaration:—"The Lords, of consent of the Bishop of Rosse, declairs the parishionairs of Rosemarkie frie of the support of the kirk of Chanonrie, *et e contra*."

Now, there were two churches in existence at that time. There was a church in Rosemarkie, which was the parish church of the whole parish of Rosemarkie, including Chanonry, but then in Chanonry there was another church, which was the cathedral church of the diocese of Ross, and in which of course the bishop was specially interested. These are the two kirks that are united, and with reference to which it is ordered that the minister of Rosemarkie is to conduct service at each of these churches "Sunday day about,"—i.e., the service at one church one Sunday, and the service at the other on the next. It is also declared that the "parishioners of Rosemarkie are to be free of the support of the kirk of Chanonry, *et e contra*." This is undoubtedly a very ambiguous sentence, and at first sight it is not very easy to give it any meaning but this, that the parishioners of Rosemarkie, by which we must understand the parishioners of the whole parish of Rosemarkie, including the parishioners in the district of

No. 36. Chanonry, are to be free of the support of the kirk of Chanonry. That was not very surprising, because such was the state of matters at that date. In 1709, 26, 1880. parishioners could be liable for the support of a cathedral church which was supported out of the revenues of the bishop or of the chapter, and this provision therefore, conferred no favour. But there follows "*et c contra*," which would seem to mean that the persons who are liable for the support of the kirk of Chanonry shall not be liable for the support of the kirk of Rosemarkie. But who was liable for support of the kirk of Chanonry? The bishop or the chapter,—not the parishioners; and therefore the conclusion would be that there are no parishioners freed from the obligations which then lay upon them of supporting the parish church of Rosemarkie, but only that the parishioners were not to support the cathedral church, and the bishop and chapter were not to support the parish church. That is one reading, and it is a reading which at first sight commends itself to me as not improbable.

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But I see very well that the words are susceptible of another meaning, and looking to what the Commissioners were doing—uniting two churches in one parish, but at the same time dealing with that parish as consisting of two districts—it may very well have been the intention of the Commissioners to say, that, although we thus make a parish to have two churches, the district in which the one church is situated shall support that church, and the old parish church of Rosemarkie shall be supported by those who are not of the Chanonry district, but in Rosemarkie. That is the other reading. And between these two readings I think it is not very easy to decide unless we can get light elsewhere.

But there is some light thrown upon this question by an ancient MS., if we are entitled to take that MS. as good evidence in a question of this kind. It is light so important as to be in my mind perfectly conclusive if we are entitled to avail ourselves of it. But it is proper to make sure that in referring to the MS., which is printed by Sir John Connel in the appendix of his book on Tithes, we are appealing to an authentic historical document, and we must see what is the account which the learned writer gives of the MS., which he uses very freely in the course of his work. In his preface, after mentioning a number of other MSS., he says—"The only other MS. of which it seems necessary to give any account consists of papers (to some of which I have already alluded) collected by the late Lord Swinton when Solicitor of Tithes, and most obligingly communicated to me by his Lordship's son, Mr Archibald Swinton, one of the Clerks to the Signet. This book contains many valuable writings said to have been copied from old manuscripts, some of which must themselves have been taken at one time or other from the sederunt books B and C. There are also several of the papers in this collection which are duplicates of the manuscript in the Advocates' Library. But there is one of them which is to be found nowhere else, and is much deserving of regard. It is entitled 'An Abbreviate of what is remarkable in the Decrees pronounced by the Lords of Plantation of Kirks and Valuation of Teinds from 1661 till November 1673, extracted from the Records of that Court,' and is said to be taken 'from an MS. collection of R. Mills, in the hands of Mr Charles Hamilton Gordon, 1758.'"

Sir John Connel goes on to say further, that "it appears from the preface to Mr Forbes' Treatise that he had in his possession a copy of this paper, and a number of decisions which he quotes are evidently taken from it." What he means there obviously is, that Mr Forbes had in his possession the MS. collection of R. Mills, and that that MS. collection was in the hands of Mr Charles

Gordon in 1758. But if the MS. collection was in the hands of Mr Forbes, that proves that it was in existence at a time very nearly contemporary with the decree with which we are dealing, for Mr Forbes' work was published in 1705, and it must have been the result of continued study for a number of years. So that Mr Forbes' work may very well be said to be a contemporary, or almost a contemporary, of that decree of 1670. The reference in Mr Forbes' preface to this MS. is certainly not very distinct, although, upon the whole, I am disposed to agree with Sir John Connel that he probably was dealing with the very same MS. that we are now considering. He says—"I was put to more trouble in perfecting this work through the loss of the commission registers, but yet dare say that few material occurrences before that judicature have escaped my observation. For I had an abstract of all that passed till November 1673. And any decret of moment since that time hath been friendly communicated to me by the parties or their doers."

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Now, this MS. terminates in November 1673, and is an abbreviate, or as Mr Forbes calls it, "an abstract" of all that passed in the Commission Court. So that it is fair to conclude, as Sir John Connel does, that he had access to this very MS., and used it as an authentic historical document; and this is confirmed by what Sir John Connel further says that it appears in the body of his work that he must have taken a number of the cases that he comments on from that MS., because they are not to be found elsewhere.

That being the state of the historical evidence, I am disposed to think that we may very fairly hold the MS. in question to be an authentic account of what passed in the Commission of Teinds from 1661, i.e., from the Restoration, down to the end of 1673, and if that be so, that we may take as an account of the proceedings of the Commissioners of Teinds what we find under date 2d February 1670, being the same date with the extract from the minute-book that we have in process. Now, the account which the writer of that MS. gives of the case of Rosemarkie is this,—“John, bishop of Ross, pursues a summons bearing that Chanery being a burgh royal and the bishop's seat, where there was considerable resort of noblemen and gentlemen, and the conveniency of a kirk, yet the same was not erected into a parochial church, and that the kirk of Rosemarkie was near and might be united and annexed to the said kirk of Chanery, and a competent stipend settled to both.” Then there follows an account of the proceeding, and this affords pretty distinct internal evidence that the writer of this document was really acquainted with what passed on the occasion, because there is a minuteness and precision which shew that this is not an imaginary contention that is set out. The result is thus stated at the end,—“The Lords united the two kirks, and appointed the minister of Rosemarkie to serve the cure at both *per vices*”—one Sabbath at Chanonry and the other at Rosemarkie—“and of consent of the bishop, declared the heritors free of the reparation of one another's churches.”

If that is an accurate account, it puts an end to all contention as to the meaning of the decree, and particularly as to “*et c contra*.” It means simply that although there was no separate parish of Chanonry yet in uniting the two kirks the Commissioners dealt with the church of Chanonry as a cathedral church, but as having a district surrounding it appropriated to it, as it were, before this decree was pronounced, the inhabitants of that district resorting to the cathedral church as their only church; and the result to which they came was that they united the churches—made them both churches of the same parish of Rosemarkie—but provided that the heritors of the two districts should be separately liable

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each for the support of their own church, *i.e.*, the heritors of the district of Chanonry for the support of the cathedral church, which had fallen into disrepair in consequence of the unfavourable position in which bishops were then placed from the loss of the capitular revenues, and that the other church should be supported by the heritors within the district of Rosemarkie.

Now, if this is the true construction of the decree it seems to be conclusive of the whole matter. But there is a great deal of evidence as to what has been done in practice with reference to the church of Rosemarkie. As to the maintenance of the church of Chanonry that is a thing which does not seem ever to have been seriously thought of. That church became ruinous—being “a great fabric,” nobody would care to support such a church as that, especially after the Revolution, when it ceased to have any reverence or sanctity attached to it as the cathedral church or seat of a bishop. But there certainly were repairs made on the church of Rosemarkie from time to time. For a considerable period I do not think these throw much light on the matter or help us in understanding it one way or another, because the district of Chanonry was a district not containing heritors who were liable to be assessed on their valued rent, and the repair of the church was by law laid entirely on heritors of that character. Consequently, the repairs on the church of Rosemarkie being laid upon the heritors in the valuation-roll only, the complainers and parties in their position never could have been assessed, because they were not among those heritors. Therefore that cannot be taken as shewing usage one way or the other.

But there is an occurrence in 1820 which has a great bearing on this question, and seems to me pretty conclusive, if any further evidence is wanted, as to what was the obligation in the decree of 1670. The church of Rosemarkie in 1820 had become irreparable, and it was necessary to build a new church. There was then an assessment laid upon the heritors of the whole parish according to their real rents, including the county heritors and the burghal heritors also, and those who were at that time the predecessors of the complainers. A dispute arose about this, and the minor heritors, as they called themselves, maintained that they should not be assessed, and in the course of this discussion the decree of 1670, which appears to have fallen aside or been forgotten for a very considerable period, was discovered or came to the knowledge of the parties somehow, and when this turned up the minor heritors availed themselves of the discovery and claimed exemption in virtue of the decree. The parties agreed to take the opinion of Sir John Connel. It is quite clear what his opinion must have been, unless he had very suddenly changed it, for in his work on Parishes he deals with the case of Rosemarkie, and he says that the effect of the decree of 1670 was just what is expressed in the ancient MS. already referred to, and therefore we may fairly conclude that the advice they received was that the heritors in the district of Chanonry were not bound to contribute to the church of Rosemarkie. Now, what did they do? They proceeded to define the districts, and they drew a line between the proper parish of Rosemarkie and the district of Chanonry—the burghal district—which certainly goes beyond the proper limits of the burgh so far as we can see. But it seems to have been done after full consideration and inquiry—done by the whole heritors, the whole parties assessed, as an arrangement for the distribution of this liability. The heritors of the burghal district were exempted, and exempted after full consideration, and apparently after an arrangement had been made which was intended to operate in all time coming. I think it would be a very extraordinary

thing to allow the heritors of Rosemarkie, as I call them by way of distinction, No. 36.
 to go back upon this, unless they could shew very plainly that that arrangement
 proceeded upon some misconception of the decree of 1670. But so far from
 that being the case, it appears to me that the arrangement which they then
 made was quite in accordance with what we have ascertained to be the true
 meaning of that decree. Therefore, without going further, I come without any
 hesitation to the same conclusion as the Lord Ordinary, that the complainers
 are entitled to be exempt from the assessment for the repairs of the church. But,
 with his Lordship, I am also very clearly of opinion that it cannot go further
 than that, because it is the church, and nothing but the church, which is dealt
 with in the decree. Of the two churches, I should rather say one is to be sup-
 ported by the heritors of the burgh or by the parishioners of the burgh and the
 burghal district, the other by the heritors of the Rosemarkie district. As to
 the manse and other ecclesiastical buildings of Rosemarkie, I do not see how the
 complainers can be exempt from them, because there never was imposed on them
 any corresponding obligation to maintain a manse and buildings at Chanonry. The
 two things, the obligation to uphold Chanonry church, and the exemption from
 upholding Rosemarkie church, were intended to be equivalents. Therefore, on
 the whole matter, I am of the same opinion as the Lord Ordinary.

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LORD DEAS and LORD MURE concurred.

LORD SHAND.—I entirely concur in what your Lordship has said, and it is
 unnecessary for me to say anything after the full and instructive opinion given
 by your Lordship. I shall only add that it appears to me that the elements
 which ought to weigh, and which in my mind do weigh, as decisive, are not so
 much what was done in 1820 or subsequent to 1820 as the contemporaneous
 writings of about 1670 which have been laid before us. I felt that there was a
 great deal of force in the argument that the actings in 1820 and subsequently
 could scarcely give much light on the proceedings of two centuries before. In
 1820 the parties were just thrown back upon the legal question of what was
 the effect of the decree in 1670. I think the Lord Ordinary has arrived at a
 sound conclusion upon the effect of the decree, even if we had not the light of
 the MS. quoted by Sir John Connel. But, my Lords, while I think that is
 so, there can be no doubt that the MS. is conclusive on the subject, and I agree
 with your Lordship in thinking that that document is entitled to weight.

THIS interlocutor was pronounced :—" Refuse the reclaiming note,
 and decern : Find no expenses due to or by either party in the
 Inner-House, and remit the cause to the Lord Ordinary."

MACANDREW & WRIGHT, W.S.—MACKENZIE & BLACK, W.S.—Agents.

GEORGE AULDJO JAMIESON AND OTHERS (Liquidators of the City of
 Glasgow Bank), First Parties.—*Kinnear—Lorimer.*

THE REVEREND ALEXANDER MITCHELL, D.D., Second Party.—
Trayner—Pearson.

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 Liquidators of
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 Mitchell.

*Public Company—Winding up—Shareholder holding for himself and as exe-
 cutor—Construction of terms of compromise by surrender.*—In a winding up a
 person was placed upon the list of contributories (1) in his own right, and (2)
 as one of two executors upon the estate of a deceased. He failed to pay the

No. 37. calls made upon him in the first capacity, but he paid those made on him in the second. Terms of an agreement between him and the liquidators, under the sanction of the Court, by which the Court held that he had surrendered his whole estate, and that he was bound to give an assignation to all claims which might be competent to him in the future in respect of either holding.

Observations upon the meaning of "compromise" as applied to such an agreement.

1st DIVISION. **M.** IN October 1878 the City of Glasgow Bank, a joint stock company, stopped payment and went into liquidation under supervision of the Court. Dr Alexander Mitchell, of the North Church, Dunfermline, held (1) in his own name £1000 stock, and (2) as executor, along with his brother James, upon the estate of William Mitchell, £600 stock. In respect of both holdings he was placed on the first part of the list of contributories.

He paid the two calls made upon him as executor (being the half of £16,553, 12s. 6d.) He was unable to meet in full the second call upon his own £1000 stock, amounting to £22,500. The liquidators accordingly furnished him with the schedule of queries for such cases which was appended to an excerpt from the minutes of the liquidators.*

Dr Mitchell filled up the schedule, giving a statement of his assets and liabilities, accompanied by valuations. He offered £3000 "for a discharge in full of all claims by the liquidators against him as a shareholder." The liquidators thereupon made inquiries, and Mr Haldane, one of their number, communicated the result of them in this letter to Dr Mitchell's agent,—“Edinburgh, 25th June 1879.—Dear Sir,—We have now considered this case, and, taking the whole circumstances into account, we agree (subject to the sanction of the Court and all necessary consents) to discharge Dr Mitchell of his obligations in respect of the £1000 of stock belonging to him (in his own right), provided he pays the sum of £4400, and grants an assignation in favour of the liquidators of any claims of relief he may have against the trust-estate of the late William Mitchell, or against his co-trustee in that trust.—Yours truly, JAMES HALDANE, Liqr.” Subsequently the £4400 was modified to £3800. The £3800 was paid, and Dr Mitchell was asked to assign to the liquidators any claim of relief against William Mitchell's estate, but such an assignation was afterwards dispensed with. Dr Mitchell's case was, at a later date, submitted to the Court in a list of complete surrenders, and sanctioned by them in terms of the Act.

A difference then arose between the liquidators and Dr Mitchell upon the terms of the mutual deed which fell to be executed. The former maintained that the clause of assignation should include any claims he might have (if there was a surplus of the assets of the bank, or of the calls) in both capacities, as holder of the £1000 and of the £600 stock, or otherwise. Dr Mitchell maintained that the discharge applied only to

* Excerpt from minute of the liquidation.—“Resolved—1st. That all parties who are not prepared to make payment in full of the £ call, or to satisfy the liquidators that the same will be paid without undue delay, shall be required to return answers to the queries contained in the schedule as now revised, and to attest the same by a solemn declaration attached thereto. 2d. That parties who apply for a present discharge in full of all claims at the instance of the liquidators shall be required, in addition to the payment which may be agreed upon, to assign all claims competent to them for participation in any future surplus of the assets of the bank, and all claims of relief and damages at their instance against the bank, or the directors or officials thereof, or their fellow-shareholders in the bank.”

the £1000 stock, and that he was not bound to assign his rights in respect of the £600. No. 37.

This case was therefore submitted to the Court under the Companies Act, 1862, and these questions were put,—“1. Whether the Reverend Dr Alexander Mitchell is bound to assign to the liquidators all claims competent to him in respect of the said £600 stock on any eventual surplus of the assets of the said bank, or of the calls made or to be made by the liquidators; and all claims competent to him in respect of the said £600 stock against the directors of the bank and others? or, 2. Whether the assignation to be granted by Dr Mitchell should in these respects be limited to the holding of £1000 stock?”

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At advising,—

LORD PRESIDENT.—This is a case arising in the course of the liquidation of the City of Glasgow Bank in respect of a compromise between the liquidators and Dr Alexander Mitchell, which compromise was sanctioned by the Court.

In the course of the argument the liquidators took some exception to the word “compromise” as applied to such an arrangement as that before us; but I think there is no foundation for that objection. No doubt, part of the arrangement between the liquidators and the contributory is that he shall surrender his whole estate, and, in so far as that is concerned, that is not a compromise, but it partakes of the nature of a compromise in this respect, that in arranging for the surrender of the estate a certain sum of money has to be fixed, which is to be presently paid, or paid by instalments, and which is held, for the purposes of the arrangement, as representing the full liability of the party paying the money. But, although it is a compromise in this respect, the liquidators are quite right in saying that the arrangement also embodies a complete surrender of the estate, and, therefore, though the contributory may not be able to pay more than a certain amount, he is bound under such an arrangement as this to give them an assignation to all the prospective and possible assets of his estate. That is the general nature of such an arrangement.

Now, it must be kept in view that this arrangement can receive no effect at all without the sanction of the Court, because it was a condition of the supervision order pronounced on the 27th of November 1878, under which the whole of this liquidation has been conducted, that unless and until it shall be otherwise directed and ordained by the Court the liquidators shall not accept any compromise with any contributory except with the leave of the Court. And, therefore, the true question for our consideration is, what was the arrangement between the contributory and the liquidators to which the sanction of the Court was given? It appears that Dr Mitchell was, along with his brother James, as executor of another brother who died some time ago, proprietor of £600 stock of the bank, and was registered as a partner, and consequently put upon the list of contributories for that amount. In regard to that stock the two brothers, Dr Alexander Mitchell and Mr James Mitchell, paid up the first and second calls in full, the total amount being £16,553, 12s. 6d. All their liability in respect of that £600 stock was therefore extinguished. But, notwithstanding, they were still on the contributory list for that £600, and it depended entirely upon whether or not any further calls might be necessary in the course of liquidation whether they should become liable for any further sum in respect of that particular stock. They were not discharged of their liability for that stock, but only discharged of their liability on those two calls.

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Then, in addition to that stock, Dr Alexander Mitchell was a partner on his own account to the extent of £1000 stock, and for that sum was placed on the list of contributories. He intimated to the liquidators that he was unable to meet the second call upon this stock, and that therefore he desired to enter into an arrangement with the liquidators to surrender his estate, and accordingly the liquidators sent to him, as they were in the habit of doing to all persons so situated, a certain schedule containing a number of particulars which the contributory was required to answer as the basis of the arrangement to be entered into. Now, that schedule has affixed to it an excerpt from a minute of the liquidators, dated the 18th of November 1878, containing resolutions which advertise parties who undertake to make answer to the queries contained in the schedule that the following is the basis of the arrangement which is to follow upon those answers. They are to receive a discharge in full on the one hand of all claims at the instance of the liquidators, and they are to pay such a sum as may be agreed upon, and assign all claims competent to them to participate in any future surplus of the bank. In short, there is to be, on the one hand, a complete discharge of the contributory, so as to put an end to all connection between him and the bank and its liquidators,—there is to be no liability of any kind in the future on any ground whatever,—and, on the other hand, there is to be an entire surrender of the estate, a present payment in money, the amount to be arranged, and a surrender of all claims competent to the contributory against the bank and its surplus assets, or any of its office-bearers and contributories.

Now, that being so, without going into the details of the answers which are given to this schedule, the question arises whether Dr Mitchell is not now bound to assign to the liquidators, in terms of a draft deed of discharge which is before us, all claims which he can have in any capacity for participation in the future surplus assets of the bank, if there shall be any. That the liquidators intended that this should be so cannot admit of any dispute, because we know that the compromise or arrangement between them and Dr Mitchell, which they submitted for the sanction of the Court, did involve such an assignation—an assignation of every claim which he could have in any capacity—and there was brought under the notice of the Court at that time by the liquidators the circumstance that he was a shareholder of the bank not only as an individual, but also in the capacity of one of the executors, and that was the compromise and arrangement which the Court sanctioned. There is therefore no other compromise or arrangement binding upon either party, and none which could receive effect in the liquidation, except that compromise and arrangement which was sanctioned by the Court. It is very true that in some of the correspondence between the parties as to the amount of money that was to be paid there are some expressions which look very like an adoption of the view which Dr Mitchell now contends for, and particularly a letter by Mr Haldane, one of the liquidators, dated 25th June 1879. The expression, “a discharge of his obligations in respect of the £1000 stock belonging to him,” is undoubtedly an inaccurate expression with reference to the compromise which was in course of being submitted or about to be submitted to the Court. But then, on the other hand, it must be observed that this same letter stipulates for an assignation which has nothing to do with the £1000 stock, but is an assignation of the claim of relief which he may have against the trust-estate of William Mitchell,—that is to say, an assignation of any right he may have in respect of

his being a holder of £600 stock belonging to the executry estate, and against his co-trustee in that trust. That assignation is not now insisted upon, because the liquidators have become satisfied, on the one hand, that it could not be of any value, and, in the second place, that Dr Mitchell very strongly objected to grant such an assignation as a matter of feeling. The liquidators very properly, I think, in the circumstances, yielded that point. But this part of the letter is not on that account of the less value as shewing what was in the mind of the liquidators at the time,—that the discharge to be granted, and the surrender by Dr Mitchell, were to have reference not only to the £1000 stock which he held in his own name, but also to the £600 of the executry stock.

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But be that as it may, I think there can be no doubt, as I said before, that the arrangement which was sanctioned by the Court is the arrangement which the liquidators now contend must receive effect, and that any correspondence of this character which takes place in the interval cannot, I think, interfere with what is the proper arrangement between the parties; and I am therefore of opinion that Dr Mitchell is bound to assign to the liquidators all claims competent to him, in respect of the £600 stock, on any future surplus of the assets of the bank, or of the calls made or to be made by the liquidators, and all claims competent to him, in respect of the said £600 stock, against the contributories of the bank and others,—that is to say, the first question submitted to us must be answered in the affirmative, and the second question in the negative.

LORD DEAS concurred.

LORD MURE.—I am of the same opinion. There is certainly some little difficulty created by the terms of the letter of 25th June, because there is a stipulation in it that the assignation shall be of a special claim of relief, and not of all claims competent to Dr Mitchell, or to become competent to him. It is contended that by that letter the liquidators conceded any claim of the nature of that here in question. Now, as your Lordship has remarked, there is no doubt something in the expression used in the letter which is calculated to give rise to the argument that the question is foreclosed, and that it is not now open to inquire into the true nature of the transaction by way of compromise of which the Court approved in November 1879. But I agree with your Lordships that the terms of the letter are not sufficient in the circumstances to prevent the question from being raised as it now is, and assuming the question to be open, I am of opinion that the liquidators are right in their present contention. It appears to me, having regard to the minute and relative declarations upon which all the settlements by way of compromise proceed, that it is quite plain that those settlements are made upon the distinct understanding that there is to be a complete surrender of the estate of the contributories, actual and contingent, when a discharge is given for a much smaller sum than that actually due. The contributory is to surrender his whole estate. That, I think, is the condition which the terms of the minute and declaration import, and the papers which were laid before us when the compromise was approved of seem to me to imply that there was to be an assignation granted of everything to which Dr Mitchell might have a right or claim in relation to the bank shares here in question. I am therefore of opinion that the questions should be answered in the way proposed by your Lordship.

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LORD SHAND.—I am also satisfied that this question must be answered in the way contended for by the liquidators. It must be kept in view that Dr Mitchell, when called upon to meet the second call upon the £1000 stock held by him, was only able to meet the claim on the footing of a complete surrender of his estate by offering £3800. The debt that he was due was £22,500, so that to the extent of £18,700 he was unable to meet the demand. It would, I think, be very extraordinary that in these circumstances, being unable to pay his debt to the extent of £18,700 to the bank, it should have been part of the arrangement under which he was giving only £3800 that he should have a claim against the bank for the reversion upon other stock that belonged to him, if there should be any such reversion. That view of the case would come to this, that he was getting a discharge to the extent of £18,700, paying nothing for it, and yet reserving a claim against the liquidators for, it might be, £2000 or £3000, payable at a future date by them. Now, such a thing might be done by mistake, but it is quite plain that it could only be by a mistake on the part of the liquidators that any such agreement should have been come to. It must further be observed, as your Lordship has pointed out, that any compromise which proceeded on the footing of surrender must always be under the sanction of this Court. Indeed, Mr Haldane, in the letter which has been already referred to, explains that the sanction of the Court must be given to the arrangement; and I am satisfied, as your Lordship is, that the Court did not sanction an arrangement in the terms contended for by Dr Mitchell.

On the question itself, it is quite clear that the parties must have regarded the claim to a possible reversion upon the shares as of some value. It appears very clearly that the parties had before them claims which might arise in respect of this very executry stock, for Mr Haldane stipulated that the bank should have assigned to them any right of relief that Dr Mitchell had in respect of that stock, and it was only because it was made clear that there were no such claims of relief that the assignation was not taken from him. Then, farther, as has been pointed out—and this really is at the basis of the decision of this question—in the memorandum issued to him with a view to his giving a relative declaration and answers, it is expressly said in the most explicit terms that persons who are taking advantage by way of surrender must assign all claims competent to them for participation in any future assets of the bank, and all claims of relief and damages against the directors and officials. These circumstances seem to me to make it conclusive that any claims by Dr Mitchell in respect of this stock must have been included.

The only matter that raises any difficulty is the letter of Mr Haldane, to which your Lordship has referred. That, it is true, no doubt referred only to a discharge of Dr Mitchell in respect of the £1000 of stock, without making special reference to his being also discharged of liability on the £600 stock; but I think this is quite explained by the circumstance that all parties dealt upon the footing that they were satisfied, in the state to which the liquidation had advanced, there would be no further calls on the shareholders,—all parties were satisfied by this time that funds enough to meet the liabilities in respect of the £600 of stock had been received.

It appears to me, then, that, taking the arrangement as a whole, it was this, that on the one hand Dr Mitchell should surrender all that he had,—and one of those assets was his possible claim in respect of this stock—and on the other hand that he should be discharged of all his liability to the bank, for I hold

that even if the liquidators had found it necessary after this date to make a further call upon the shareholders, they would not have been entitled to require Dr Mitchell to pay any further sum upon this £600 of stock. The footing of the arrangement was that he should give up everything he had, and, on the other hand, I hold that the liquidators bound themselves to discharge him of every possible liability in regard to all of the stock. Though one parcel of this stock may have been held by him as executry in a question between him and others, it must be borne in mind that in a question with the bank that did not alter his position. He was in the position of a shareholder personally liable in respect of that stock just as much as in respect of the £1000 of stock, though it was marked as executry stock in a question between him and the beneficiaries, if there were any beneficiaries besides himself. And so, even taking the matter upon Mr Haldane's letter as part of the arrangement as concluded with the liquidators, I think that the bank is right.

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But let us look now to what alone the Court have sanctioned. I have the papers before me. Dr Mitchell was no party, of course, to those proceedings, but he knew that the liquidators must get the sanction of the Court to any arrangement they should make. I find that the note was boxed on 18th November 1879. There is a title, "Complete Surrender," and "there is hereto appended a list of the contributories, marked list A, now proposed to be discharged on making a complete surrender, and paying the value of their estates, or paying a portion thereof, and surrendering the remainder;" and again the list is headed in this way, "List of contributories referred to in the foregoing note who have applied for discharge on making a complete surrender of their estates." Among the persons who so make surrender appears the name of the "Reverend Alexander Mitchell, North Church, Dunfermline," and again the "Reverend Alexander Mitchell, North Church, Dunfermline, as one of the executors of William Mitchell;" and in the relative papers shewing the money payments to be made Dr Mitchell's name occurs both as an individual and in the executry character. It is, therefore, perfectly plain that the only compromise by way of surrender which this Court sanctioned was one in which both parcels of stock were treated together, and in which there was a complete surrender of Dr Mitchell's estate, and a complete surrender of that estate implied an assignation of any claims he might have against the bank, as much in regard to the £600 of stock as in regard to the £1000 of stock.

Upon these grounds, therefore, first, that the arrangement in its substance was an arrangement of the character contended for by the bank, and, secondly and separately, because the only arrangement which the Court have sanctioned is an arrangement of that kind, I am of opinion that the liquidators are entitled to succeed.

THE COURT accordingly answered the first question in the affirmative, and the second in the negative.

DAVIDSON & SYME, W.S.—GILLESPIE & PATTERSON, W.S.—Agents.

No. 38. PETER M'LAREN AND OTHERS (Bryson's Trustees), of the First Part.—
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WILLIAM CLARK, of the Second Part.—*Kinnear—C. S. Dickson.*
 MRS MARY CLARK OR BOYD AND OTHERS, of the Third Part.—*Mackintosh—Pearson.*

ANN CLARK AND OTHERS, of the Fourth Part.—*Kinnear—C. S. Dickson.*

Succession—Vesting—Conveyance to Trustees—Interposed liferent—Destination over.—A trustor directed his trustees to pay to his wife a liferent of his whole estate, so long as she remained a widow, and “within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be,” to convey certain heritable subjects to his wife's nephew, “A, and the heirs of his body, whom failing, to B,” A's brother, “whom failing,” &c. A predeceased the trustor's widow, who had not married again. *Held* that as the deed conferred no right upon A, apart from the direction to convey to him, no right vested in him prior to the date when the conveyance fell to be made.

Succession—Trustee—Direction to sell.—A trustor directed his trustees “twelve months after the death of my said wife and myself,” to convey certain heritable subjects “if not sold as after-mentioned,” to a certain series of heirs. The subjects were burdened with a bond for £2000. He then directed his trustees that should the holders of the bond “resolve to call up their money, and intimate such resolution prior to the expiry of twelve months from the death of the longest liver of my said wife and me,” the property should be sold and the price divided, after payment of the bond, among a slightly different set of heirs. Prior to the death of the testator's widow a person who had right to one half of the bond gave notice to the trustees that he wished payment. The trustees arranged for payment to this creditor on his granting an assignation to another lender, and the property was not sold. *Held* that the calling up of a part of the bond was not in the circumstances the event contemplated by the testator, and that the trustees were not then bound to sell the property.

1st DIVISION.
 M.

A special case was presented for the opinion and judgment of the Court upon two questions arising on the construction of the settlement of the late John Bryson, Bainsford, who died on 22d October 1851.

The settlement conveyed to trustees the testator's whole heritable and moveable estate, and particularly eight properties, which were specially described, with a declaration that the subjects were conveyed in trust for the following purposes:—“First, for payment of all my just and lawful debts and expenses . . . Secondly, I appoint my said trustees to pay to the said Margaret Campbell, my wife, during her survivance and viduity after my death, the free rents, profits, and produce of my said estates, heritable and moveable . . . Fourthly, within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be, I appoint my said trustees, at the expense of the disponees respectively, to dispoise and convey the several remaining subjects before described, with houses and pertinents thereon, as follows, viz.:—The subjects first above disposed” . . . (certain heritable subjects in Abbotsford Place, Glasgow): “Item, the third and seventh above disposed to be conveyed to the said John Bryson Clark and the heirs of his body; whom failing, to the said William Clark; whom failing, to the said George Clark; whom failing, to the said Mary, Ann, and Margaret Bryson Clark and their heirs.”

John Bryson Clark died on 21st January 1870, without leaving heirs of his body, during the survivance of Mrs Margaret Campbell or Bryson, the testator's widow, in whose favour he left a settlement conveying to her his whole interest in her husband's estate. Mrs Margaret Campbell or Bryson died on 19th April 1879, leaving a settlement, under which Mrs Mary Clark or Boyd and others (the third parties) were the residuary legatees.

William Clark (the second party) called upon the trustees of the testator (the first parties) to convey to him the subjects above referred to, third and seventh disposed in Mr Bryson's settlement, as having right to the properties, in consequence of the death of the said John Bryson Clark, without heirs of his body, previously to the death of the said Mrs Margaret Campbell or Bryson. The third parties objected to said conveyance being granted, and maintained that the said properties were carried by the foresaid disposition and assignation and testament of the said John Bryson Clark, and formed part of the estate of the said Mrs Margaret Campbell or Bryson, and as such fell under her settlement.

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A different question arose as to other subjects, as to which the following direction was given in the fourth purpose,—“ Within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be, I appoint my said trustees, at the expense of the disponees respectively, to dispose and convey the several remaining subjects before described, with houses and pertinents thereon as follows, viz. :—The subjects first above disposed ” (certain heritable subjects in Abbotsford Place, Glasgow), “ if not sold as after-mentioned, to be conveyed under the burden of said security (a bond for £2000) to John Bryson, my nephew, residing with me, and the heirs of his body ; whom failing, to William Bryson, his brother ; whom failing, to John Bryson Clark, my wife's nephew, residing with me ; whom failing, to William Clark, his brother ; whom failing, to George Clark, his brother ; whom failing, to his three sisters, Mary, Ann, and Margaret Bryson Clark, all residing in Bainsford, and their heirs. . . . Fifthly, In case the holders of the bond ” (a heritable security for £2000) “ affecting the subjects first above disposed resolve to call up their money, and intimate such resolution prior to the expiry of twelve months from the death of the longest liver of my said wife and me, I appoint my trustees to complete all necessary titles to these subjects, and sell the same in such manner as they shall deem proper, and after paying the debt which affects the same to divide the free proceeds of the price into four equal parts or shares and to pay to the said John Bryson, my nephew, and his heirs one such share, the said William Bryson, my nephew, and his heirs one such share, the said John Bryson Clark and his heirs one such share, and the remaining share to be paid to the said Margaret Campbell ; whom failing, the said John Bryson Clark ; whom failing, his brother William ; whom failing, his brother George ; whom failing, his three sisters, Mary, Ann, and Margaret Bryson Clark and their heirs.”

At the date of the death of the testator in 1851 the bond for £2000 over the Abbotsford Place property, referred to in the fifth purpose of the deceased's trust-disposition and settlement, was held by and vested in John Smith, writer, Falkirk, to the extent of £1000, and John Wilson, of South Bantaskine, Falkirk, to the extent of the remaining £1000. In November 1853 Mr Wilson, by letter addressed to the said John Smith, who was agent for the trustees of the testator, gave notice that he wished payment, and in February 1854 he received payment of his part of the bond, granting assignation of the same in favour of Alexander Macvey, Carron, and Mr Smith's part of the bond was, in July 1854, assigned to Mrs Foord Brackenless, a sister of Mrs Bryson and of Mrs Macvey, wife of the said Mr Alexander Macvey. The trustees under Mr Bryson's trust-disposition and settlement did not sell the Abbotsford Place property when the bond was assigned, as above mentioned, in 1854 ; but the holders having by notarial intimation called up the same on 3d February 1875, the trustees sold the property on 27th February 1875 at the price of £3000 sterling, thus leaving a reversion of £950, after deducting £50 for expense of realising.

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The question then arose whether it had been the duty of the trustees in 1853 to sell the property, and divide the proceeds among John Bryson, William Bryson, John Bryson Clark, and Mrs Bryson, the testator's widow, who were all then alive, or whether the division fell to be made as at 1875, by which time John Bryson Clark had died, and his heirs had become entitled to his share under the deed, his right having lapsed.

On the assumption that the right to John Bryson Clark's share had vested in himself in 1853, the third parties were entitled thereto, as residuary legatees of the late Mrs Bryson, to whom John Bryson Clark had bequeathed his interest. His share was also claimed by Ann Clark, and others (the fourth parties), his next of kin, as beneficiaries entitled to it in their own right under the deed.

Argued for third parties;—The subjects third and seventh disposed vested *a morte testatoris*, and John Bryson Clark took a fee in them during his life. They were therefore carried by his disposition and assignation. If these subjects had been moveable it could not have been maintained that the fee had vested in John Bryson Clark, but in the case of heritable subjects, where the trustees were directed to insert a destination such as this, the presumption was for substitution, not conditional institution.¹ There was a vested right notwithstanding these substitutions.²

(2) It was conceded that no right in the Abbotsford Place property could vest in John Bryson Clark until the bondholders called up their bond. But the fact that one of the bondholders called up his part of the bond was enough to satisfy the condition in purpose five of the trust-deed.

Argued for the second and fourth parties;—(1) The subjects third and seventh disposed had not vested in John Bryson Clark at his death. The conveyance under purpose four was not to be made until both of the spouses were dead. There was a conveyance to trustees, and there was a destination over. All this shewed that the vesting was not *a morte testatoris*.³ (2) On the question as to the Abbotsford Place property: The Court was dealing with a very peculiar clause. The period of vesting was to be determined by what certain strangers, the bondholders, did. That being so, great strictness was required in the interpretation. What the testator contemplated was, that if the whole bond were called up, the trustees would be hampered in their duties, and would have had to effect a new loan to enable them to pay the bond.

At advising.—

LORD PRESIDENT.—The first question which we have here to determine in the construction of the settlements of the late Mr John Bryson, has regard to certain subjects which are generally mentioned as the subjects "3d and 7th disposed." The scheme of the settlement is to convey to trustees by special conveyance a number of different subjects, and also to convey generally any other lands of which the testator was possessed, and his whole moveable estate. The conveyance to trustees is controlled by the purposes of the trust, but there is nothing but what is contained in the purposes of the trust that can be held to give a beneficial right or interest to any one here concerned.

As regards the subjects 3d and 7th disposed, the declaration of the testator's

¹ Russell v. M'Dowall and Selkirk, Feb. 6, 1824, Fac. Coll.; Smith v. Leitch, June 2, 1826, 4 S. 659, aff. Feb. 17, 1829, 3 W. and S. 366.

² Marjoribanks v. Brockie, Feb. 18, 1836, 14 S. 521; Campbell v. Campbell, Dec. 11, 1878, *ante*, vol. vi. p. 310, July 8, 1880, *ante*, vol. vii. H. L. p. 100.

³ Stodart's Trustees v. Stodart, March 5, 1870, 8 Macph. 667; Wright v. Ogilvy, July 9, 1840, 2 D. 1357; Howat's Trustees v. Howat, Dec. 17, 1869, 8 Macph. 337.

intention is embodied in the 4th purpose or direction, for it is rather a direction, and contains provisions as to a number of different subjects. Taking the words which apply to the subjects in question it reads thus:—"Fourthly, within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be, I appoint my said trustees, at the expense of the disponees respectively, to dispoise and convey the several remaining subjects before described, with houses and pertinents thereon as follows, viz.— . . . Item, the subjects 3d and 7th above disposed to be conveyed to the said John Bryson Clark and the heirs of his body; whom failing, to the said William Clark; whom failing, to the said George Clark; whom failing, to the said Mary, Ann, and Margaret Bryson Clark and their heirs." So far as regards John Bryson Clark and his right and interest in the subjects 3d and 7th disposed, it depends on this direction to convey. There are no other words of gift in his favour in this settlement as regards these subjects, and no other direction to the trustees to hold them for his behoof. The only provision in his favour is, that in a certain event the trustees are directed to convey to him and his heirs, whom failing, as above. Now, John Bryson Clark predeceased the term at which this conveyance was to be made. He survived the testator, but predeceased the widow, and the question is, did the fee of these subjects vest in him before that period arrived? I am clearly of opinion that it did not. It is in vain to review the authorities in a question of this kind, but I think they amount to this, that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him, to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period he takes no right under the settlement. I think that is settled law, and applicable to this case, and I am therefore of opinion that John Bryson Clark having died without heirs of his body, the duty of the trustees under the fourth head of the settlement is to convey the subjects in question to William Clark.

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The other question involves considerations of an entirely different kind. The trustees are directed in a certain event to sell a certain subject, and to divide it in a particular way. The subject was that known as the Abbotsford Place subject, and is described in the settlement as the subject first conveyed. Now, in this same 4th head the trustees are directed within twelve months after the death of the longest liver of the testator and his wife, as follows:—"The subjects first above disposed, if not sold as after-mentioned, to be conveyed under the burden of said security" (that was a certain bond for £2000) "to John Bryson, my nephew, residing with me, and the heirs of his body, whom failing, to William Bryson, his brother, whom failing, to John Bryson Clark, my wife's nephew, residing with me, whom failing, to William Clark, his brother, whom failing, to George Clark, his brother, whom failing, to his three sisters, Mary, Ann, and Margaret Bryson Clark, and their heirs." Now, the reservation "if not sold as after-mentioned" refers to a provision in the fifth head of the settlement, that "in case the holders of the bond affecting the subjects first above disposed resolve to call up their money, and intimate such resolution prior to the expiry of twelve months from the death of the longest liver of my said wife and me," the trustees are to complete titles to the subjects and sell the same, and, after paying the debt on them, to divide the proceeds into four equal parts, and to "pay to the said John Bryson, my nephew, and his heirs, one such share, the said William Bryson, my nephew,

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Nov. 26, 1880. one such share, and the remaining share to be paid to the said Margaret
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brother William, whom failing, his brother George," whom failing, to their
three sisters and their heirs. Now, it must be observed that the parties
who are to take benefit in the event of the subjects being sold are different
from those who are to receive a disposition of the subjects if they remain
unsold, and therefore the event on which the sale is made imperative on the
trustees becomes very important in the question of carrying out the in-
tention of the testator. One can hardly suppose that a testator would direct
his trustees to divide the subjects if sold among one class of beneficiaries,
and if not sold, among another class, and leave the question of selling or
not selling to their discretion, or dependent on any mere chance. That does
not seem a very rational purpose, and I should therefore be inclined to think
that the event which was to operate this change in the destination of the subjects
must be one capable of being determinately fixed, and the contemplation of
which influenced the testator's mind in making this change of succession follow
on that event. As the intention is expressed, it seems to be that if the holders
of the bond should press for their money, and the trustees should have to pay
up, the subjects were to be sold to enable them to do so. That seems to have
been the idea present in the testator's mind. The events which actually oc-
curred are described in the 7th article of the case. The bond for £2000 was
held at the testator's death in 1851 by John Smith, writer, Falkirk, to the ex-
tent of £1000, and to the extent of the remaining £1000 by John Wilson.
These gentlemen were both assignees to the portions of the bond which they
respectively held. John Smith was the testator's agent, and continued after his
death to be the agent of the trust. In November 1853 Mr Wilson, by a letter to
Mr Smith, gave notice that he wanted payment of his money, and in February
1854 he was paid, granting at the same time an assignation in favour of Alex-
ander Macvey, Carron, and Mr Smith's part of the bond was, in July 1854,
assigned to Mrs Foord, Brackenless. The trustees did not think this was
the event contemplated in the fifth purpose of the settlement, and accordingly
did not bring the subjects to sale. The question is, whether they were right or
wrong in doing as they did? On the 3d of February 1875 they did sell the
property, and quite rightly, on the bond being called up. But this sale in 1875
could not affect the present question, though it does alter the condition of the
subjects from heritable to moveable, and makes the price divisible as directed in
the deed. But if the trustees were wrong not to sell in 1854 the subjects must
be dealt with as if they had then sold them, and the result would be that Mrs
Bryson, as assignee of John Bryson Clark, would be entitled to a share of the
price under the fifth head of the settlement, because by reason of the sale, if
it had taken place, John Bryson Clark would have been vested in one-fourth
of the price. The whole question is, whether the trustees were right or wrong
in not selling in 1854. I am not disposed to think that any assignation of
this bond necessarily came up to what the testator meant when he spoke of the
bondholders calling up their money, and intimating their resolution to do so.
He seems to have contemplated the whole money being called up, and to have
thought that that would embarrass the trustees in holding the property, and that
so it would be better to sell. Now, all that actually happened was this. Mr Wil-
son, who was an assignee to one half of the bond, said he wanted his money.

There was no very formal intimation of his wish, though I should not be inclined to lay much stress on that, but he got payment and assigned his share to another person. Only a fragment of the bond was called up, and, for aught we know, the other half was not called up at all. I do not think this was what was contemplated by the testator. The trustees were not embarrassed, or necessitated to find £2000 as the testator contemplated they might be. In addition, the information we have as to what occurred in 1853 and 1854 is not very complete or definite. No blame attaches on account of that to the parties, for almost everybody is now dead who could have given any information on the subject; but if our information is imperfect and defective the presumption arises that what the trustees did in their discretion was rightly done. That presumption is only fair. On the whole matter I am disposed to think—and without difficulty—that it has not been made out by the party who contends that a sale should have taken place in 1854, that the events had then occurred which were contemplated by the testator in his settlement.

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I think, therefore, on this point we should answer the third question in favour of the fourth parties, and that disposes of the whole matter.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT pronounced the following interlocutor:—"Find and declare that the properties in Graham's Road and Bainsford, Falkirk, did not vest in John Bryson Clark, and were not carried by his disposition and assignation, or his testament, and that William Clark is entitled to a conveyance of these properties: Find and declare that the fourth parties are entitled to one-fourth share of the reversion of the price of the Abbotsford Place property, and decern."

J. GILLON FERGUSON, W.S.—J. & A. PEDDIE & IVORY, W.S.—Agents.

JOHN MORISON AND JOHN MORISON JUNIOR, Pursuers.—*Trayner—Mackintosh.*

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JOHN SIME THOMSON AND OTHERS (Thomson's Trustees), Defenders.—*Scott—Kinnear—Dickson.*
JAMES STEEL, Defender.

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Arbitration—Objections to decree—Arbiter applying for loan from parties-submitters.—An arbiter who was the intimate friend of both the parties-submitters having, during the dependence of the submission, become involved in financial difficulties, applied to each of the parties successively for a loan of £1000. The loan was refused by both parties, and the submission was proceeded with until a final award was pronounced. In an action of reduction of the award at the instance of one of the parties on the ground of legal corruption on the part of the arbiter in consequence of his actings in connection with the application for a loan, *held* that his application, although in the abstract liable to misconstruction, was not in itself corrupt, and decree of reduction refused accordingly.

FROM August 1869 until December 1877 Messrs John Morison and John Morison junior, wine and spirit merchants, Edinburgh, and John Thomson, brewer there, carried on business as brewers and maltsters in Edinburgh, under the firm of J. & J. Morison & Thomson. In the end of 1877 or beginning of 1878 disputes having arisen among the partners, it was agreed that Mr Thomson should retire from the copartnery, and

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that the amount to be paid him upon so retiring should be fixed by arbitration. The arbiter selected was a Mr James Steel, a mutual friend of both parties, who had formerly himself been a brewer in Glasgow, and was then a wine and spirit merchant there. A formal minute of reference to Mr Steel was entered into on 15th May 1878, the Morisons being parties on the one side and Thomson the party on the other.

On 5th June 1878 Mr Steel duly accepted the office of arbiter, and claims were lodged by the parties to the submission, and a record made up. Mr Thomson died on 17th April 1879, but in terms of the minute of reference the trustees appointed by him in his trust-deed and settlement were sisted as parties to the submission. On several days in May and June 1879 proof was led before the arbiter, and counsel were heard by him upon the whole case. On 28th July 1879 the arbiter issued notes of his proposed award to the parties. Representations were lodged for both parties against certain findings in the notes so issued, and Messrs Morison applied for an oral hearing on their objections to the proposed award. On 14th October 1879 the arbiter issued a draft award, which bore to proceed upon consideration of the representations of parties, and in which, to some extent, his views as expressed in his former notes were modified partly in favour of the Morisons. Thereafter, on 12th November 1879, the arbiter refused to allow an oral hearing. On 4th February 1880 the final decreet-arbitral was pronounced, the result of which was to find a sum of about £12,000 due by the Morisons to Thomson's trustees.

Messrs Morison had, in the meantime, on 12th December 1879, lodged a note of protest against the arbiter proceeding in the submission for certain reasons therein given, which were substantially the same as the reasons of reduction after-mentioned. In this protest they reserved their right to bring a reduction of any award that might be pronounced.

Accordingly, on 27th February 1880, Messrs Morison raised an action of reduction of the award of 4th February. In their condescendence they averred,—(Cond. 6) "While the process was at avizandum with the arbiter, and about the middle of July 1879, he called on Mr Thomas Duncan, of Messrs D. & T. Duncan, wine merchants and commission agents, 100 West Regent Street, Glasgow, the agents in Glasgow for the pursuers, and known to the arbiter to be so, the said Thomas Duncan having been examined as a witness at the proof before the arbiter, and the arbiter explained to the said Thomas Duncan that he wanted to raise a loan of £2500 to enable him to pay an overdraft from the City of Glasgow Bank, for which he was being pressed by the liquidators of the said bank, and that he proposed to ask a Mr Fraser, a wholesale spirit merchant, for £1000 of the amount, and give him, as an inducement, the whole of his trade in spirits, meaning thereby the supplying of the whole of the spirits required to be purchased by the arbiter for the business carried on by him as a wine and spirit merchant and restaurateur at the Cross of Glasgow, and to ask a Mr Dalrymple for £500, and give him the whole of his trade in porter, and to ask the pursuers for £1000, and give them, as an inducement, the whole of his trade in ales, and he accordingly asked the said Thomas Duncan to lay his said proposal before the pursuers, and to keep it private, as he said it was a delicate matter on account of the dependence of the said submission, and to report to him what answer the pursuers should make to it. Mr Duncan called on the pursuers in Edinburgh on or about 21st July 1879, and communicated to them the said proposal. The pursuers were placed in a position of great difficulty by this request from the arbiter for a loan. They were unwilling to entertain it, and Mr Duncan, although anxious to avail himself of an

opportunity of extending the trade of the brewery through his agency, No. 39. did not recommend it. The pursuers felt that in the circumstances in which they were placed towards the arbiter they could not venture to give his proposal a direct refusal, but they informed Mr Duncan that before they could entertain it they would require to know the arbiter's position in respect of his liabilities, and what security he intended to offer. Mr Duncan gave an answer to that effect to the arbiter. The arbiter was not a customer of the said brewery, and he had apparently no other reason for applying to the pursuers for the said loan than that they were parties before him in the said submission, and were deemed by him likely on that account to give him the required loan."

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The pursuers also relied upon certain letters written by the arbiter to them in reference to the loan above-mentioned, and on an application made on 4th November to Mr John Sime Thomson, Mr Thomson's son and one of his trustees, for a loan of a similar sum made after they had declined to make the required advance. They, in addition, adduced as reasons of reduction the refusal by the arbiter to allow an oral hearing on their objections to the notes of award issued by him, and also that there had been a correspondence between the clerk to the submission and the agents for Thomson's trustees as to the amount of the arbiter's fee.

Thomson's trustees defended the action.

Pleaded for the Morisons ;—(1) The arbiter having been guilty of grossly improper and illegal conduct and of corruption within the meaning of the Act of Regulations, 1695, the said decree-arbitral is illegal and corrupt, and ought to be reduced. (2) The loan asked by the arbiter from the pursuers having been of the character of a gift, or at all events involving large benefit to the arbiter, the whole subsequent proceedings in the submission were and are corrupt, illegal, and invalid. (3) The arbiter having acted improperly, illegally, and corruptly in unfairly increasing his original findings in several particulars, in refusing the reasonable request of the pursuers for a further hearing, and in refusing to correct errors pointed out to him by them, and otherwise as condescended on, the said decree-arbitral is corrupt, illegal, and invalid. (5) The arbiter having improperly and illegally bargained with Mr Thomson's trustees for a fee before issuing his decree-arbitral, and, *separatim*, that fee being exorbitant, the said decree-arbitral was in the circumstances obtained by bribery and corruption, and is illegal and invalid. (6) The arbiter having misconducted himself and given reasonable grounds for a suspicion of unfairness, and of having negotiated with both parties to the submission for loans and favours, the said decree-arbitral cannot be sustained.

Pleaded for Thomson's trustees ;—(1) The pursuers having concealed from the defenders the whole matters now alleged by them upon which they found the charge of corruption, until the arbiter had pronounced his final findings, and having continued to plead before him and to take their chance of a more favourable judgment, they are now barred from impugning the decree. (3) The arbiter not having been guilty of corrupt conduct, or of bargaining or taking bribes, and having exercised his functions as arbiter to the best of his ability, the defenders should be assolizied. (4) The defenders being entirely free from any corrupt conduct, and having had no knowledge of the communications between the arbiter and the pursuers, the pursuers are not entitled, in the circumstances, to have the decree-arbitral set aside.

A proof was allowed, from which it appeared that Steel, the arbiter, had been for long on intimate terms with both the Morisons and the late Mr Thomson and his family. That in 1879, Steel having largely overdrawn his account with the City of Glasgow Bank, was being pressed by the

No. 39. liquidators of that bank for payment, and had, after trying in vain to raise money through his agents on the security of certain heritable property of which he was possessed, made the application referred to by the Morisons in their reasons of reduction. Mr Morison junior, who had conducted the negotiations with Steel as to the proposed loan, stated that when the application was made to him in July 1879 he had purposely left the matter open, partly for fear of offending the arbiter, and partly until he saw the result of their representation against the notes issued by him in July.

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On 20th July 1880 the Lord Ordinary pronounced this interlocutor :—
“ Finds that the defender, James Steel, did not act corruptly in pronouncing the decree-arbitral libelled : Finds that the pursuers on or about 16th July 1879, and while the arbitration referred to in the summons was still depending, received from the arbiter, through Mr James Duncan, their agent in Glasgow, an application for a loan of £1000, and that they entertained the proposal, or allowed the said James Steel to proceed in the arbitration, to issue notes of his proposed findings, and to receive representations and answers with reference thereto, in the belief that it was a proposal which could be entertained : And finds that they thereby waived any right which they might have had to found upon the said proposal as disqualifying the arbiter : Finds, further, that the procedure in the submission was regular, and that the pursuers have failed to prove any unfairness, excess of power, or neglect of duty on the part of the arbiter : Therefore repels the reasons of reduction, assoilzies the defenders from the conclusions of the action, and decerns : Finds the defenders entitled to expenses,” &c.*

* “ NOTE.—In May 1878 it was agreed between the pursuers and their now deceased partner, Mr William Thomson, that the latter should retire from the brewing business carried on by them upon payment to him by the pursuers of the value of his share and interest in the concern under the contract of copartnery, and a submission was entered into for the purpose of determining the amount so to be paid. The arbiter named was Mr James Steel, a friend of both parties, and formerly a brewer in Glasgow. He is called as a defender in this action, which craves reduction of the decree-arbitral, dated 4th February 1880. The chief ground of reduction libelled is, that the arbiter acted corruptly in pronouncing his decree, inasmuch as, pending the submission, he made a proposal to the pursuers for a loan of £1000, and was influenced in his final award by the pursuers' conduct in not agreeing to the proposal. There are other grounds stated. In particular, it was urged that he improperly refused to the pursuers an oral hearing upon the proposed findings, and that he communicated to the parties before the decree-arbitral was signed, through the clerk to the reference, the amount of the fee which he expected as arbiter. But, as the refusal of an oral hearing was after written representations and answers for both parties upon the subject had been received and considered, the Lord Ordinary is of opinion that the case is not one in which such refusal affords a ground of reduction. It is not suggested that the pursuers had less opportunity of being heard than the other party, and it appears to the Lord Ordinary that both parties were allowed abundant opportunity of submitting their views. And, as regards the communication about the arbiter's fee, it is sufficient to say that it took place after the award had been finally settled, and in consequence of an inquiry at the clerk to the reference ; it was not a case of bargaining about the fee pending the submission.

“ But the proceedings with reference to the arbiter's proposal for a loan require to be more particularly considered. The facts are as follows :—The arbiter had heard counsel for the parties on 16th June 1879, after the conclusion of the proof, and he then proceeded to consider his decision. He appears to have made a very full investigation, and, as his proposed findings were issued on 28th July,

The Morisons reclaimed.

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Argued for them;—On the facts of the case, as disclosed in the proof, a

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his statement, that on 16th July he had substantially settled with the clerk to the reference the general principles of his award, is probably correct. On that day (16th July) he went to Mr Duncan, the agent in Glasgow for the pursuers' brewery, and inquired as to the probability of the pursuers being able and willing to lend him £1000 on the security of property, which he valued at £22,000, but which was already burdened to the extent of £16,000, and on the further security of his beer business, which he estimated as worth to a brewer about £400 or £500 a-year. The result was that Mr Duncan wrote on that day to the pursuers the letter No. 440 of process. Although marked private, it is evident that Mr Duncan saw no impropriety in such a proposal. For he not only transmitted it without hesitation, but explained, in answer to the Lord Ordinary, that he saw no objection to the transaction except that it was not a good investment. There is no doubt that Mr Steel was pressed for money at the time, owing to his debt to the City of Glasgow Bank (to which he owed £3000, for which decree had been taken); but his unwillingness to sell his property at that time is very intelligible, and there is no reason to doubt that he had a fair-going business, and some reason to think that his credit was not so bad but that he might look for assistance from friends upon such security as he could offer. He had already been promised £1500 by two friends upon the security of his wine and porter business. And, on the whole, the Lord Ordinary is satisfied, both upon his own evidence and the other evidence in the case, that there was no corrupt idea or consciousness of impropriety in the mind of Mr Steel in making the proposal.

"The question remains, however, whether at any subsequent stage of the proceedings, prior to his final award, he acted corruptly in connection with this matter of the proposed loan, or allowed himself to be influenced by the pursuers' conduct in regard to it. What happened was, that he personally saw the pursuers on the subject. He states that he did not see them until after the proposed findings were in their hands, and gives a reason for that impression. But the Lord Ordinary is not disposed to doubt the accuracy of the pursuers' statement, that he saw them both on the 21st July and in the beginning of August, about eight days after the proposed findings were issued. The way in which the pursuers treated the proposal is not satisfactory. They say that they felt at once that the proposal placed them in a situation of delicacy and embarrassment; but that they did not like to offend the arbiter by refusing to entertain his proposal, and accordingly professed to entertain it, and to be desirous of receiving further information as to the securities offered. They allowed him to leave under the idea that he would have the loan, if the securities were satisfactory. Before Mr Steel's visit in the beginning of August they had consulted their law-agent on the subject, and he had told them at once to let the arbiter know that the proposal could not be entertained during the dependence of the submission. This was very proper advice, and the Lord Ordinary sees no reason why the pursuers should not have acted on it. There was no awkwardness whatever in their letting Mr Steel know that they had been so advised. They had no right to assume that he would be offended at them for doing so, and no reason to fear him if he did take offence, and act unjustly, in consequence of their doing what was right. Mr Steel might have exposed himself to an objection as arbiter by his indiscreet conduct. But they were not entitled to hoard up the objection, and to allow him to go on in the belief that the pursuers, as well as himself, felt no difficulty in treating for the loan, as a matter which should not affect in any way the arbitration proceedings. Instead of doing so, however, they allowed him to go on in ignorance of the advice they had got, and of the feeling of delicacy and embarrassment which they say troubled them. Mr Morison junior went to Glasgow to see Mr Steel on the subject about 22d August. At that time, if not sooner, it was known that the pursuers were to put in a representation against the proposed findings; and on that occasion Mr Steel gave Mr Morison junior to understand that the loan proposal would have to wait until the arbitration was settled; and nothing more was said or done about the matter until after

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clear case of corruption was made out. This arbiter, having found it impossible to raise money in the ordinary way, applied to one of the parties-submitters before him for a loan on unmarketable security, and, when refused the accommodation, used his utmost endeavour to injure the party declining to help him. Any such actings as had here taken place were sufficient to invalidate an award.¹ Where it was evident that an arbiter intended to use his office for his own profit it was unnecessary for the party challenging his award to connect the corrupt state of his mind with any particular part of the award. It was therefore unnecessary for the pursuers to shew exactly wherein they were damaged. The corrupt intention was enough.² The fact also that a rehearing was refused in the circumstances was sufficient ground for setting aside the award.³

14th October, when the arbiter issued the interlocutor or note No. 84 of process, disposing of the representations, and of the question of expenses in the arbitration. The terms of that interlocutor or note shew that the arbiter had fully considered the matters brought before him in the representations, and then finally committed himself to the views (to a considerable extent favourable to the pursuers) upon which his valuation proceeded. The alterations which he made were insignificant, and are explained. The letters of 2d and 4th November, printed in Cond. 12, were thus written after the arbiter had not only intimated his decision, but had disposed of the representations on both sides, and of the matter of expenses. The pursuers' note of 11th November asking an oral hearing was, in the Lord Ordinary's opinion, quite legitimately refused; and the evidence affords no support to the allegation that it was issued under feelings of irritation on account of the pursuers' refusal of the arbiter's request for a loan. The letter of 13th November shews no irritation whatever; and on 27th November the arbiter issued the interlocutor No. 86 of process in reference to a point which had occurred in preparing the decree-arbitral as to the form of the decerniture. It was not until 12th December that the pursuers lodged their note protesting against the arbiter proceeding farther in the reference.

"The Lord Ordinary is of opinion that the pursuers, unless they could have proved actual corruption on the part of the arbiter (which they have failed to do), had previously waived any right which they might have had to allege that the arbiter, by the mere fact of his proposal for a loan, had disqualified himself from acting as arbiter. The mere statement of the facts, as disclosed in the proceedings, and in the evidence of the pursuers themselves, appears sufficient to shew this.

"It is upon these views of the case that the Lord Ordinary has pronounced the foregoing interlocutor. He considers it unnecessary to go into the details of the proof. But it is proper to add that the evidence of the leading witnesses was, in his opinion, creditably free from any attempt at exaggeration. The pursuers did not in the least conceal their unfortunate want of candour and sincerity in their communications with Mr Steel. And Mr Steel, on the other hand, while he admitted, under the searching examination through which he was put, his consciousness now of the indiscretion he committed in opening such a proposal before the arbitration was finally settled, gave his evidence in such a manner as to convince the Lord Ordinary that he was entirely free from corrupt motive.

"The evidence relating to the proposal to Mr Thomson on 4th November really throws no additional light on the matter. Before that date the arbiter had finally intimated his decision, and his proposal of the loan to Mr Thomson, when he ascertained that the pursuers were not going on with it, does not appear to the Lord Ordinary, in the whole circumstances, to afford evidence of corruption, or of any such misconduct as should vitiate the decree-arbitral."

¹ Act of Regulations, 1695; *Beddow v. Beddow*, April 17, 1878, L. R., 9 Chanc. Div., 89.

² *Elliot v. Elliot*, Dec. 15, 1789, M. 668; *M'Kenzie v. Clark*, Dec. 19, 1828, 7 Sh. 215.

³ *Mitchell v. Cable*, June 17, 1848, 10 D. 1297, 20 Scot. Jur. 476.

Argued for Thomson's trustees;—The only possible ground for objection here was the application for a loan. That was, at the worst, a mere irregularity, and, as such, would never found a reduction of the award.¹

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At advising,—

LORD JUSTICE-CLERK.—A dispute arose between the partners in this brewing business, the course of which it is unnecessary to follow. It suffices to say that finally it was agreed that the amount to be paid to Mr Thomson on his retiring from the firm was to be fixed by arbitration. The arbiter selected was a Mr Steel, who had been at one time employed in a similar business, and who, therefore, was presumably familiar with the details of such a concern. The reference was adjusted and entered into in May 1878. In the course of the next year, Steel, the arbiter, got into difficulties owing to the failure of the City of Glasgow Bank, with which he was involved, and he proposed, in July 1879, to borrow £1000 from the Morisons, one of the parties-submitters before him in the reference. To this request he received no definite answer until the following November. Mr Morison junior says, however, in his evidence that he, to some extent purposely, left Steel, after the interviews in July, under the impression that the loan might be got,—his object in leaving the matter thus apparently open being, he explains, that before deciding he wished to see the nature of the arbiter's final award. In November, however, after becoming acquainted with the terms of the award, he wrote Steel declining to make the desired advance. Steel thereupon made an application for a loan to Mr John Sime Thomson, the son and one of the trustees of the late Mr Thomson, and therefore one of the parties-submitters. Mr Thomson, under the advice of his agent, declined to give the loan, the obstacle being that as a party to the reference he could not enter into such a transaction with the arbiter pending the proceedings. Neither of the parties, however, proposed to put a stop to the reference, or in any way to suspend the proceedings, until 17th December 1879, when the pursuers lodged a protest against the arbiter proceeding.

The question now raised for our decision is whether these applications made by the arbiter to the parties-submitters render nugatory the award, and whether these actings on the part of the arbiter were corrupt in the sense of the Act of Regulations.

Apart from this general ground, the award has also been challenged upon two more special grounds—(1) That the arbiter, after issuing the notes of his proposed award, refused an application by one of the parties to be heard orally upon them. That is a ground of challenge which has often been stated to arbiters' awards, but I think that, except in very peculiar circumstances, it is absolutely within the discretion of an arbiter to decide whether he will hear parties of new or not. I am of opinion the arbiter in this case acted rightly in refusing a rehearing. (2) The second objection is as to the correspondence and discussion as to the arbiter's fee; but we have heard no argument on that point, and it is therefore unnecessary to advert to it.

The general question is whether the arbiter approached his decision with a

¹ Morgan v. Morgan, 1832, 1 Dowling, 611; Trowsdale & Son v. Jopp, Nov. 15, 1865, 4 Macph. 31, 38 Scot. Jur. 25; Drew v. Drew, March 8, 1855, 2 Macq. 1, 27 Scot. Jur. 273; Johnston v. Cheape, July 8, 1817, 5 Dow's App. 247; *in re* Hopper, Jan. 17, 1867, L. R., 2 Q. B., 367; Mossey v. Simpson, May 8, 1873, L. R., 16 Eq., 226; Ball on Arbitration, sec. 238.

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clear and impartial mind? Now, as a general proposition, in such a case, I should say that if the act alleged against the arbiter be in itself corrupt in the sense of the Act of Regulations,—that is to say illegal in itself—it would not be necessary to shew that it had a direct effect upon the mind of the arbiter, and had influenced it in order to support a challenge of his award. I think that any act which was in its nature sufficient unduly to bias the *quasi* judicial mind of an arbiter would be enough to justify a challenge of his award. But if the act be indifferent in itself, and of a nature not necessarily unduly to influence the arbiter's mind, then it will fall upon the challenger to shew, at all events, that the act may reasonably be presumed to have left the arbiter's mind deprived of the free and impartial quality essential in his position. The cases of *Elliot* and *Mackenzie* illustrate the distinction which I desire to make. The questions in these cases were not whether the actings of the arbiters were corrupt, but whether the arbiters had not so mixed themselves up with the subjects in dispute as to preclude them from being in the position of viewing them dispassionately. This case is in an entirely different position. The act objected to is one entirely apart from and independent of the arbitration. The question really comes to be whether anything occurred in this arbitration which necessarily would influence the mind of the arbiter. I have read the evidence carefully, and, to my mind, there is nothing which is necessarily to be presumed, or can be presumed to have unduly biassed the mind of the arbiter. I think that there is nothing illegal in itself in a business transaction between an arbiter and the parties-submitters before him, provided the transaction has nothing to do with the arbitration. It may be that the proceeding as now attempted to be construed appears to be an improper one, but it had no connection with the arbitration, and although, in any view, it may not be entirely excusable in the abstract, still I have no doubt that none of the parties at first had any idea that it had any bearing on the question submitted, or on the award. When the arbiter made the applications for this loan time was of the utmost importance to him. He had already exhausted all the ordinary channels through which a loan could be obtained. I do not think that we are bound to assume that he went to these persons, who were old and intimate friends, in order to be influenced in his award by the success or non-success of his application. We are rather bound to hold, on the other hand, that he went to them because he had to get the money, and that at once. Morison gave him no definite answer for three or four months, and then after becoming aware of the terms of the award as finally adjusted, he stated that he was unable to give the required advance. That was urged upon us as proof that he waited until he knew the nature of the final award, for fear that an answer in the negative before then might have an effect upon the arbiter's mind unfavourable to him. But I am inclined to give a more simple explanation of his behaviour. When he became convinced that the arbiter was going to find so large a sum due by him to Thomson's trustees, he thought that he would have no money left available for the loan. Therefore, as regards Morison, I think there is no ground for supposing that the arbiter's mind was influenced one way or the other. As regards Thomson, before the arbiter applied to him at all his mind was fully made up as to his award, and the terms of the award had been communicated to the parties. The arbitration, it is true, was not finally and formally at end, but the lines upon which the award was to be given were definitely fixed. On the whole matter, I am of opinion that there is not here any solid ground for imputing corruption to any

of the parties. It may be that the arbiter committed a mistake in not considering the aspect which his application might be made to bear, but I think he was thoroughly honest.

The other ground on which the Lord Ordinary proceeds, viz. that Morison waived any right he might have had to challenge the award, involves principles upon which I am not prepared to rest my judgment, although I am willing to acquiesce in the interlocutor as it stands. It seems to me that if a corrupt act had been done by the arbiter it would take a great deal of acquiescence to bar challenge of his award. Nothing, however, in this case really occurred to suggest dishonesty on the part of the arbiter to the mind of Morison, and accordingly the arbitration was allowed to go on to the close. For the reasons I have given, I am for adhering to the Lord Ordinary's interlocutor.

LORD GIFFORD concurred.

LORD YOUNG.—I am of the same opinion also, and I do not know whether I may add, concurring as I do most thoroughly in your Lordship's observations on the question of waiver, that perhaps the best form for our interlocutor to take would be to repel the reasons of reduction. I say so because I feel a difficulty as to the Lord Ordinary's second ground of judgment, viz. waiver. I feel so strongly that this arbiter was quite honest, that I am not willing to suggest that there was any corrupt act on his part which could be waived.

LORD JUSTICE-CLERK.—That is certainly the form of interlocutor which I should have preferred, but I am not prepared to recall the Lord Ordinary's interlocutor as if we in any way disagreed with him.

THE COURT adhered.

JOHN GILL, S.S.C.—NISBET & MATHISON, S.S.C.—Agents.

JAMES HERON (Pursuer), Appellant.—*Keir*—*A. J. Young*.
WILLIAM A. GRAY (Defender), Respondent.—*Kinnear*—*Darling*.

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Property—Urban tenement—Implied servitude of light and air.—A property company purchased, in one lot, a villa and surrounding garden ground. Thereafter they divided the subjects into two lots, the first of which consisted of a shop, which they had erected on the plot of ground lying to the front of the villa, and two cellars or warerooms—part of the sunk storey of the villa—which, for more than forty years, had received light and air through two small windows in the south gable, which overlooked the plot of ground adjoining. This lot the company sold to A, together with the *solum* of the piece of ground on which the shop was built, and a right of property in common with the proprietors of the villa in the *solum* of the piece of ground on which the warerooms were situated. In the following year the company sold the remainder of the property to B. This lot consisted of the villa, other than the part of the sunk storey already sold to A, together with a right of property, along with A, in the *solum* of the piece of ground on which said house was built, together with the piece of ground, or green, lying to the back and south of the house, with right to make use of it as absolute owner, it being thereby declared that there was no restriction against building, or any right of servitude affecting the said piece of ground. B erected on the piece of ground to the south of the house a wooden screen, in such a manner as to obstruct the windows of the warerooms. *Held* that he was not entitled so to obstruct the windows, on the ground that A's title gave him, as at the date of purchase, an implied servitude of air and light over the said plot of ground, and

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that the subsequent declaration in B's title, that there was not "any right of servitude affecting the said piece of ground," could not override the implied servitude.

By disposition dated 10th and 11th May 1877, and recorded in the division of the General Register of Sasines applicable to the county of Edinburgh, 16th May 1877, Lauchlan M'Kinnon junior, advocate in Aberdeen, sold and disposed to and in favour of the Scottish National Heritable Property Company (Limited), and their assignees, All and Whole "that lot of ground of the lands of Belleville, and house built thereon, No. 1 Arniston Place, Edinburgh." This house and ground had been occupied as an undivided villa residence since the year 1810, when the ground was feued by the then proprietor, and the house built. When the property company purchased the subjects there were in the ground storey of the house, and in the south gable thereof, certain openings, for the purpose of admitting light and air to the sunk flat. These apertures, or windows, overlooked a piece of ground which lay to the south, between the house and Salisbury Road. The property company divided the property into two lots, of which the first consisted of a shop, which they built on a piece of ground lying to the west of the house, between it and Arniston Place, and of the western or front portion of the sunk flat of the house. The sunk flat was intended for warerooms for the new shop, and to make it suitable for this purpose the two apertures or windows above mentioned were enlarged to the size of three feet square. The second lot into which the subjects were divided consisted of the remaining portion of the old house, together with, *inter alia*, the piece of ground lying to the south thereof.

By disposition dated 12th and 19th, and recorded in said Register of Sasines 25th June 1878, the Scottish National Heritable Property Company, in consideration of the price of £1750, sold and disposed to and in favour of James Heron, his heirs and assignees whomsoever, heritably and irredeemably, "All and Whole that shop No. 1A Arniston Place, Newington, Edinburgh, situated at the corner of Arniston Place and Salisbury Road, there, together with the cellar underneath said shop, and together also with the two cellars, or warerooms, forming the western or front portions of the sunk or ground flat of the dwelling-houses Nos. 1 and 2 Arniston Place, now communicating with the said shop, with entrance to the said two cellars or warerooms from the said shop, together with (first) the *solum* of the piece of ground on which the said shop is built; (second) a right of property in common with the proprietors of the said dwelling-houses to the *solum* of the piece of ground on which the said cellars or warerooms are situated; which shop, with the cellar immediately below the same, and entrance to the said two cellars or warerooms, are erected upon part of the area of ground lying to the front of the said last mentioned dwelling-house, and the southmost of the said two back cellars or warerooms forms part of the said dwelling-house, and which dwelling-house, with the ground pertaining thereto, is described in the titles."

By disposition dated 10th and recorded 11th November 1879 William Affleck Gray, doctor of medicine, in consideration of the price of £800, acquired from the company the remaining portion of the dwelling-house, viz., "All and Whole the self-contained dwelling-house No. 1 Arniston Place, now entering by No. 23 Salisbury Road, Edinburgh, in the county of Edinburgh, but excepting always the front or westmost portion of the sunk storey of said dwelling-house, disposed by said company to James Heron, merchant, No. 5 Arniston Place, Edinburgh, along with the shop at the corner of Arniston Place, and Salisbury Road, Edinburgh, with access to the said dwelling-house by the passage and stair leading thereto from Salisbury Road, together with a right of property, along with the

said James Heron, to the *solum* of the piece of ground on which the said house is built; together with the piece of ground, or green, lying to the east and south of the said dwelling-house, as the same is now enclosed, with right to make use of it as absolute owner, it being hereby declared that there is no restriction against building on or any right of servitude affecting the said piece of ground.”

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It appeared from the record that a question having arisen between Mr Heron and Dr Gray as to whether the disposition granted to the latter gave him the sole right, unburdened by any servitude, to the piece of ground lying south of the house, into which the windows of the warehouse belonging to Heron looked, Dr Gray, for the purpose of trying the question, “placed on the said area of ground a wooden structure, or boarding, hard against the said southmost gable of said house, and for the sole purpose, and with the effect, of closing up the windows in that division of said gable which forms the southmost wall of said warerooms.”

Thereupon Heron presented a petition in the Sheriff Court at Edinburgh praying the Court to find and declare that he had a right of property in common with Dr Gray to the *solum* of the said piece of ground; and further “to find and declare that the defender has no right to make any erections or buildings on said area of ground which will in any way interfere with, affect, or injure the pursuer’s property, which forms the westmost or front portion of the sunk or ground flat of the said dwelling-house No. 1 Arniston Place, Edinburgh, now used as warerooms, or the pursuer’s rights in said area of ground; and to find and declare that the wooden structure or boarding placed by the defender on the said area of ground, near or against that part of the southmost gable of said dwelling-house which forms the southmost wall of the said warerooms (the western part of the ground flat of said house) belonging to pursuer, is illegal and unwarrantable, and to ordain the defender to remove it forthwith.”

The screen having been put up solely with the view of asserting the defender’s right to build on the said piece of ground was removed by him when the case came into Court.

The pursuer pleaded, *inter alia*;—(2) The pursuer, in respect of the circumstances condescended on, and particularly of the disposition in his favour, is proprietor of and entitled to the rights and others sought to be declared, including the rights of light and ventilation mentioned, and as these are now interfered with he is entitled to the decree craved. (3) In respect of the terms of the titles, and particularly of said deed of agreement, there exists a servitude on the ground in dispute which bars the defender’s alleged rights, and entitles the pursuer to the findings craved. (6) In any event, the pursuer has at least a right of common interest in the area in question, and is therefore entitled to decree of removing and prohibition as craved, with expenses.

The defender pleaded, *inter alia*;—(1) The pursuer having, under his titles, no right of property in or servitude affecting the ground upon which the erections complained of have been made, and his averments of common proprietary or other right therein being unfounded, is not entitled to decree of declarator in terms of the prayer of the petition, and the defender should therefore be assoilzied with expenses. (2) The defender, as absolute and unrestricted proprietor of the ground in question in virtue of his titles, is entitled to make the erections complained of, and should therefore be assoilzied from the prayer of the petition.

On 2d August, 1880, the Sheriff-substitute (Hallard) issued the following interlocutor:—“Finds that the present question relates to an enclosed piece of ground lying between Salisbury Road and the south gable of the house No. 1 Arniston Place: Finds that said piece of ground is not in-

No. 40. cluded within the pursuer's title, and that he has no right of property, either exclusive or common, thereto, nor any servitude thereon : There-
 Nov. 27, 1880. fore sustains the defences : Assoilzies the defender," &c.
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The pursuer appealed to the Sheriff (Davidson), who, on 4th October 1880, adhered.

The pursuer appealed to the Court of Session, but did not there contend that he had a right of common property in the said piece of ground.

Argued for the pursuer ;—The windows in the gable were made before the property was subdivided by the Property Company, and a right to light and air was implied in the sale of the warerooms as a separate tenement.¹ In every sale of land all incidental rights essential to the reasonable enjoyment of the subject of the sale are implied.²

Argued for defender ;—The defender's title clearly shewed that there was no servitude over the piece of ground in question. A negative urban servitude such as was here claimed could not be constituted by prescription.³

LORD GIFFORD.—This is a question as to a right of property in and servitude over a small piece of ground situated to the south of Dr Gray's house in Salisbury Road. The piece of ground is very limited in extent, and the pursuer, Mr Heron, claims, first, a right of property over it, and, alternatively, and in addition, he asks the Court to find and declare that the defender has no right to make any erections or buildings on the said piece of ground which will in any way interfere with his, the pursuer's, property or rights. I have come to be of the opinion that both parties are wrong in the strong contentions which they have advanced. I am of opinion that the pursuer has no right of common property in this piece of ground, but that the *solum* is the exclusive property of Dr Gray. But, on the other hand, I think that the pursuer, being the proprietor of the sunk storey, is entitled to a right of servitude of light for his warerooms. Originally the whole property consisted of a dwelling-house with a sunk flat, and also a front plot of ground. This property came into the hands of the National Heritable Property Company, who altered its condition, and built on the front plot a shop, and then sold the new shop and the sunk flat of the old house to Mr Heron, and the remaining part of the dwelling-house to Dr Gray. The question is, what right has the proprietor of the shop to any portion of the ground to the south of the original dwelling-house—is it a right of property or a servitude, or neither ? In order to answer this question we must look to the title-deeds. The first was granted in 1878 to Mr Heron, the second to Dr Gray in 1879. By his conveyance Mr Heron got the shop together with the cellar below the shop. He also got the two warerooms under the dwelling-house and the *solum* of the ground on which the shop was built. He also got a right of property in common with the proprietors of the dwelling-house to the *solum* of the ground on which the warerooms were situated.

On the other hand, Gray in 1879 acquired the dwelling-house, "excepting always the front or westmost portion of the sunk storey of said dwelling-house disposed to James Heron, . . . together with a right of property

¹ Ewart v. Cochranes, Jan. 13, 1860, 22 D. 358, aff. March 25, 1861, 23 D. (H. L.) 3 ; Gow's Trustees v. Mealls, May 28, 1875, *ante*, vol. ii., p. 729.

² McLaren v. City of Glasgow Union Railway Co., July 10, 1878, *ante*, vol. v., p. 1042 ; Palmer v. Fletcher, 1 Lewin, 122 ; Swanborough v. Coventry, Nov. 13, 1832, 9 Bingham, 305.

³ Stair ii., 7, 9 ; Alexander v. Butchart, Nov. 25, 1875, *ante*, vol. iii., p. 156.

along with the said James Heron to the *solum* of the piece of ground on which the said house is built, together with the piece of ground or green lying to the east and south of the said dwelling-house, as the same is now enclosed, with right to make use of it as absolute owner, it being hereby declared that there is no restriction against building on or any right of servitude affecting the said piece of ground." Now, if Dr Gray had got his right first, and recorded it, he would have had a very strong case for saying, "I have this piece of ground absolutely, and you can claim neither property nor servitude over it," but the question must be determined as at the date of the first infeftment, viz., Heron's, and we must ask what were the rights he got by his disposition. Now, we are familiar with the law as to this kind of urban property. It is a common thing in Edinburgh to erect a property with a main-door and a sunk area, and then separate flats above. It is not unusual in such cases to give the proprietor of the main-door tenement an exclusive right not only to the plot in front but to the green behind. Nothing is said as to servitude, but there is an implied servitude in all such cases in favour of the proprietors of the upper flats, that the proprietor of the main-door house shall not erect buildings in the back-green so as to obstruct their lights. In one case the proprietor of the lower storey wished to build on the back-green, and, after remitting to the Dean of Guild to report whether the lights of the upper flats were interfered with, we stopped the operations on a report saying that they were. That applies directly to the present case. No doubt there is here given to Heron not the upper flat but a portion of the lower, but that portion is lighted by what were once small windows, and which are now windows three feet square. It is plain Heron was intended to have these windows, and access to the light and air they give. There is no right in Gray to block them up. On the other hand, Heron's claim is clearly untenable—the only proprietor of the ground is Dr Gray, and he may pave it or do what he likes with it, the only restriction on his use of it being that he shall not interrupt the light and air which comes to the pursuer's windows. He must have had this in view when he obtained a declaration in his titles that there was no servitude over the ground. That may or may not give him a right of recourse against his author, but will make no difference in a question with Heron. The windows have existed more than forty years, though they are now larger than they were. The proprietor of the shop is entitled to the benefit and use of them. This leads to a modification of the Sheriff's judgment. He is right in not affirming common property. The true view of the case is that there is an implied servitude of light, and that Dr Gray, though proprietor of the *solum*, is not entitled to cut off that light.

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THE LORD JUSTICE-CLERK and LORD YOUNG concurred.

THE COURT recalled the Sheriff's interlocutor, and found that the defender was sole and exclusive proprietor of the area of ground in question, but subject always to an implied servitude of light and air in favour of the pursuer as proprietor of a portion of the dwelling-house, No. 1 Arniston Place, and found and declared that the defender was not entitled to make any erection on the said area of ground that would in any way obstruct the access of light or air to the property of the pursuer, &c.

W. ADAM & WINCHESTER, S.S.C.—A. & G. V. MANN, S.S.C.—Agents.

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JOHN JAMES HOPE JOHNSTONE, Petitioner.—*Lord-Adv. M'Laren—**Johnstone—Pearson.*

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PERCY ALEXANDER JOHN HOPE JOHNSTONE AND OTHERS, Respondents.—
Kinnear—Keir.

Entail—Heir in possession—Provisions to children, authority to charge fee and rents with, by bond and disposition in security—Entail Amendment Act, 1848 (11 and 12 Vict. c. 36), sec. 21.—A deed of entail dated in 1799 conferred power upon the heirs of entail in possession to grant provisions to their younger children, not exceeding three years' free rents of the estates, provided that the bonds of provision should "contain this express condition, that the sums contained in the same shall not be exigible at once but shall be payable only by yearly instalments of ten per cent of the capital sum of such provisions, together with the interest due at the time." There was farther a declaration that the heirs in possession should pay regularly the instalments as they fell due, with interest, and should forfeit all right to the estate in the event of their allowing the instalments to fall three years in arrear, but there was no irritancy of the bonds.

In 1819 the heir of entail in possession granted a bond of provision in favour of his younger children for "a sum equal to three years' free rent of the said lands."

This provision became payable on the granter's death in 1876, and the succeeding heir of entail applied to the Court for power to charge the fee and rents of the estate with the amount by bond and disposition in security under the 21st section of the Rutherford Act.*

Held that notwithstanding that the amount of the provisions was payable in ten yearly instalments the 21st section applied, and petition granted.

Case of *Campbell*, 26th January 1854, 16 D. 396, *distinguished*.

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Lord Lee.
R.

JAMES HOPE JOHNSTONE, Earl of Hopetoun, by deed of trust dated 11th April 1793, conveyed the Annandale estates to trustees for the purpose of paying off the debts, burdens, and provisions affecting these estates in manner therein provided, and then of conveying them to a series of heirs therein named, or to any other series of heirs which he might point out by any future deed, but under the proviso that, should he at any time choose to make an entail of the said estates the disposition to be granted

* The Entail Amendment Act, 1848 (11 and 12 Vict. c. 36), sec. 21, enacts, that "In all cases where an heir of entail in possession of an entailed estate in Scotland shall be liable to pay or to provide by assignation of the rents and proceeds of such estate for any sum or sums of money granted by any former heir of entail by way of provisions to younger children, in terms of the said recited Act passed in the fifth year of the reign of his Majesty King George the Fourth, or in virtue of the powers to that effect contained in any deed of entail under which the heir of entail in possession holds, . . . it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate other than the mansion-house, offices, and policies thereof, or to charge the fee and rents of any portion of such estate other than as aforesaid, with the amount of such provisions, by granting bond and disposition in security over such estate, or such portion thereof other than as aforesaid, for such amount, with the due and legal interest thereof from the date of such bond and disposition in security, or any subsequent date, till repaid, and with corresponding penalties; and such bond and disposition in security may be in ordinary form binding the granter and his heirs of entail in their order successively to repay the principal sum therein, with interest and penalties as aforesaid, and may contain all clauses usual in bonds and dispositions in security granted over estates in Scotland held in fee-simple."

by his trustees should contain "all the conditions, provisions, limitations, prohibitions, clauses irritant and resolute, exceptions, powers, and faculties, and all other clauses whatsoever," to be appointed by such deed of entail.

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This deed of trust was subsequently modified by supplementary deeds executed in 1800 and 1813. The Earl died in 1816.

In 1799 he had executed a deed of strict entail of the Annandale estates, proceeding on the narrative of the deed of trust of 1793, and under burden always of the trust-conveyance contained in that deed. This deed of entail conferred a power on the heirs of entail in possession to provide their children other than the heir succeeding to the estates "in competent portions and provisions, bearing interest from the death of the granter," but providing that the whole sum to be granted as portions and provisions to such younger children should not exceed three years' free rents of the estates; and "providing also that such portions or provisions to younger children as aforesaid shall be secured only by bonds of provision, binding for the regular payment thereof by instalments in manner after mentioned the heir of entail who for the time shall be in possession" of the said estates, "and that such bonds of provision shall contain an express condition that it shall not be in the power of the said younger children or their heirs or assignees to obtain adjudication against" the said estates, "or to use any other method of diligence whatever against the same, except for levying the rent and yearly profits thereof; and that such bonds of provision shall also contain this express condition, that the sums contained in the same shall not be exigible at once, but shall be payable only by yearly instalments of ten per cent of the capital sum of such provisions, together with the interest due at the time," beginning the first payment or consignment of such instalment of ten per cent of the aforesaid provisions, together with the interest due at the time, at the third term of Whitsunday or the third term of Martinmas, whichever shall first happen after the death of the heir in possession who shall have granted the said provisions, and continuing the payment or consignations of an instalment of 10 per cent of such provision, together with the interest due at the time, yearly thereafter, until the whole of such provisions shall be paid off, "and it is hereby specially provided and declared that all and each of the heirs and members of tailie before mentioned in possession of the foresaid" estates "at the time shall pay regularly as they fall due at the terms before mentioned the instalments of 10 per cent of the several provisions which shall have been granted in manner before mentioned, . . . and in no case shall any of the heirs or members of tailie suffer any of the said instalments and interest due along therewith to remain in arrear for three years from the time when he or she by this deed of entail ought to have paid the same."

It was further provided that the bonds of provision to be granted in virtue of this power should have inserted in them "the several conditions herein mentioned" on pain of nullity, and that any heir of entail in possession who should "fail or neglect to insert the several conditions hereinbefore mentioned" in the several bonds of provision to be granted by him, or should grant any other security for payment of the foresaid provisions, "except in the manner hereinbefore directed, or shall omit for three years complete to pay or consign in manner before directed any of the aforesaid instalments of 10 per cent of the aforesaid provisions payable to younger children, with the interest due along therewith, shall immediately amit, lose, and forfeit all right and title which he or she shall have or can pretend to the lands, &c. before mentioned, or any part thereof, and the same shall become void and extinct, and *ipso facto* fall,

No. 41. accresce to and devolve upon the next immediate heir or member of
 Nov. 27, 1880. taillie in manner and under the conditions before mentioned, and such
 Hope John- next immediate heir or member of taillie shall be obliged to establish a
 stone v. Hope right in his or her person by declarator or otherwise within the time
 Johnstone. and in the same manner and under the like irritancy as is hereby provided respecting the other contraventions hereinbefore mentioned."

This deed of entail, though complete in itself, and registered in the Books of Council and Session after the granter's death, was never recorded in the Register of Tailzies, and was never feudalised. After they had cleared the estates of debt and otherwise implemented the trust-purposes the trustees under the trust-deed of 1793 executed two deeds of entail, the first of the main body of the Annandale estates, dated 9th December 1839, and the other of certain outlying properties which they had found it necessary to keep longer in their hands, dated 30th and 31st October and 1st November 1850, in favour of John James Hope Johnstone, eldest son of Lady Ann Johnstone Hope, and grandson of James Hope Johnstone, Earl of Hopetoun, and as such the heir of entail in possession under the deed of entail of 1799. There were inserted in these deeds the destination and whole conditions, prohibitions, clauses irritant and resolute, and other clauses, and in particular those above narrated having reference to children's provisions, contained in the deed of entail of 1799, all as directed by the deed of trust of 1793. These deeds of entail of 1839 and 1850 were duly recorded in the Register of Tailzies, and under these John James Hope Johnstone made up his title to the Annandale estates.

On the occasion of his marriage in 1816 John James Hope Johnstone, who was then heir-apparent of entail to the Annandale estates, his mother, Lady Ann Johnstone Hope, being still alive, bound himself on his succeeding to these estates to grant bond or bonds of provision "in the terms allowed and pointed out by said deed of entail" (of 1799) in favour of the younger children of his marriage, binding himself and the heirs of entail succeeding to him to pay to said younger children "such a sum as is allowed to be provided for the younger children of an heir in possession of said estates by said entail," but particularly providing and declaring that the bonds to be granted for the said provisions should be "made out and executed in exact conformity to the directions for that effect contained in the foresaid deed of entail, . . . so as due obedience may be paid to it in every respect, and no irritancy be incurred."

In implement of this obligation John James Hope Johnstone, after the succession to the estates opened to him by the death of his mother, though subject always to the trust-deed of 1793, and the unrecorded entail of 1799, granted at various dates four different bonds of provision.

First, Bond of provision, dated 11th January 1819, for "a sum equal to three years' free rent of the said lands," &c. This bond, while bearing to be granted in virtue of the powers conferred by the deed of entail of 1799, did not provide for the payment of the provision by instalments of 10 per cent per annum, and did not have inserted in it the whole several conditions anent provisions to children contained in the deed of entail, but merely the condition that it should not be the foundation of adjudication or other diligence against the lands.

Second, Bond of provision, dated 27th December 1839, for £12,000, being one year's free rents in the event of there being one child other than the heir, £24,000, being two years' free rents in the event of their being two children, and £36,000, being three years' free rent in the event of there being three or more children other than the heir. This bond bore to be granted under the powers conferred by the Aberdeen Act, which

had passed in 1824, and by the deed of entail of 1839, and affected only the lands embraced in that entail. It contained no special provision for payment by instalments, and did not engross the various conditions directed to be inserted by the deed of entail.

Third, Supplementary bond of provision, dated 23d December 1853, affecting the lands embraced in the entail of 1850, with provisions of £3750, £7500, and £11,250, according as there were one, two, and three or more children other than the heir, but only to the effect of supplementing the bond of 1839, so as to secure that under the two bonds the full provisions granted by the bond of 1839 should be drawn, but no more. This bond contained a provision for payment by instalments, and that it should not be a foundation for adjudication or other diligence against the lands, but did not engross the other conditions directed by the deed of entail to be inserted.

Fourth, Bond of provision, dated 12th February 1861, granted by virtue of the powers contained in the entails of 1839 and 1850, and in the Aberdeen Act, for £1333, 6s. 8d., £2666, 13s. 4d., or £4000, according as there were one, two, or three or more children other than the heir, and that in addition to the provisions contained in the former bonds. This bond contained a provision for payment by instalments, and that it should not be a foundation for adjudication or other diligence against the estates, but none of the other conditions were directed to be inserted.

John James Hope Johnstone died in 1876, and was succeeded in the Annandale estates by his grandson, John James Hope Johnstone the younger.

John James Hope Johnstone the elder had eight children. The full provisions of £36,000 and £4000, or £40,000 in all, in favour of younger children, were therefore exigible under the bonds of 1839, 1853, and 1861. This sum was, without objection, in 1877, charged on the fee of the estate under the provisions of the Rutherford Act, and of the Entail Amendment Act, 1853.

Three years' free rents of the estates, however, as at the death of John James Hope Johnstone the elder amounted to £56,000, and a claim was made by the younger children, founded on the obligation in their father's marriage-contract of 1816 and on the bond of provision of 1819 and subsequent bonds, for an additional sum of £16,000. An action of declarator and payment was accordingly raised by them against John James Hope Johnstone the younger and the substitute heirs of entail, in which it was found, *inter alia*, "that the said bonds of provision are still to the extent of £16,280, 17s. 9d. valid and effectual against the defender, John James Hope Johnstone, as heir of entail, and the heirs of entail succeeding to him in the said lands and estate."¹

The defender in this action, John James Hope Johnstone the younger, then presented a second petition to charge the fee and rents of the estate with this additional sum of £16,280, 17s. 9d. by granting bond and disposition in security therefor, in terms of the Rutherford Act, 1848 (11 and 12 Vict. c. 36), sec. 21, and the Entail Amendment Act, 1853, 16 and 17 Vict. c. 94, sec. 7.

The Lord Ordinary made a remit to Mr Archibald Steuart, W.S., who, in his report, raised the question as to the petitioner's right to charge the fee of the estates with the sum in question.

Mr Steuart presented for consideration the view that the provisions to which the Aberdeen Act applied were those only granted under the bonds of 1839, 1853, and 1861, and were therefore limited to the £40,000 which

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¹ May 19, 1880, *ante*, vol. vii., p. 766.

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had been already paid and charged; that the balance of £16,000 still due and now sought to be charged was exigible only under the marriage-contract of 1816 and the bond of 1819; that that bond depended for its validity on the deed of entail of 1799 alone, and that the exercise of power thereby must be held to be controlled by the conditions contained in that deed of entail; that whatever, therefore, might have been held had the question been raised with reference to the provision of £40,000, to which the Aberdeen Act applied, it was clear that the condition of the entail that the provisions should only be exigible by ten yearly instalments applied to this balance of £16,000; that if so, the case was ruled by the decision in *Campbell's* case, Jan. 26, 1854, 16 D. 396, 26 Scot. Jur. 188, in which it was held that the 21st section of the Rutherford Act did not contemplate provisions of this qualified nature, but only provisions which, in accordance with the terms of the entail, formed a continuous burden upon the rents of the estate.

The Lord Ordinary, having considered Mr Steuart's report, on 20th June 1880 pronounced this interlocutor:—"Finds that the petitioner is not authorised by the Act 11 and 12 Vict. c. 36, or the other statutes recited in the petition, to charge the fee and rents of the estate with the sum of £16,280, 17s. 9d., as proposed: Therefore refuses the prayer of the petition, and decerns."*

* "NOTE.—. . . It is said in the present case that the petitioner is within the scope of the clause" (the 21st section of the Rutherford Act), "inasmuch as he is liable to pay the balance of the provisions constituted by bond of provision executed by the deceased John James Hope Johnstone, of date 11th January 1819, and the other bonds granted in implement of his marriage-contract, and referred to in the judgment of Lord Young, adhered to by the Second Division of the Court on 19th May 1880. It was contended, on the other hand, on behalf of the next heirs of entail, that under the bonds of provision, and the marriage-contract to which they refer, the petitioner is not liable to pay the sum mentioned in the petition, excepting by instalments of ten per cent per annum, and is therefore not authorised by the clause founded on to charge the amount as a permanent burden on the estate. It was also contended that this point, as to the manner and time of payment, is settled by the terms of the decree contained in the judgment already referred to.

"The Lord Ordinary is of opinion that the contention of the respondents is well founded, and that the petition in its present shape must be refused.

"In the first place, it appears to him that the terms of Lord Young's judgment, adhered to by the Second Division, distinctly constitute the debt against the petitioner, and the heirs of entail succeeding to him, but only 'at the terms and by the instalments, all as specified and provided in said bond of provision.'

"In the second place, the Lord Ordinary is of opinion that according to the sound construction of the bonds of provision no obligation is imposed upon the petitioner to pay the amount found due, otherwise than by instalments, as provided in the marriage-contract to which they relate. The marriage-contract provided that the provisions should be payable in manner mentioned in the deed of entail, and should be made out in exact conformity thereto. But the Lord Ordinary does not doubt, and it was not disputed on the part of the next heirs, that after the date of the Aberdeen Act it was in the power of the deceased Mr Hope Johnstone to grant provisions up to the limit authorised by that statute without the condition of payment by ten yearly instalments required by the deed of entail. The fact is, however, that although the later bonds refer also to the powers of the Aberdeen Act, none of them professes to grant provisions in excess of the obligation contained in the marriage-contract, and the latest of all, which purports to increase the provisions as far as the increase of rental then warranted, makes it an express condition that the 'provisions herein conceived, so far as the same shall be payable out of the lands, teinds, and others contained

The petitioner reclaimed.
At advising,—

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LORD YOUNG.—The petitioner, who, as heir of entail in possession of the estate

in the deed of entail second above mentioned, or from the heir of entail in possession thereof, shall not be exigible at once, but shall be payable only by yearly instalments of ten per cent of the capital sum.' The bond of 1853 contains a similar provision, and the bond of 1819 bears to be granted exclusively under the powers of the deed of entail, and in implement of the marriage-contract. It was suggested that the bond of 1839 might be read by itself, and as creating an obligation under the Aberdeen Act, altogether unsecured by reference to the terms of the marriage-contract. It rather appears to the Lord Ordinary that this bond admits of being so read. But as it professes to be in implement of the marriage-contract, and does not to any further extent than £36,000 free the marriage-contract obligation from the condition of payment by instalments, the Lord Ordinary cannot hold that this bond sanctions the proposed charge of the balance of £16,280, 17s. 9d. It must be kept in view that the petitioner has already been allowed, under a former application referred to in the petition, to charge £40,000 on the fee and rents of the estate, and that the interlocutor of Lord Young expressly decerns for payment of this balance by instalments.

"If the Lord Ordinary's view be well founded it is necessary to look at the terms of the marriage-contract for the purpose of ascertaining the character and conditions of the petitioner's liability for this balance of £16,280, 17s. 9d. This is what the Lord Ordinary understands the Court to have done in decerning for payment of the sum by instalments, as concluded for in the action at the instance of Miss Lucy Hope Johnstone. In so far as the Lord Ordinary may have any right to examine a matter which appears to be already *res judicata*, he may say that the terms of the marriage-contract satisfy him that the obligation of the petitioner, in so far as standing upon that deed, is subject to the condition of payment by yearly instalments of ten per cent in terms of the deed of entail. The marriage-contract distinctly requires that the provisions shall 'be payable in manner mentioned in said deed of entail itself,' and the deed of entail not only imposed the condition of payment by yearly instalments at ten per cent, but provided that any heir who should grant provisions except in the manner therein directed, or should omit for three years to pay or consign in manner therein directed any of the required instalments, should forfeit all right to the estate.

"The result is that the only obligation imposed on the petitioner and the other heirs of entail with regard to the balance of the provisions is an obligation to pay by ten yearly instalments; and the question of law raised by the present petition is whether such an obligation enables the heir now in possession to take advantage of the 21st clause of the Rutherford Act, to the effect of granting a bond and disposition in security constituting the amount a permanent burden on the estate. This appears to the Lord Ordinary to be precisely the same question which was decided in the case of *Campbell*, January 26, 1854, 16 D. 396. The decision in that case was unanimous, and was concurred in by Lord Rutherford. The opinions are quite conclusive of this case in the Lord Ordinary's view of it. For although the limitation under the entail in that case was for a period of twenty-five years, the case of a shorter period was taken as affording a stronger illustration of the inapplicability of the statute. Lord Rutherford said,—'It is plain that the bond contemplated by the Act was chargeable on the rents in all time coming, and the Legislature, having that in view, says it may be charged directly on the fee; but when the entailer, looking to this transaction, says no bond shall be granted by the heir to affect the rents for longer than twenty-five years, it is not only out of the statute in words but in substance. Suppose it had been for three years, could the Court have held that it was the intention of the Legislature to make that a charge on the fee of the estate for ever?'

"On these grounds the Lord Ordinary has refused this petition."

No. 41. of Annandale, is liable, according to a recent judgment of the Court, to pay a sum of £16,280, 17s. 9d., granted by his grandfather, his immediate predecessor, by way of provisions to younger children, asks authority, under section 21 of the Entail Amendment Act, 1848, to charge that sum on the estate. It was assumed in the argument addressed to us that the sum in question (which is truly only the unpaid balance of provisions to a much larger amount) was not exigible immediately on the petitioner's accession, which occurred in July 1876, but by instalments extending over ten years from that time, interest, however, running from the first, the indulgence being accompanied by a condition of forfeiture of the debtor's right to the estate should he allow any instalment to remain unpaid for more than three years. The Lord Ordinary, proceeding on this assumption, and on the authority of the case of *Campbell*, 16 D. 396, has refused the application for leave to charge. The question is, whether the refusal was right, and I am of opinion that it was not.

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The assumption to which I have referred is probably right, and, at all events, I accept it, as the Lord Ordinary did. It was the condition of the argument. The parties were, however, in controversy on one point, viz., whether, if the provisions or any of the instalments should be left unpaid beyond the prescribed period of ten years, the debt, *i.e.*, the whole provisions or the instalments with respect to which such default was made, would, according to the provisions of the entail, survive or be cancelled. It was conceded by the respondents that it would survive against the defaulting heir and his general representatives, but they contended that should he die, or the irritancy be enforced against him by the heir next in succession, the debt in whole or in part, according as the default was total or partial, would cease to be payable by the heir in possession. The point is material only with reference to the applicability contended for of the case of *Campbell*, 16 D. 396, but for which I should have thought it clearly immaterial. I am of opinion that the contention of the respondents is erroneous. It would, I think, require a clear and distinct provision to that effect to annul a debt against the heir of entail in possession by reason of default made in the due payment of it, and there being here none such I can attach no such consequence, and reject the argument by which it was attempted to be deduced from provisions which were, I think, plainly intended only to give ample indulgence to the debtor on the one hand, and, on the other, to prevent that indulgence from being exceeded.

The question really depends on the true meaning of section 21 of the Act of 1848. The material words are—"In all cases where an heir of entail in possession of an entailed estate in Scotland shall be liable to pay" "any sum or sums of money granted by any former heir of entail by way of provisions to younger children in virtue of the powers to that effect contained in any deed of entail under which the heir of entail in possession holds, . . . it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate" "with the amount of such provisions," &c. That these words exactly apply to the petitioner in the position which he occupies is, I think, not doubtful. He is heir of entail in possession of an entailed estate in Scotland, and he is liable to pay the sum of £16,280, 17s. 9d., granted by the preceding heir by way of provisions to younger children, in virtue of the powers of the entail which he holds. Prior to the statute an heir in possession had to meet his liability to pay provisions to younger children as he best might out of his income or general estate, being, of course, at liberty to pledge his life interest in the entailed estate for that as for any other

debt of his. The creditors in the provisions might also, like creditors in any other debts, but not otherwise, have attached by diligence any estate of his, including his rents from the entailed lands. But the fee of the estate was sacred, so that no relief could be had out of it. The purpose of the Act was to remedy this to the heir's relief, by enabling him to meet his liability by charging the estate, *i.e.*, by borrowing money on it. But the only condition and measure of his right to charge is his liability to pay, which, prior to the statute, he must have met out of his income or general estate, if he had any. Now, here, the fact of the petitioner's liability is not doubtful, nor the amount of it, for both are fixed by a decree of this Court. The indulgence to pay by instalments does not affect the existence or amount of his liability, but is only a provision for his convenience, should he choose to avail himself of it, in meeting it, and he might not choose, having to pay interest, possibly at a higher rate than he could borrow for. He might, no doubt, die before payment—just as an heir to whom no such indulgence was accorded might—and then the liability would attach to the succeeding heir, with a corresponding right to charge in order to meet it. I can find no ground for thinking that an heir liable to pay provisions to younger children is deprived of the benefit of the Act by any special indulgence as to the time or times of payment, and, indeed, if indulgence to pay by ten instalments would exclude the application of the Act I should be at a loss to find a reason why indulgence to pay by two should not have the same effect. The more extended the indulgence the more likely are the succeeding heirs to have benefit by the charge which they object to, for the more likely is liability for the debt, to a greater or less extent, to pass to them. The heir in possession is most immediately and certainly relieved by the Act, at the possible cost of his successors, when his full liability is enforceable instantly and at once on his succession.

The only doubt which I had was whether we could allow an immediate charge beyond the amount presently exigible from the petitioner under his liability, *i.e.*, the amount of the past-due instalments. This point was not adverted to in the argument, and no doubt both parties thought that if the Act applied there was an obvious convenience in making one charge for the whole amount which is past-due to the extent of about a half, and that with respect to the rest it will be advisable to arrange to pay it up at once. It is immaterial whether interest is payable to the creditors in the provisions or to the lender of the money by which they are at once paid off, and, in short, I do not assume, and the parties did not suggest, that any one can take prejudice by following the most convenient course with respect to the mere business arrangement, *viz.*, borrowing, and paying the whole at once.

With regard to the case of *Campbell*, on which the Lord Ordinary has founded his judgment, I am of opinion that it is inapplicable, inasmuch as the peculiar feature of that case, and on which alone it was decided, does not occur here. That feature was a valid provision, as the Court held (rightly or wrongly we are not concerned to inquire), that the debt there in question should subsist for a certain specified period and no longer, and that, if not paid within that period, it should altogether cease to exist. The provision, so far as I know, was unique, and it is unlikely to be of frequent occurrence. Should it again occur, the case of *Campbell* may possibly be thought to require reconsideration. I should myself incline to the opinion that the liability of the heir in possession was not the less a liability within the meaning of the Act passed for his relief, because the

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No. 41. disposition of the creditor to enforce it was likely to be quickened by a provision that if he did not within a time limited he would lose his right altogether.

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LORD GIFFORD.—This petition raises a very important question under the 21st section of the Entail Amendment Act of 1848. The petitioner, who is heir of entail in possession of the entailed estates of Annandale, asks authority to charge the fee and rents of the estate other than the mansion-house, offices, and policies, with a sum of £16,280, 17s. 9d., being the balance of the provision of £56,280, 17s. 9d. made by the late Mr J. J. Hope Johnstone of Annandale for his younger children, the amount of which provision was held fixed and validly constituted against the present petitioner and against the heirs of entail succeeding to him in the entailed estates by final judgment of this Court, dated 19th May 1880. The petitioner, founding on the 21st section of the Entail Amendment Act of 1848, proposes to grant a bond and disposition in security or bonds amounting in all to the said sum of £16,280, 17s. 9d., in order to the payment of the amount to the younger children of the late heir of entail or to those in their right.

The heirs of entail next in order object to this on the ground that by the terms of the entails of the estate of Annandale the heir of entail then in possession for the time is bound to pay off all provisions in favour of younger children within a period of ten years, and that by instalments of ten per cent per annum as therein mentioned, and this obligation against the heirs of entail in possession is enforced by an irritancy to the effect that if any of the heirs of entail in possession shall omit for three years complete to pay the said instalments of ten per cent per annum of the said provisions to younger children such heir in possession so failing to pay off the provisions shall forfeit the entailed estates at the instance of the next heir.

It thus appears that it was the intention of the entailer, and was expressly provided by him, that provisions in favour of younger children should not be permanent burdens upon the entailed estate or upon the rents thereof, but should be paid off or discharged within a period of ten years, so as thereafter to leave the whole estate free and disencumbered thereof for the benefit of the future heirs of entail, and it is said that wherever an entailer has made a provision like this, then the enactments in the 21st section of the Entail Amendment Act do not apply, and the heir of entail in possession is not entitled to create the provisions to younger children a permanent burden upon the entailed estate by granting bond and disposition in security therefor in manner provided in the 21st section.

The true objection is not merely that the provisions in favour of younger children are payable only by instalments, and spread over a greater or less number of years, for that is merely an indulgence to the heir or heirs of entail in possession, and prevents their being unduly pressed for payment of the capital. The true force of the objection lies in the fact that, by the terms of the entail, the heirs of entail in possession are bound at all hazards and within a definite time to pay off the provisions in favour of younger children, so that they shall no longer affect the entailed estates.

Now, apart from the decision in the case of *Campbell*, 26th Jan. 1854, 16 D. 396, I confess I should have been disposed to think that the words of the 21st section of the Entail Amendment Act are sufficiently broad and strong to cover all cases where an heir of entail in possession is obliged to pay provisions

to younger children granted by a former heir whether the amount of these provisions is payable at once and in one sum, or is payable by instalments and over a series of years. I should have been disposed to think that the provision of the Entail Amendment Act even applied to cases where the heir or heirs in possession were taken bound to pay off the provisions within a definite number of years, for the words of the statutory enactment do not make any such exceptions.

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The provision is that "in all cases where an heir of entail in possession of an entailed estate shall be liable to pay or to provide by assignation of the rents and proceeds of such estate for any sum or sums of money granted by any former heir of entail by way of provisions to younger children in terms of the said recited Act passed in the fifth year of the reign of His Majesty King George the Fourth, or in virtue of the powers to that effect contained in any deed of entail under which the heir of entail in possession holds, and in all cases where any heir of entail in possession as aforesaid shall in the marriage-contract of his younger child have validly granted provision for such younger child out of the rents and proceeds of such entailed estate in terms of the said recited Act, or in terms of such deed of entail, it shall be lawful for such heir of entail in possession to charge the fee and rents of such estate other than the mansion-house, offices, and policies thereof, or to charge the fee and rents of any portion of such estate other than as aforesaid, with the amount of such provisions, by granting bond and disposition in security over such estate" in manner therein mentioned. This provision seems unqualified and unconditional. It applies apparently to every case where an heir of entail in possession is either (1) liable to pay; or (2) liable to provide by assignation of the rents for provisions to younger children, and, *prima facie*, the petitioner in the present case is undoubtedly in the position supposed. He is liable to pay this provision of £16,000 odds, and he is liable to provide for it by assigning the rents under the statute or otherwise. Nothing is said in the statute about cases where payment is to be made by instalments, or where it is spread over a period of years, and at first sight I have a difficulty in seeing how these circumstances can affect the express enactment. If the statute applies where the whole sum is instantly exigible, or where the relief of the heir in possession is only by tendering an assignation of a third of the rents under the tenth section of the Aberdeen Act, it is difficult to see why a provision for payment by ten yearly instalments should deprive the heir of the benefit of the Entail Amendment Act. In truth, the statutory mode of payment by assigning one-third of the rents will in general be very nearly equivalent to paying off the provisions by ten yearly instalments.

But the decision in the case of *Campbell*, followed as it seems to have been by the case of *Baillie* (Duncan on Entails, p. 339), creates a very serious difficulty in the present case. In *Campbell's* case it was held that, where an entail provided that provisions for younger children should not affect the entailed estate or the rents thereof for a longer period than twenty-five years after the death of the granter, and that any provisions not under this condition should be void and null, in such a case the heir in possession could not grant bond and disposition in security under the 21st section of the Entail Amendment Act, the Court apparently holding that it was only where the rents of an estate might be pledged in all time coming, or for an indefinite period, that the Act of 1848 authorised the fee to be charged by a bond and disposition in security. This is an authoritative decision, and it is not possible for this Division to go back upon it, though,

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But I do not think that the case of *Campbell*, or the case of *Baillie*, are really applicable to the present case. The specialty in these cases was that the heir of entail in possession was by the express terms of the entails disabled from validly or effectually assigning or affecting the rents of the entailed estate for more than a definite limited period. If the debt to the younger children was not paid off and discharged within a certain and fixed number of years then it came to an end, and became null and void, so far as related to the entailed estate, and to the rents and profits thereof. The estate and its rents became, by the lapse of the appointed period, free and disburdened, leaving only a personal claim against the heirs in possession individually; and Lord Rutherford explains that it was only where the rents might be charged with the debt in all time coming, or indefinitely, that the Legislature says the debt may be charged directly on the fee.

Now, in the present case, there is no provision that the bond in favour of the younger children, or the assignation of the rents in security thereof, shall become void or null if the provision be not paid within a definite period. There is no irritancy of the bond itself, or of the security thereby afforded to the younger children. These are not touched, and will remain effectual to the younger children so long as their debt is unpaid. It will be a valid assignation of the rents to the younger children in all time coming until their provisions are paid, and thus in the present case the heir of entail in possession is entitled to do what he was not entitled to do in the case of *Campbell*, grant an effectual security to the creditors, which will remain effectual to them for an indefinite period, or, in all time coming, until the debt is paid.

No doubt while the security of the younger children is not affected thereby the heir or heirs of entail are taken bound to pay off the provision within ten years, and it is true that this obligation on the heir of entail is fenced with an irritancy directed against him. But I do not think that this makes any difference, the essential point being that there is no irritancy directed against the creditors in the bond, and that the failure of the heir to pay it off in ten years will in no way affect the rights of the creditors, or the extent and efficacy of their security.

I am of opinion, therefore, though not without considerable hesitation, that the authority of the case of *Campbell* does not extend to or govern the present case, that the petitioner is within the purview and provisions of the 21st section of the Entail Amendment Act, and that he is entitled to grant the bond and disposition in security as proposed by him. I think the object of the Entail Amendment Act was to give relief to an heir of entail in the situation of the petitioner by enabling him to make the provisions to the younger children a permanent charge upon the fee, and thus enjoy the estate under burden only of the interest of the provisions instead of being bound to pay off the capital thereof in ten years, or in any other limited period. I incline to think that a proprietor making an entail after 1848 could not defeat the provisions of that Act by merely taking his heirs of entail bound to pay off provisions to younger children within a definite or limited time.

LORD JUSTICE-CLERK.—I concur in the result at which your Lordships have arrived. A good deal of difficulty has, I think, been introduced into a question,

which otherwise would not have presented much, by a reference to the authority of the case of *Campbell*. On the one hand, I do not think that the relaxation introduced by the Legislature in the 21st section of the Entail Amendment Act, 1848, was intended solely for the benefit of the heir in possession, who was bound to pay; I think it was also intended to confer and did confer benefit on the younger children who were entitled to payment, by securing to them payment in a more convenient form than theretofore. No. 41.
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On the other hand, I cannot doubt that the object of the entailor, in this particular case, was to secure the extinction of all provisions granted in favour of younger children at the end of ten years. But that appears to me to be just one of the cases for which the 21st section of the Entail Amendment Act was intended. The enactment applies with very great force to a burden subject to such condition. Suppose the free rent of the estate to be £1000, then three years' free rents would be £3000, and it would take £300 a-year for ten years, besides a sum to keep down interest on the balances still due, to clear off this liability. This implies that the heir in possession would be reduced to a revenue of £700 a-year from the estate. But make it a permanent burden and you cripple the heir of entail in possession much less. All he will have to do will be to pay the annual interest on £3000. But one at least of the objects of the Entail Amendment Act, in section 21, was just to relieve the heir in possession in this way.

Campbell's case raises indeed much difficulty, but I must own that where a principle is rested on a single decision, not shewn to have been followed during a long course of years, I should not consider myself precluded from reconsidering it. I am, however, willing to accept the distinctions which have been pointed out by Lord Gifford between *Campbell's* case and the present, and I am otherwise of opinion that the 21st section of the Entail Amendment Act applies with peculiar force to the present case.

THIS interlocutor was pronounced:—"Recall the interlocutor reclaimed against, and remit to the Lord Ordinary with instructions, after due inquiry made, to interpose authority, and grant warrant in terms of the prayer of the petition."

HOPE, MANN, & KIRK, W.S.—LINDSAY, HOWE, TYTLER, & CO., W.S.—Agents.

WILLIAM YEATS (Judicial Factor on Dr James Brown's Estate), Pursuer and Real Raiser. No. 42.

THOMAS PATON, Defender and Claimant.—*Mackenzie.*

GEORGE PATON, Defender and Claimant.—*Begg.*

REV. JAMES HAWES, Defender and Claimant.—*Darling.*

JAMES RITCHIE AND OTHERS, Defenders and Claimants.—*G. Burnet.*

MRS SARAH THOMAS OR TAYLOR, Defender and Claimant.—*Mackintosh*
—*Low.*

MRS MARGARET ANNA CUMINE OR FALCONER AND OTHERS, Defenders and Claimants.—*Baxter.*

WALTER THOMAS BROWN AND ANOTHER, Defenders and Claimants.—*Shaw.*

Succession—Vesting.—A testator, under the sixth purpose of his testament, bequeathed to his brothers Thomas and Alexander "the sum of £500 sterling each, payable at the first term . . . after the decease of my said spouse." By the residue-clause he appointed "the residue and remainder of my estate of every description, at the death of my said spouse, and including . . . any

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legacy that may have lapsed by the legatees predeceasing her, to be equally divided," &c. The legacies of £500 to his brothers Thomas and Alexander, who had survived the testator, but predeceased his widow, were the only legacies under the testament to which the above reference to lapse could apply.

Held that the legacies of £500 to the testator's brothers Thomas and Alexander vested in them *a morte testatoris*, in terms of the sixth purpose of the testament, and that the direction as to lapsed legacies in the residue clause did not suspend vesting, but only provided for the possibility of lapse by reason of there being no one to take.

Succession—Residuary Bequest—Condition.—A bequest of residue "to be equally divided among the children then alive of my brothers and sisters, equally *per capita*," contained the condition "but always secluding the eldest son of each family who may have succeeded to any heritable property of his father's." *Held* that this condition did not apply in the case of a brother or sister having only one child.

2D DIVISION.
Lord Rutherford
Clark.
M.

JAMES BROWN, M.D., who died in Aberdeen in 1823, left a last will and testament, whereby he appointed his wife, Mrs Margaret Paton or Brown, and others his executors.

The purposes of the will were, so far as material to the present case, that the executors should pay an annuity to the testator's widow, and certain other smaller annuities, and should pay or hand over certain minor specific legacies and bequests.

In the sixth purpose there occurred the following bequest:—"To my brothers Thomas and Alexander Brown I bequeath the sum of £500 sterling each, payable at the first term of Whitsunday or Martinmas after the decease of my said spouse."

The residue-clause was as follows:—"And after paying the whole legacies and other sums before destined I appoint the residue and remainder of my estate of every description at the death of my said spouse, and including the principal sum laid out for an annuity to her, and any legacy that may have lapsed by the legatees predeceasing her, to be equally divided among the children then alive of my brothers and sisters, equally *per capita*; but always secluding the eldest son of each family who may have succeeded to any heritable property of his father's, and any of my said nephews who may have situations in India."

The testator's widow, Mrs Margaret Paton or Brown, survived till 28th May 1879, when Dr James Brown's estate fell to be wound up. The executors having all deceased, William Yeats, advocate, Aberdeen, was appointed judicial factor.

Various questions having arisen in the distribution of the estate, the judicial factor raised this multiplepinding, calling as defenders the surviving children of Dr Brown's brothers and sisters, and the issue of such as had predeceased. All Dr Brown's brothers and sisters had predeceased his widow.

Only two questions came before the Inner-House, viz., (1) whether the legacies to Thomas and Alexander Brown had lapsed and fallen into residue owing to their having predeceased the testator's widow; and (2) whether the issue of George Brown, who was the only child of the testator's brother Thomas Brown, and had succeeded to heritable property from his father, were excluded under the condition attached to the residue clause "secluding the eldest son of each family who may have succeeded to any heritable property of his father's."

The Lord Ordinary, on 16th July 1880, pronounced an interlocutor containing, *inter alia*, these findings:—"Finds that the legacies to Thomas and Alexander Brown lapsed by their having predeceased the widow of the testator: Finds that the residue is divisible in equal shares among the

nephews and nieces of the testator who survived the testator's widow, and the children of such nephews and nieces as predeceased the testator's widow, such children taking their parents' shares, but subject to the qualification that the children of George Brown, nephew of the testator, are not entitled to any share, in respect that the said George Brown succeeded to heritage from his father." * No. 42.
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Against the first of the above findings a reclaiming note was presented by Mrs Sarah Thomas or Taylor, who was in right both of Alexander and Thomas Brown, the testator's brothers, and maintained that the legacies of £500 each, contained in the 6th purpose of the testament, had vested in them, and were transmitted to her as their representative.

The claimants, Walter Thomas Brown and another, took advantage of this reclaiming note to argue against the second of the above findings of the Lord Ordinary, which excluded them from any share in the fund available for residue, owing to their father George Brown having succeeded to heritable estate from his father.

At advising,—

LORD JUSTICE-CLERK.—The Lord Ordinary has decided several questions in this action of multiplepounding, but the two reclaiming notes now before us raise the only two points on which his interlocutor is brought under review.

The first question arises under the bequest of £500 to each of the testator's brothers, Thomas and Alexander Brown, "payable at the first term of Whitsunday or Martinmas after the decease of my said spouse." It appears that both of these legatees of £500 predeceased the testator's widow, and the question is whether the legacies lapsed. The Lord Ordinary has found that the terms of the residue clause occurring at a later part of the deed so far control this bequest as to suspend or postpone vesting, and that, therefore, the legacies have in the circumstances lapsed. I am not surprised that the Lord Ordinary has come to that conclusion, because at first sight the parenthetical clause "and any legacy that may have lapsed by the legatees predeceasing her" (that is, the widow), occurring in the provision as to residue, does lead to the apparent inference that these legacies were intended to lapse.

But, dealing with the bequest of £500 each to these two brothers by itself, in the first place, it is clear that, if there is nothing to the contrary, the legacies

* "NOTE.—1. The first question is, whether the legacies to Thomas and Alexander Brown vested *a morte testatoris*. If this were to be determined by the clause of bequest alone it is not doubtful that they vested at that date, inasmuch as there is only a postponement of payment till the death of the widow; but a difficulty arises in consequence of the residuary clause. The testator directs that the residue, and 'any legacy which may have lapsed by the legatees predeceasing' the widow, shall be disposed of in a certain way. These words can apply to no other legacies than those which the testator left to his brothers, and the Lord Ordinary is inclined to think that they shew that the testator not only postponed payment, but postponed vesting till the widow's death.

"2. The Lord Ordinary is of opinion that the children of predeceasing nephews and nieces take their parents' share. This is the ordinary rule under such a will, and he does not think that in this case there is room for an exception.

"3. But George Brown, a nephew of the truster, succeeded to heritable property from his father. He was therefore excluded from any share, and the exclusion, in the opinion of the Lord Ordinary, extends to his descendants, who merely come in his place. If he could not take, neither, it is thought, can they."

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vest a morte testatoris. It is simply a gift to the testator's brothers, payable on the decease of his wife. That is the operative bequest, and it is there that one naturally looks for the terms and conditions under which the gift is made. But there are none.

The residue clause again appears to me to deal with the possible contingency of a legacy not being claimable by anybody. Taking the circumstances as they stand, there is no difficulty in giving effect to the provision, because, in point of fact, no legacy has lapsed. The provision is not that any legacy shall lapse "by the legatee predeceasing" the testator's widow, and shall fall into residue; but only that in the event of any legacy lapsing, it shall fall into residue. The testator may have had some doubt in his own mind as to whether some of the legacies he had given might not lapse, and he has provided by this clause for the possibility of any legacy lapsing prior to the period of payment. But that is all, I think, that he intended to do. I cannot think that he thereby intended to affect the vesting of legacies already given.

With regard to the second point, viz., that arising on the clause "secluding the eldest son of each family who may have succeeded to any heritable property of his father's," it appears that in one of the families there is only one child, a son, who has succeeded, of course, to the heritable property of his father, and the question is, does the seclusion apply to him to the benefit of the remaining residuary legatees? I think not. I think it only applies *intra familiam*, and that there is no justice or equity in extending it to a family where there is only one child. I am therefore of opinion that where the real object was to prevent the heir in heritage taking any portion in competition with his younger brothers and sisters there is no ground for excluding him where he has no younger brothers or sisters.

LORD GIFFORD.—I concur with your Lordship on both points. On the question of vesting it is a cardinal principle in the interpretation of wills that you are always to avoid reading a subordinate clause in a sense repugnant to the substantive gift, if reconciliation is possible. Now, the testator here in his residue-clause does not directly fix the period of vesting at the death of his wife; he only intimates a doubt in his own mind whether the result of some of the provisions he has already made may not be that the legacies provided may lapse by the legatees predeceasing his wife, and he provides for that possibility. But if it is plain that, but for this clause, a legacy would not lapse, I am of opinion that the clause was not intended to suspend the vesting of a gift already given in such terms as to vest it absolutely.

On the second question I have nothing to add.

LORD YOUNG concurred.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for Mrs Sarah Thomas or Taylor against Lord Rutherford Clark's interlocutor of 16th July 1880, Recall the said interlocutor in so far as it finds that the legacies to Thomas and Alexander Brown lapsed by their having predeceased the widow of the testator, and find that the same vested *a morte testatoris*, and that the reclamer, Mrs Sarah Thomas or Taylor, as representing the said legatees, is entitled to the legacies: Further, recall the said interlocutor in so far as it finds that the children of George Brown, nephew of the testator, are not entitled to any

share of the residue, and find that their father, the said George No. 42.
Brown, was not excluded in respect that he succeeded to heritage
from his father, and that the said claimants are entitled to his Nov. 27, 1880.
share of the estate : *Quoad ultra* adhere to the said interlocutor : Yeats v.
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Remit to the Lord Ordinary to proceed with the cause,"
&c.

HENRY & SCOTT, S.S.C.—BAXTER & BURNET, W.S.—J. YOUNG GUTHRIE, S.S.C.—THOMAS
M'NAUGHT, S.S.C.—JOHN CAY, W.S.—GIBSON & STRATHERN, W.S.—Agents.

JOHN LE CONTE, Pursuer.—*Scott—Shaw.*

No. 43.

WILLIAM SCOTT DOUGLAS, Defender.—*D.-F. Fraser.*

Dec. 1, 1880.
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Richardson.

ROBERT RICHARDSON, Defender.—*Lord-Adv. M'Laren—Campbell Smith.*

Poinding—Illegal execution—Appraisement—Liability of creditor.—A sheriff-officer, in carrying through a poinding under a small-debt decree, poinded almost the whole articles in the debtor's house, and in the report of the valuation and sale articles of household furniture, pictures, and portfolios full of engravings, were united under one head, and valued together. No serious attempt had been made to arrive at the real value, and the whole were valued at the amount of the decree, and expenses. The two appraisers who assisted were not put on oath. No bidders having appeared at the sale, the articles were declared to belong to the poinding creditor at the appraised value, and were removed by him to an auction sale-room for sale. Before they were sold the debtor intimated that the proceedings were illegal, and that he held both the poinding creditor and the sheriff-officer answerable. In an action of reduction and damages, held that the poinding and sale had been illegally carried through, and that the poinding creditor, having sold the goods after receiving notice of the illegality, must be held to have adopted the proceedings of the officer, and was liable in damages along with him.

Question, is the employer of a sheriff-officer liable in damages for his illegal acts?

Opinion (per Lord Craighill) that appraisers in pointings must be put on oath.

ON 12th July 1876 William Scott Douglas obtained a small-debt decree for £12, and 4s. 1d. of expenses, against John Le Conte, engraver, Edinburgh; and in May 1879, acting under instructions of Mr Douglas, Robert Richardson, sheriff-officer, carried through a poinding and sale of the furniture and other effects in Mr Le Conte's house in Greyfriars Place, Edinburgh.

1st DIVISION.
Ld. Craighill.
M.

Mr Le Conte brought two actions (which were conjoined), the one in June 1879 against Mr Douglas, and the other in October 1879 against Mr Richardson, the sheriff-officer, for reduction of the poinding and sale, for restoration of the poinded effects, and for damages.

The pursuer alleged that the valuation of the effects in his house had not been properly made, because, *inter alia*, a large number of valuable engravings in portfolios had not been separately valued, and other articles had been valued in lots, and the amount stated at sums far below their value; that the two appraisers who signed the report of the valuation had not been put on oath; and that the execution of the officer, which stated that this had been done, was false.

The pursuer pleaded that the proceedings were illegal and oppressive, and that he was entitled to reduction and damages.

The defenders maintained that the poinding and sale had been carried through in the usual way, and that it was not necessary that the appraisers should be put on oath. The defender Douglas maintained that he was not answerable for the mistakes of the sheriff-officer whom he employed,

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and that the pursuer was aware that the effects had been removed to Lyon & Turnbull's rooms for sale, and should then have brought a suspension and interdict to prevent the sale. He offered to pay the difference between the amount realised by the sale at Lyon & Turnbull's and the amount of the decree under which the pouncing was executed.

A proof was allowed. The following facts were established:—In the report of the pouncing by Richardson the articles of furniture were not all valued separately, but were put down together in lots. The last item was —“(11) Large mahogany table, an old table, a chair, a stool, a piece of carpet, an easel, four drawing boards, ten unframed oil-paintings, five oil-paintings in gilt frames, and two pictures in gilt frames, six portfolios containing a large quantity of engravings, oil-paintings, and water-colour drawings, £3, 11s. 7d.” The whole of the articles were valued at £12, 4s. 1d., the amount of the decree and expenses. The report by the officer stated that the effects had been duly appraised “upon oath,” and that, “after public notice of, at least, two hours,” the articles were, on 23d May 1879, exposed by public roup, but, no person having offered the appraised value, they were declared to belong to the pouncing creditor at the appraised value.

The articles were afterwards removed by Mr Douglas to the sale-rooms of Messrs Lyon & Turnbull, auctioneers, and sold for £35, 9s. 11d. On 26th May, before the articles were sold, the agent of Mr Le Conte wrote to Mr Douglas that the pouncing and sale had been carried through illegally, and that, unless the articles were restored by next day, an action of damages would be raised, and Mr Douglas replied that the sheriff-officer was answerable for any irregularity.

The Lord Ordinary pronounced this interlocutor:—“In the first place, finds as matter of fact (1) that the defender Richardson, on the employment of the defender Douglas, pounded effects belonging to the pursuer; (2) that the effects thus pounded were, under a warrant of the Sheriff of Midlothian, afterwards exposed to sale, and no person having appeared to offer the appraised value, being £12, 4s. 1d., these were declared to belong to the pouncing creditor, the defender Douglas, as set forth in the report of the pouncing and sale; (3) that the said effects were not appraised on oath, the appraisers not having been sworn, and the statement in the said report that the same had been duly appraised on oath is false; (4) and *separatim*, that the said effects were appraised without reference to their value, and, especially in the case of prints, engravings, and oil-paintings in portfolios, without reasonable knowledge on the part of the appraisers of the things which were pounded; (5) that it has not been proved that there was concert or conspiracy between the defenders in the premises, nor has it been proved that effects not pounded were carried off by either of the defenders; and (6) that the said pouncing and sale were to the loss, injury, and damage of the pursuer, and these, with an allowance of £25 for *solatium*, may reasonably be estimated at £100: In the second place, finds as matters of law, the facts being as above set forth (1) that the said pouncing and sale were irregular and illegal, and (2) that the defenders are liable to make good to the pursuer said loss, injury, and damage: Therefore, in the action against the defender Richardson, repels the defences; ordains said defender to pay to the pursuer the said sum of £100, but under deduction always of any sum which may be paid by or recovered from the defender Douglas on account of said loss, injury, and damage, and decerns: And, in the action against the defender Douglas, repels the defences; ordains the said defender to pay to the pursuer the said sum of £100, but under deduction always of any sum which may be paid by or recovered from the defender Richardson on account of said

loss, injury, and damage; and decerns: Finds the defenders severally liable to the pursuer in the expenses of the actions," &c.* No. 43.

The defender Richardson reclaimed, and argued;—The decree and proceedings being *ex facie* regular and valid, the pursuer's remedy was interdict, and, at any rate, the reductive conclusions were incompetent against him, he being bound in respect of his office to execute the decree upon the instructions of his employer. Having acted throughout *in bona fide*,
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* "NOTE.—The pursuer here seeks to recover reparation for loss, injury, and damage said to have been caused by the irregular and illegal pointing and sale of his property, carried through by the defender Richardson on the employment of the defender Douglas. Both defenders maintain that the proceedings were regular and legal. The defender Douglas also pleads that, even if there were irregularity or illegality in the proceedings, he, as the employer, is not answerable to the pursuer for the consequences. The Lord Ordinary is of opinion that the pointing and sale were irregular and illegal, first, because the appraisers were not put upon oath; and, secondly, because the appraisement was conducted without reference to the value of the articles pointed, and especially as regards the contents of the portfolios, without reasonable knowledge on the part of the appraisers of the things which were included in the pointing. On the first point the defenders contend that the administration of an oath to the appraiser is not requisite. And this contention is maintained upon two grounds. In the first place, it is said that the provisions of the Small-Debt Act, 1 Vict. chap. 41, do not prescribe the administration of an oath, but, reading section 20 of that statute and the relative schedule G together the Lord Ordinary thinks that this contention is unsound. The report of the pointing and sale, No. 87 of process, which sets forth that the effects had been 'duly appraised on oath,' points certainly to this conclusion. It is further maintained, on the part of the defenders that, even if by the Small-Debt Act the administration of an oath had been prescribed this solemnity was taken away by the Promissory Oaths Act, 1868, 31 and 32 Vict. cap. 72. The parts of this statute which are relied on are section 12, sub-sections 4 and 5. These, however, must be read in connection with the 'saving clause,' section 14, sub-section 12, and, so reading them, the Lord Ordinary thinks it must be held that the oath in question has not been abolished.

"On the second point, the Lord Ordinary thinks it proved that those concerned in the execution of the diligence were indifferent to the interests of the debtor, and that the values which were put upon the pursuer's effects were hardly, if at all, influenced by any consideration of their real worth. What was done, and the way of doing it, may have been similar to what frequently occurs, as the defenders have suggested, but the Lord Ordinary considers that this is not a reason for deciding in favour of its validity, but rather the contrary.

"The defender Douglas has a separate plea in defence. He contends that the irregularities in the execution of the pointing are not things for which he, as employer, is answerable. The pursuer, he argues, must look to the sheriff-officer who did the wrong, and to his cautioners, and cannot come upon the creditor for redress. The Lord Ordinary, however, thinks that this point has already been judicially determined (*vide Macdonell v. Bank of Scotland*, July 21, 1835, 13 S., p. 701; *Beattie v. M'Lellan*, June 29, 1846, 8 D., p. 930; and *Struthers v. Dykes*, 7th July 1847, 9 D. 1437, 19 Scot. Jur. 583); and consequently that it is his duty to overrule the plea maintained on the part of this defender.

"The point upon which the Lord Ordinary has experienced most difficulty is the assessment of the damage. The valuation, as set forth in the pointing, is absurdly low. The prices obtained, when the effects were subsequently sold for behoof of the defender Douglas came considerably nearer, but, as the Lord Ordinary thinks, did not reach to, the true value. Taking everything into account, the Lord Ordinary is of opinion that the £100 which has been awarded is not more than fair reparation to the pursuer for the loss, injury, and damage which he has suffered."

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and the pursuer not having through his actings suffered loss, he could not be held liable in damages.¹

Argued for both defenders;—The proceedings were unchallengeable, although the usual or judicial form of oath was not administered to the appraisers, that not being now required by law, or in accordance with common usage. The Small-Debt Act, 1837 (1 Vict. c. 41), sec. 20, although most minute in its directions as to pointing, did not mention an oath, but provided that goods pointed should be “duly” appraised, and the mention of the oath in the schedule was not sufficient to incorporate it into the statute. The Promissory Oaths Act, 1868 (31 and 32 Vict. c. 72), sec. 12, sub-secs. 4 and 5, covered the office of appraiser, and the saving-clause in sec. 14, sub-sec. 12, referred only to proceedings of a judicial nature, while the proceedings here complained of were purely executorial. The Personal Diligence Act, 1838 (1 and 2 Vict. c. 114), sec. 23, had also impliedly abolished oaths.²

Argued for Douglas;—He was not answerable for the illegal acts of the sheriff-officer, as he was bound to employ an officer, and if he employed a properly qualified officer he had done all he could.

The pursuer replied;—The cases quoted by the Lord Ordinary established that an employer of a sheriff-officer was responsible for his illegal acts. Besides, here the defender Douglas adopted these acts. The sheriff-officer was bound to have administered an oath to the appraisers. The schedule of pointing was false in stating that an oath had been administered, and the whole manner in which the valuation was carried through was illegal. No proper valuation had been made. It was not legal to include a number of articles under one head in the valuation, but each article should have been stated at a separate value.

LORD PRESIDENT.—The pointing complained of in this action was used upon a small-debt decree for £12, with 4s. 1d. of expenses, obtained by the defender Douglas against the pursuer in the Sheriff Court of Midlothian, and the Lord Ordinary has found it illegal on two grounds, first, that the appraisers were not put on oath, and, in the second place, that the circumstances show it to be an oppressive use of diligence.

I shall consider first the latter objection, which depends on the report of pointing itself which we have before us. There appears to have been a great variety and quantity of effects, and among others a number of pictures, prints, and engravings, which are all included in the goods pointed and appraised in the schedule of pointing at very small values. The last entry in the report is in these terms:—“A large mahogany table, an old table, a chair, a stool, a piece carpet, an easel, four drawing boards, ten unframed oil-paintings, five oil-paintings in gilt frames, six portfolios containing a large quantity of engravings, oil-paintings, and water-colour drawings, at £3, 11s. 7d.” Now, it is quite apparent

¹ *On the irregularity of the pointing*.—M’Knight v. Green, Jan. 27, 1835, 13 S. 342, 7 Scot. Jur. 171; Robertson v. Galbraith, July 16, 1857, 19 D. 1016, 29 Scot. Jur. 481; Hamilton v. Emslie, Nov. 27, 1868, 7 Macph. 173, 41 Scot. Jur. 98; Aitkin v. Finlay, Feb. 25, 1837, 15 S. 683, 9 Scot. Jur. 333; Henderson v. Rollo, Nov. 18, 1871, 10 Macph. 104, 44 Scot. Jur. 73; M’Kinnon v. Hamilton, June 21, 1866, 4 Macph. 852, 38 Scot. Jur. 445.

² *Atchison’s Trustees v. Atchison*, Jan. 21, 1876, *ante*, vol. iii., p. 388; *Queen v. Baines*, June 11, 1840, 12 Ad. and E. 201; *Bell v. Presbytery of Meigle*, July 20, 1869, 7 Macph. 1083, 41 Scot. Jur. 638; *Tait’s Office of a Justice of Peace*, 4th ed., 369.

that this sum is put in just to make up the amount of the debt and expenses. **No. 43.**
 That, on the face of it, appears to be a very objectionable mode of making an
 appraisement. When we look into the evidence adduced as to the manner **Dec. 1, 1880.**
 in which the poiding was executed, that impression is very much confirmed. **Le Conte v.**
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 Articles of very various description, furniture, and works of art contained in six
 large portfolios, are slumped together without any further specification of their
 value and contents. Now, in the evidence led, Cowan, one of the appraisers, who
 is examined as a witness for the pursuer, gives this account of the way the pro-
 ceedings were conducted. He says that after a general examination, which seems
 to have been slight, of the house and its contents, he and the other appraiser
 and the sheriff-officer went to the parlour and sat down at a table. He then goes
 on to say—"During the whole time we were there I did not leave the room
 excepting when we surveyed the house previous to going into the parlour.
 When we surveyed the house we went from one room to another. We just
 had a look at the place and then sat down at the table. We valued the articles.
 Richardson called out so many things, and we put them down at so much. We
 had no other examination of the articles than what I have mentioned. We
 just went into the room and looked at what was in it. We never took much
 notice. We did not look inside any of the portfolios. I cannot say if they
 were locked up tight. I did not know what was inside them. I afterwards
 knew that there were paintings, and sketches, and scraps. Richardson did not
 name the value of the articles. When he called them he would say, 'How much
 are they worth? Are they worth four shillings, or five shillings, or what?' We
 considered, and we might put them down as he said, or if the value was too low
 we altered the sum. (Q.) Did Richardson not mention the value of every lot
 he called out? (A.) No. (Q.) What are the other lots the value of which he
 did mention? (A.) I cannot say. He might say 'mahogany table in two halves,—
 is it worth ten shillings?' We might say no; put it down at 7s. 6d. We
 took the values into our own consideration. If we did not think the sum
 Richardson asked as the value of an article sufficient, we put it down at what
 we thought proper. I cannot mention any articles that were put down in the
 schedule at a smaller sum than that suggested by Richardson. I cannot say if
 there are any. (Q.) Is it not the case that there was a sum mentioned by
 Richardson, and that that sum was the one you took as the value? (A.) There
 might be in one case, but I cannot swear. That certainly was not the case with
 all the articles. Richardson did not say exactly what the value of any article
 was. He merely asked us. (Q.) Can you tell me one article that you valued?
 (A.) No. 7 for example, which was valued by myself and by Lauder. I had
 seen the articles before I sat down at the table. I made up the 7s. 6d. by a
 rough calculation of what we thought the articles would fetch at a sale. We
 made the calculation for the whole lot. I cannot state what sum we put on
 each article in that entry, No. 7. Lauder and I valued the last item, No.
 11, 'large mahogany table.' The portfolios were in pursuer's work-room.
 Ten unframed oil-paintings, and five oil-paintings in gilt frames were in
 that room, if I mistake not. (Q.) How did you come at the value, £3,
 11s. 7d.? (A.) Richardson asked pursuer what was the value of the things
 in the portfolios, and the pursuer said, 'Merely rubbish.' (Q.) Then you put no
 value upon them? (A.) No; they were just included in the whole lot. I did
 not look at any of the oil-paintings that were there. I don't know who ex-
 amined them. (Q.) Then it is not your valuation, is it? (A.) I suppose it

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must be. (Q.) Who put the value upon them? (A.) Lauder and I. (Q.) You never looked at them? (A.) We put the value on them for all that. We saw that they were paintings, but I did not see what was inside the portfolios. I did not examine the paintings on the walls minutely. (Q.) How could you put a value on them? (A.) I put them down at £3, 11s. 7d. I come to that by a rough calculation. By the Court.—We both made the valuation. Nobody else made it but ourselves. (Q.) Can you not tell what part you took in the calculation? (A.) I took no part further than the other witness. (Q.) Is not this the case, that when you came to value lot No. 7 there was just £3, 11s. 7d. required to be made up, and you put that in in order to get the amount of the debt? (A.) Yes, that might be so.”

The other appraiser is examined for the defenders, and his account of the proceedings does not substantially differ from that of Cowan. He is asked—“Were there more than six portfolios in the place? (A.) I could not say. (Q.) Did you see six? (A.) I did not count them. (Q.) You surely counted six, did you not? (A.) No; Richardson said there were six. (Q.) You saw the portfolios that were there, did you not? (A.) Yes, but I did not count them. Before we began to value the things Richardson told us to put a fair valuation on the articles to the best of our knowledge. (Q.) Did you agree to do so. (A.) Yes, we said we would do it. (Q.) Was what was said and done that day in accordance with your usual practice in the execution of poindings in small-debt decrees? (A.) Yes; Cowan wrote a copy on the back of the small-debt decree the same as mine. (Q.) When Richardson pointed out the things to you, and you entered them in your schedule, did you put a value upon them? (A.) Yes. (Q.) You and Cowan did? (A.) Yes; Richardson put no value upon them. (Q.) Did he ever say, when you were doing your work upon any occasion, that you were ever putting too low or too high a value upon the things? (A.) No; I am not a judge of the value of engravings; but I did my best in putting a value on Le Conte's pictures and engravings. By the Court.—(Q.) Did you see a great number of engravings? (A.) I saw some portfolios, but they were tied up, I think. I did not see the engravings that were inside the portfolios. (Q.) How could you do your best to put a value upon them if you never looked upon them? (A.) The £3, 11s. 7d. was to make up the amount of the debt, and what was required when we came to the last lot was to bring the value up to the amount of the debt.”

Now, the question comes to be, whether this mode of executing the diligence of poinding is legal, and I entertain no sort of doubt that it is eminently illegal, and for this reason, that the goods were never appraised. It is essential to the validity of a poinding that the goods should be appraised and reported on by the officer executing the diligence, and on that report the warrant of sale is got from the Court, and the goods are put up for sale at the appraised value. This shews the appraisement to be an essential part of the process. But to take a quantity of articles of furniture and six portfolios containing engravings and put a value upon them simply to make up the sum of the debt and expenses, is not an appraisement. It is quite true that a critical valuation is not to be expected, but the appraisers are bound to use their best skill and care to come to a proper idea of the value of the articles. Here, however, all idea of an appraisement seems to have been abandoned, and from other parts of the evidence we see the officer simply made a clean sweep of the debtor's premises. It seems

to me unnecessary to go further in order to concur with the Lord Ordinary that the proceedings complained of were illegal and oppressive. No. 43.

But it is contended on the part of the creditor in the decree that he is not answerable for the mode of execution, having employed a proper and responsible officer. Whatever may be the merits of that question, when it occurs purely, I am clearly of opinion that the creditor cannot take benefit from such a plea in the present case, for he adopted the actings of the officer. The goods were handed over to him as his property. He was at that stage duly warned that the proceedings were illegal, but took the goods adjudged to him by the officer and sent them to an auction-room to be sold. Having thus adopted the proceedings of the officer he cannot maintain that he is not responsible. I therefore think that the pursuer here is entitled to prevail. It is unnecessary in the present case to decide the question whether the appraisers in such a proceeding must be formally put on oath. I am therefore for adhering to the interlocutor of the Lord Ordinary, and giving damages as he has done.

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LORD DEAS.—A question of this kind occurred in a case cited at the hearing, *M'Kinnon v. Hamilton*, 4 Macph. 852. In that case Hamilton had executed a poiding of the ground for a debt of £13. The value of the effects poided amounted to £72, 19s. The Lord Ordinary was Lord Mure, who passed the note, and continued the interdict, and he observes,—“The poiding of effects of an appraised value of upwards of five times the amount of the debt sought to be recovered is, in the opinion of the Lord Ordinary, of itself a very questionable proceeding.” Then the Lord President observed,—“The poiding was excessive, and we cannot sanction the excuse that the creditor poided as much as would satisfy the landlord's claims.” Lord Curriehill said,—“If this poiding were sustained on the ground now pleaded it might as well be maintained that if a debtor's estate were burdened with an heritable debt, for which a poiding of the ground might be executed by the heritable creditor, which would be preferable to the diligence of personal creditors of the owner, it would follow that any personal creditor of the owner, poiding for payment of a personal debt, however trifling in amount, might poid all the moveable effects upon the ground, in order to guard against the possible contingency of the heritable creditor happening to use his remedy under his real security. Then there are some observations which I made,—“The poiding was perfectly unjustifiable, for it appears to have involved a total dispenishing for a debt of £13. If we were to sanction such a proceeding we should be making the diligence of poiding the means of gross injustice and oppression.” Lord Ardmillan concurred in those opinions. Now, it is true that the question there was only a question of passing the note of suspension, but the opinions are explicit, and unqualified with reference to the merits. The Lord Ordinary's interlocutor was adhered to, and so the result was that the complainer was found entitled to stop the sale, and the case does not seem to have come again before the Court. Your Lordship has stated the grounds of judgment in the present case, and they are stronger here than in the case of *M'Kinnon v. Hamilton*. I can therefore have no hesitation in agreeing. The case is *a fortiori* of that case, which was decided in 1866.

LORD MURE was absent.

LORD SHAND.—It appears to me that the question for the decision of the Court is substantially that stated in the issue adjusted in the case of *Robertson v. Galbraith*. In that case the landlord, having obtained a warrant to sell, was

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said to have carried it through illegally, and the Court settled the following issue, viz., "Whether the defender, on or about the 16th of March 1855, in selling part of the sequestrated effects under the said warrant, did illegally and oppressively sell the same in disregard of the interests of the pursuer, and in a manner to produce loss, injury, and damage to the pursuer?" The question here is whether this defender, having procured a warrant of pointing and sale, did in carrying it out act illegally and oppressively, and in disregard of the interests of the pursuer, and to his loss, injury, and damage. I have no doubt that the proof establishes the affirmative of this issue. The statute no doubt provides that the proceedings should be carried out in a summary way, and if the warrant be granted for a debt of really small amount, and the articles pointed are of trifling value I do not say that there ought to be a very minute and detailed valuation. But there ought as far as possible to be an accurate valuation. Each case must be looked at according to the circumstances.

In the present case the whole effects in the house were inventoried and included in the valuation. It would be a serious thing if the officer were to be allowed recklessly to include every article in the house so as to inventory and have the power of selling all the debtor possesses. There must be reasonable procedure in the way of valuing the effects, for the valuation is only a step towards transferring to the creditor the property of the debtor at the amount of the valuation. The statute provides for a notice of two hours before the goods are exposed for sale by the officer, and if no one appears to offer the appraised value the property is handed to the creditor at that value as his own. It is clear, therefore, that there must be a substantial, if a somewhat rough, valuation of the goods pointed. But here the evidence shews that no serious attempt was made to put a fair value on the effects. I shall only add, in addition to the item already referred to by your Lordship in the chair, that in article five of the report of pointing we have, "twenty pictures in gilt frames, five oil paintings, at £5." These works appear to have been of substantial value, and we find that the articles realised upwards of £36 at the sale, and were thought by the purchasers to have been bought at a low price. The officer appears to have thought the claim would be settled, and that the proceeding was a mere matter of form, but there can be no doubt that the proceedings were illegal and oppressive, in disregard of the interests of the debtor, and to his loss, injury, and damage. And I am not disposed to interfere with the Lord Ordinary's valuation of that loss.

As to the responsibility, which the Lord Ordinary has found to be conjunct and several, the employer maintained he was not liable. I think it unnecessary to give any opinion on the general case argued, for in this case the creditor was duly warned of the nature of the proceedings, and must be held to have adopted them by going on with the sale.

Another objection stated was that the pursuer was not entitled to lie by, and then after the articles were sold bring an action of damages, and that his proper course would have been to interdict the sale. The pursuer was in straitened circumstances, and it was not easy for him to find an agent to take up his case at once, and proceed by way of suspension, a process in which he might possibly have been required to find caution, and I am not prepared to say that he was bound to proceed in that way.

The case discloses a very loose practice in regard to sales of this kind. The defence practically came to this, that the defenders were only doing what other people usually did. If that be so, all I can say is that the sooner such practices

are put a stop to the better, by regulations issued by the Sheriffs, in virtue of their powers under the statute, or from the Crown office if necessary. No. 43.

LORD DEAS.—Lord Shand has reminded me that I meant to make two further observations. In the first place, I do not see any ground to interfere with the amount of damages which the Lord Ordinary has fixed. In the second place, this case raises no general question as to the liability of the employer of a messenger or sheriff-officer, because here the employer adopted the acting of the officer.

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THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find that the diligence sought to be reduced was used oppressively and illegally: Therefore repel the defences in both of the conjoined actions: Reduce, decern, and declare in terms of the reductive conclusions of both summonses: Find the pursuer entitled to damages; assess the same at £100, and decern against both defenders conjunctly and severally for payment thereof to the pursuer: Find the pursuer entitled to three-fourths of the expenses incurred in the Outer-House: Find him entitled to expenses since the date of the Lord Ordinary's interlocutor," &c.

DANIEL TURNER, S.L.—P. MORISON, S.S.C.—Agents.

THE EARL OF STAIR, Pursuer.—*Asher—Keir.*
HARRY GEORGE AUSTIN AND OTHERS, Defenders.—*Johnstone—*
W. C. Smith.

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Sea-shore—Right of barony proprietor to exclude public from his private pier and harbour.—A proprietor of seaboard lands, with a barony title, who had built a quay upon the foreshore *ex adverso* of his barony, and had formed a small harbour, with a road giving access to it from a village on his estate, for more than forty years had exacted dues from coasting craft, but not from fishing-boats, for admission to the pier and harbour. In an action raised by him concluding for interdict to enforce payment of these dues by the lessees of oyster-fisheries, recently established in the neighbourhood, and by the owners of boats employed by them, *held* that, as the pursuer had no grant of harbour, he had no right to exclude the defenders from the use of that part of the shore where the harbour was built, or to exact harbour-dues, and defenders *assoiлиed*.

But see
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THE barony of Kilhilt, including the lands and village of Drumore, 2D DIVISION.
lying on the south-west side of the Bay of Luce, in Wigtownshire, is Lord Lee.
part of the Stair estates. Drumore Point, extending into the sea at M.
a little distance from the village, forms a smaller bay within the Bay of Luce, which is called Drumore Bay. Near this point, and within Drumore Bay, two gravel banks ran out from the shore at a short distance from one another, forming a sort of natural anchorage for fishing boats and other small craft.

By arrangement with John, Earl of Stair, a pier was erected on one of these gravel banks in 1809 by Alexander M'Douall, at considerable expense, and the *solum* was dredged between it and the other gravel bank so as to make a small tidal harbour with pier or quay for the loading and discharge of coasting vessels. M'Douall got a lease of the harbour for 99 years, at a nominal rent, with power to levy reasonable dues on vessels taking the benefit of the harbour and works. This lease was ultimately assigned to the Earl of Stair in 1843.

A private estate road was made at an early date by the Earl of Stair from the foot of Drumore village along the shore to the pier, and he continued to maintain the pier and harbour, by repairing, dredging, and

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otherwise, and, either by his servants or tacksmen, levied small dues on the trading smacks which frequented the harbour in order to reimburse himself this outlay. No dues were levied on fishing-boats, which, though they sometimes used the harbour and the shore inside the harbour, made no use of the pier. It was proved that when the weather was favourable fishing-boats were hauled up on the shore and moored to pawls fixed in the beach near high-water mark between the village of Drumore and the pier, or to rings fastened to large stones in the gravel bank behind the pier; but that in rough weather they anchored in the harbour.

In 1871 Messrs Austin & Gann, an English firm, became, for the first time, lessees from the Crown of the oyster-fisheries in the Bay of Luce. Prior to that date the boats belonging to the district sometimes dredged for oysters, but there had been no regular fishery.

Messrs Austin & Gann made Drumore village the centre of their operations, and employed many of the villagers and their boats. They dredged the oysters with large boats of fifteen or thereby tons burden, but generally landed them on the shore at a little distance from the harbour by means of small boats. At the same time, as alleged by the Earl of Stair, they brought their large boats into the harbour, and, though they seldom made use of the pier, anchored them in such a manner as frequently to block up the harbour and prevent the access of trading smacks to the pier. They refused to pay any dues in respect of their use of the harbour.

The Earl of Stair raised this action against Messrs Austin & Gann, and also against William Biggam and others, residing in Drumore, owners of boats, who with their boats were engaged in the service of Messrs Austin & Gann in the oyster-fishing, to have it found and declared "that the quay at Drumore harbour, in the Bay of Luce, and adjacent shore of the lands of Drumore, on both sides of the quay, and the access to the said quay and shore through the said lands, belong to and are the property of the pursuer, and that the defenders have no right or title to moor their vessels or boats by attaching them to the quay at Drumore, or to the stakes, buoys, anchors, or works thereon, or on the said shore, used in connection with the said harbour, or to use the said quay, stakes, buoys, anchors or other works, or the said access to the said quay and adjacent shore, for the purpose of loading or discharging their vessels or boats, or otherwise as a landing-place in connection with the fishing in the Bay of Luce," and to have the defenders "interdicted and discharged from mooring their vessels or boats at the said quay, or to the said stakes, buoys, anchors, or other works, and from using the said quay and access thereto, and to the adjacent shore, through the pursuer's lands, for the purpose of loading or discharging their vessels or boats, or otherwise as a landing-place in connection with the fishery in the Bay of Luce."

The pursuer pleaded;—(1) The pursuer being proprietor of the quay at Drumore and adjacent lands, is entitled to decree of declarator as concluded for. (2) The defenders having no right or title, ought to be interdicted from using the said quay and access thereto.

The defenders pleaded;—(1) The pursuer has produced, and has, no title to sue. (2) The pursuer's statement is irrelevant, and insufficient in law to support the conclusions of the summons. (5) In any view, the pursuer is not entitled to the decrees of declarator and interdict concluded for, in so far as these are directed against the defenders mooring their vessels in the bay and using the sea-shore for the purpose of loading or discharging their vessels or boats, or otherwise using the shore as a landing place in connection with the fishings in the Bay of Luce.

The Lord Ordinary, on 30th July 1880, pronounced this interlocutor:—"Finds it sufficiently established by the titles produced, and by the pos-

session which has been had under them by the pursuer and his predecessors, that the quay at Drumore harbour, in the Bay of Luce, and the road leading thereto from the village of Drumore, and also the adjacent shore from which such quay extends, form part of the lands and barony of Kilhilt, belonging to the pursuer, and are the property of the pursuer, and that the defenders, the lessees of the oyster-scalps and oyster-fishings in the bed of the sea in the Bay of Luce, and others fishing oysters there in their right, have no right or title to use the said quay or road or other property of the pursuer for the purposes of the oyster-fishings in the Bay of Luce: To the extent and effect of so finding, repels the defences, and finds and declares in terms of the conclusions of the summons: Grants interdict in terms of the conclusions thereof, so far as applicable to the oyster-fishery, and decerns: *Quoad ultra* finds that no grounds have been established for pronouncing decree in terms of the conclusions of the summons, and particularly that no grounds have been established for excluding the defenders who are called as fishermen residing in Drumore from the use of the shore in connection with the fishing of white fish in the Bay of Luce: Dismisses the action excepting to the extent and effect above expressed, and decerns."*

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* "NOTE.—The Lord Ordinary has been somewhat puzzled how to dispose of this action, owing to the general terms used in the conclusions of the summons, and to the fact that no distinction has been taken by the defenders as between the rights of those exercising the Crown's right of oyster-fishing, and the rights of fishermen generally.

"As the Crown is not called, the Lord Ordinary assumes that no question was intended to be raised by the pursuer concerning the property of the foreshore, or the uses to which it may be subject on the part of fishermen exercising the right of fishing for white fish. He has therefore decided only upon the question raised with the oyster-fishers as to their use of the quay."

(His Lordship then narrated the history of the pier and its access.)

"In these circumstances, the question raised by the defenders is, whether they have right, as lessees of the Crown's oyster-fishings in the Bay of Luce, or as otherwise exercising the right of the Crown to the oyster-fishings in the sea, to use the quay in question, or to dispute the pursuer's title to it as his private property.

"The Lord Ordinary is of opinion that the defenders have failed to instruct any right to the use of the quay. The lease of oyster-fishings upon which they found deals with the oyster-fishings in the bed of the sea as a distinct patrimonial right; and the Lord Ordinary does not doubt that they may be so regarded. But such a right gives them no title, and the lease does not profess to give them any title to make use of the private property of the pursuer, or others holding property upon the sea-shore; nor does it give them any title to question the pursuer's right to maintain the quay as a part of his property—that not being questioned by the Crown, from whom the lease is derived.

"It is quite settled law, in the Lord Ordinary's opinion, that the proprietor of a seaboard estate, held under a barony title, may establish by possession a right to the property of erections on the foreshore, and to the foreshore itself—(*Agnew v. Lord Advocate*, Jan. 21, 1873, 11 Macph. 309; *Colquhoun v. Paton*, June 17, 1859, 21 D. 996). And although every right to the foreshore is subject to certain public uses, it is indisputable that the shore may be appropriated; and where it has been appropriated, with the authority, expressed or implied, of the Crown, a separate grant of oyster-beds under the sea will not confer a right to make use of the shore so appropriated. Such oyster-fishings may be carried on from any neighbouring port, and imply no right to make use of the adjacent land or property connected therewith.

"The case of the fishermen of Drumore generally, however, is different,—at least, in so far as the use of the shore is referred to in the summons. By the Scots Act of Queen Anne's reign (1705, c. 2), persons fishing for white fish ob-

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LORD YOUNG.—It is clearly of advantage to the proprietor of an estate that fishings, whosoever may be the tenants, should be established which give profitable employment to the villagers residing upon his property. Drumore is really a fishing village, situated upon what may be called a sort of natural harbour or anchorage, protected by a projecting point. The oyster-fisheries in the neighbourhood give employment to the inhabitants of the village, and are therefore of advantage to the district generally and to the proprietor in particular. It appears that a predecessor of the present Earl of Stair early in the present century, for the benefit of the district, made a road along the sea-shore to a convenient point for purposes of embarkation and disembarkation; and that he, or one of his tenants in his right, had shortly before improved this point for these purposes by making a quay at its extremity. One of the witnesses says,—“The quay was finished in 1810 so far as I remember, and the road was then cut out of one of the Earl of Stair’s fields down to a level with the quay. It was made by people employed by Mr M’Douall. Before that there was no road except to the sea-beach and the sand. After the road was made, Mr M’Douall built a wall to prevent the sea from tearing away the road. The road was made no farther west than near to the quay—cut out of the brae. Of late years a piece of road was made from the quay to the point of Drumore. It was said to be the Earl of Stair that did that—to one of his farms. The public at large in going to the harbour use the road from Drumore to the quay.” Nevertheless the quay was an improvement upon the natural shore, and it would cost a certain amount of money. The making of the road to it was also an advantage; and that it and the road should be used by all and sundry who wanted to go to the shore was just the very thing that made it of advantage to the district, and indirectly to the proprietor of the district.

It does not follow from all this, and even from Lord Stair having exacted certain payments from those who availed themselves of the improvements which he had made upon the previous natural state of things, that Lord Stair could have appropriated,—with or without the works which he had executed for the

tained right to the use of the shores for bringing in and unloading their fish. The Lord Ordinary is not aware that this right has been taken away. It does not appear to be repealed by the Fisheries Act of 1868. It is necessary, therefore, in his opinion, to avoid deciding anything which might prejudice a claim not distinctly challenged in this action, although the terms of the conclusions might affect it.

“With regard to any claim which the defenders may have to the use of the shore as members of the public, it is only necessary to say that the foregoing interlocutor will not prejudice such claim. It disposes only of the question concerning the defenders’ right to use the quay and its adjuncts. Holding, as the Lord Ordinary has held, that these are the property of the pursuer, the case of *Colquhoun v. Paton* appears to him substantially to decide against the right of individual members of the public to make use of such structures without complying with the proprietor’s conditions, and to negative the title of private individuals to complain of such structures as an encroachment.”

¹ *Authorities*.—Ersk. (Ivory), ii. 6, 17, note 91; *Officers of State v. Smith*, March 11, 1846, 8 D. 711, 18 Scot. Jur. 364; *Colquhoun v. Paton*, Dec. 15, 1853, 16 D. 206, 26 Scot. Jur. 104, and June 17, 1859, 21 D. 996, 31 Scot. Jur. 550; *Hagart v. Fyfe*, Nov. 15, 1870, 9 Macph. 127; *Agnew v. Lord Advocate*, Jan. 21, 1873, 11 Macph. 309, 45 Scot. Jur. 214; *Orr Ewing & Co. v. Colquhoun’s Trustees*, July 30, 1877, *ante*, vol. iv. (H. of L.), p. 116.

improvement of the harbour,—Drumore Point, as a place where he exclusively, or those having his special permission, should be entitled to embark and disembark, and from which all others should be excluded. For him to have pointed out any part of the sea-shore there which should be exclusively appropriated to his own use, or to the use of those having his special permission, would, I think, have been extravagant with reference to public rights; but that he should have improved the natural state of things by certain works at his own expense was the most natural thing in the world for a proprietor to do. It was not mere benevolence, although that perhaps had something to do with it. — Whatever improves the state of things in a district is a benefit to the proprietor; and it is just the multiplication and continuance of such benefits that has raised the condition of this harbour from the state in which it was in 1809 to the very different state in which it is now.

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Lord Stair, or his advisers—probably he was entirely in the hands of advisers in the matter—conceived he had a right of harbour, and a right to exact dues from all resorting to the place, but I suppose, consistently with the argument which we have heard, that it was a right of harbour of this particular sort, that he could admit whom he pleased and exclude whom he pleased. Where there is a grant of harbour, that is, where there is a grant recognised by law, all the world are entitled to resort there upon paying the reasonable dues which may be exacted; but the kind of harbour here claimed is a harbour to which some may be admitted and from which others may be excluded at the will of the alleged proprietor. Now, that is altogether out of the question.

I do not know how much of this shore the proprietor would include within the space that he so claims as subject to his entire control. It is stated on record as the quay which had been erected on the old natural gravel bank at Drumore Point and the shore adjacent on either side. How much that is to include we were told, upon appealing to the bar for information, had not yet been thought of. But it is manifest that the inhabitants of this village upon the sea-shore are entitled to put to sea in boats and to come back again. From anything that appears they might have to embark twenty miles off on either side if they were to get to sea. But if they are entitled to embark and land, as heretofore in all past time, from the adjacent sea-shore, and to moor their boats to the rings which have been put there for the purpose—and they have been doing nothing more—what in the world is the meaning of this action?

I can understand it in any other than a legal point of view. Lord Stair says—“It costs me £20 a-year to keep up this pier and to clear away the periodical silting up; and as a certain number of the villagers have profitable employment in the oyster-fishing, and use their boats in connection with that fishing, I think it is proper that they or their employers should relieve me of part at least of that expense, because of the convenience which they have in anchoring in the bay, which is, to a certain extent, protected by this quay.” That may be more or less reasonable, but I am afraid the legal answer is conclusive. “Take away your quay if you like. We do not object to your keeping it there if it serves your purpose; but if you wish to take it away, remove it, by all means, and we will land from our boats just the same; they may then be as well protected or not, as it happens. There is a difference of opinion about that. Some say the bank would protect us well enough but for the stones that have been taken out of it to make this pier. But we are prepared to take our chance.”

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There is no manner of right by which Lord Stair can exact harbour dues. When these fishermen land on the shore and fasten their boats to the rings, they are just doing what has been done in time past, and has not been objected to. They may be in greater numbers now ; that is the mark of their prosperity, which it ought to rejoice the landlord that these fishings have brought to the village and the people of the village. I say nothing about the Crown having⁺ appropriated the oyster-fishings. They may be entitled to do that and let them to an English company, or they may not ; that is not in question. But one result is to bring such additional prosperity to the village and the people thereof, as is indicated by the very concourse of fishing boats to this bay which is referred to, and to say that they are to pay dues because of this pier or dyke which was erected upon the sea-shore in 1809 is, as a legal proposition, altogether out of the question.

I entirely concur with the observation which has been made by Lord Gifford—to some extent by all of us, but more pointedly by him—that it is impossible to make any distinction between the people who are embarking for or returning from oyster-fishing, and those who are embarking for or returning from any other kind of fishing. In pursuit of lawful business or pleasure upon the sea, the inhabitants of this village, or the public at large, who are entitled to reach the sea-shore, are entitled to embark and to land as heretofore.

It has been sufficiently pointed out in the course of the argument that there is really here no question about the use of the pier, that not having been taken by the fishermen in question ; but if there had been a question about the use of the pier, as perhaps there formally is by the conclusions of the summons, it would be apparent, I think, from what I have already said, that, in my opinion, there is no distinction between the pier and the rest of the shore. The site of the pier was just the shore, and the pier is nothing more than an artificial erection, and not of a very elaborate character, on a natural bank which forms part of this bay, and I could make no distinction, if there was any legal question about it, between the pier and the rest.

I have only further to say that I quite assume that Lord Stair has all the right of property on the sea-shore, including this improved natural promontory, which is properly enough called a quay, which any adjacent seaboard proprietor could have in the sea-shore. If there was any dispute about that, we have no parties here between whom to try it. The action is directed against people who are making a use of the sea-shore not as proprietors, not as claiming any right of property, but as the residents of the district, the inhabitants of this village, or the seafaring public who happen to be dwelling in this village, and although it is quite proper to state as an introduction to the argument that the question is about this right of use by the fishermen, it is upon a challenge by the proprietor of the sea-shore. The proprietor of this barony, whose title to the barony is not in dispute, challenges a certain use. I am of opinion that there has been no invasion of his rights by the use of which he complains, therefore it is quite unnecessary to pronounce any decree of declarator of his right in the sea-shore any more than to his Stair estates, or to this barony, which is part of the Stair estates. I assume that ; and assuming that, I am of opinion that he sets forth no denial or invasion of any legal right, and that, therefore, this action is untenable, and the defenders are entitled to absolvitor.

LORD GIFFORD.—I concur, and on the same ground. In one sense this may

be said to be an important case, for its conclusions may be calculated to raise some important questions. But, fortunately, the real matter at issue is very trifling, and we are not called upon to give an opinion upon most of these questions. The conclusions of the summons are twofold, first, for a declarator that the pursuer, Lord Stair, is proprietor of a quay in the locality mentioned, and of a certain portion of the adjacent shore; and also for declarator that the defenders have no right to moor their boats at said quay, or at the adjacent shore. Then there is a conclusion that the defenders "should be interdicted and discharged from mooring their vessels or boats at the said quay, or to the said stakes, buoys, anchors, and other works." This conclusion for interdict is directed against the whole defenders, and these stakes, buoys, anchors, and other works are stated to be on the quay, and on the adjacent shore on either side of the quay, so that really the attempt is to prevent these oyster-fishers, and all people whom they employ, from using this little harbour, natural bay, or dyke at Drumore for the purpose of oyster-fishing. I think the declaratory conclusions may fairly be regarded as introductory merely to the interdict. And I agree that, so far as this is a declarator of right in the foreshore or any part of it, there is no proper contradictor and no materials for pronouncing a judgment. The proper defender would be the Crown, but the Crown is not called. The defenders who are called are partly the lessees of the oyster-fisheries, who apparently reside at Canterbury in Kent, and they have no right or interest to raise this question of property, and are eminently not defenders on that point. Neither are the other defenders, who are all residents in or near Drumore, and proprietors of small fishing-boats. Plainly these are not the parties with whom to try the question of right of property in the foreshore, and I do not think they have any interest to raise that question, for none of them are claiming property in it; they are only claiming public use. I think, therefore, this declarator is really uncalled for.

But that leaves open still the question of interdict. A proof has been led, and I think the result of the proof, or rather the result of the admissions, is this: The quay was made by the Earl of Stair, or by a tenant by arrangement with him, in or about 1809, and he has kept it up, he or his tenants by arrangement with him, ever since, such as it is, and he has levied dues from coasting vessels, whatever that expression may mean. He admits that he has never levied dues from fishing-boats resorting to the quay or coming into the bay and using the pawls. Now, in that state of fact, he proposes to levy dues from the fishing-boats belonging to the defenders, the principal tacksmen of the oyster-fishings in the bay, and from all boats to whomsoever belonging, employed by them in connection with the oyster-fishings. I do not think that conclusion has been supported in point of proof, or upon any ground intelligible or reasonable either in law or equity. If the dredging of oysters had gone on on a smaller scale with vessels of somewhat less size as it did before the Crown let the fishing to the Kent company, I suppose there would have been no demand for such dues. No boat ever paid dues for bringing in oysters from time immemorial; that has been admitted and proven. Why then shall the boats that come from Kent, or the fishermen who bring boats from Kent, pay any dues? The admission given in the proof was not that it was a gratuity given to the tenants of Drumore estate; the admission was that fishing-boats had come there, as undoubtedly they had a right to do, ever since there was such a thing as fishing there, or a

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And this really exposes the fallacy which underlies this action, viz., that Lord Stair has a right of harbour, which he has not, and therefore no right to levy harbour dues. In the statement on record he says,—“The defenders nevertheless refuse to pay harbour dues to the pursuer, and this action has therefore been rendered necessary.” It is not that the defenders are doing wrong, or because any injury has been done, but because they are now refusing to pay harbour dues, although their boats are not coasting vessels, which alone have paid harbour dues hitherto, but fishing boats, and the foundation of Lord Stair’s claim is the idea that he has the right to levy harbour dues, and, as the counterpart of that right, to interdict anybody from using the harbour who does not pay harbour dues. The claim of the pursuer comes, in fact, to this,—“I have the right of harbour at Drumore, you the fishing boats from Kent shall not enter my harbour and have the benefit of my harbour without paying me harbour dues.” The answer to that is,—“You have no right of harbour.” Nobody has right of harbour who has not a grant of harbour and who does not support the harbour, granted, as such grants always are, for advantage, and containing, as they always do, an obligation to maintain the harbour for the purposes, of the public, and the right to levy dues is the counterpart of maintaining the harbour. Lord Stair is not bound to maintain this harbour; he is not bound to lay out that £20, which he seems to think so serious a matter, upon the harbour; he may give up expending it, and say to the tenants and to the oyster fishermen, “You are the only parties using the harbour, keep it up yourselves.” That may be a reasonable thing for him to say, not a very generous thing certainly, but we have nothing to do with generosity. The question we have to decide here is whether Lord Stair is entitled to interdict anybody from going into Drumore harbour, or from fastening boats to the pawls, or even from mooring them to the shore. I think the answer to that is conclusive,—“You have no right to levy harbour dues; you do not pretend to have that right; nothing can be pointed to on which to rest it,—no right of harbour—no immemorial usage—and therefore you cannot interdict parties from doing that which they have a right to do; without that illegal condition which you have no right to impose.”

That seems to me absolutely conclusive of the whole case. I cannot hold that the man who goes out to dredge oysters is not a fisherman, and to make a distinction between the “Vigilant” when she goes out to fish cod, and the “Vigilant” when she goes out to help in the oyster-fishing, is absolutely absurd. You cannot make people pay in one case and not in another. I think the foundation of this action fails the moment it is seen that Lord Stair has no right of harbour and no right to levy dues; therefore he cannot make the payment of these dues the condition of the public use of the harbour he has made.

LORD JUSTICE-CLERK.—I have come to the same conclusion as your Lordships. I have great difficulty in understanding the drift of the pursuer’s summons. His whole claim is, I think, untenable, and I have only two observations to make.

The first is, that the Lord Ordinary gives undue importance to the case by some general expressions regarding the appropriation of the shore, which he seems to think may be made by a seaboard proprietor. There is, I think, no authority for such a proposition. It may be quite true that any erection on the

shore by the proprietor is as much his property as any other part of the shore, but it is no more. I subscribe to what Lord Neaves said in the case of *Hagart*, 9 Macph. 129,—"Even if the petitioner had a title which gave him an absolute right to the foreshore that would not give him a right to exclude the public from the shore so long as it remained a shore." That I take to mean, that no man by putting down a building or other erection on the shore can prevent any member of the public using that building or erection, just as he could any other part of the shore. But, secondly, the question in this case is really a question of interdict, and after what has been said by your Lordships it is quite unnecessary for me to go at length into the case. I would notice, however, that the defenders are actually sought to be interdicted from the use of the shore adjacent to the quay, as well as of the quay itself, as a landing place in connection with the fishery in the Bay of Luce, so that fishermen are actually proposed to be prohibited on their return from fishing oysters from setting foot upon the shore adjacent to the quay. That, in my opinion, is entirely and absolutely out of the question. It might be profitable to both parties to come to some arrangement, but that is a matter with which we cannot deal. I am satisfied that the conclusions in this summons, both for declarator and for interdict, are wholly and entirely untenable.

No. 44.

Dec. 2, 1880.
Earl of Stair
v. Austin, &c.

THIS interlocutor was pronounced :—" Having heard counsel for the parties on the reclaiming note for the defenders against Lord Lee's interlocutor of 30th July 1880, Recall the said interlocutor : Dismiss the action, and assoilzie the defenders from the conclusions thereof : Find the defenders entitled to expenses," &c.

DUNDAS & WILSON, C.S.—HOPE, MANN, & KIRK, W.S.—Agents.

THE MARQUIS OF BUTE, Pursuer.—*J. P. B. Robertson—Graham Murray.*

No. 45.

GENERAL CHARLES STUART AND OTHERS (The Marchioness of Bute's Trustees), Defenders.—*Muirhead—Darling.*

Dec. 8, 1880.
Marquis of
Bute v. Lady
Bute's Trustees,
&c.

LADY MARGARET CRICHTON STUART AND HER CURATOR *ad litem* AND OTHERS, Defenders.—*Low.*

Trust—Foreign—Direction to entail jewels as heirlooms in England—Testamentary intention.—A trust-settlement in Scotch form, and executed in Scotland by a domiciled Scotch lady, directed that certain jewels, &c. should "be held as heirlooms and settled upon" her son, the Marquis of Bute, "and after him on the heirs entitled to succeed to the Bute estates, in the county of Glamorgan;" and in the event of his dying without issue they were to be sold at his death by public auction, and the proceeds applied in the erection of almshouses, &c. The testatrix further directed that certain plate should "be settled and secured upon the same series of heirs as are appointed to succeed to the Marquis of Bute's Glamorganshire estates." The trustees delivered the jewels and plate to the Marquis on obtaining from him a receipt acknowledging that they had been delivered on the conditions set forth in the trust-deed, and binding himself to concur with the trustees in settling them by a formal deed, in such form as might be permitted by the rules of law and equity, in terms of the trust-deed.

In an action brought by the Marquis concluding for declarator that he was entitled to the property of the jewels and plate, it was admitted that by the law of England personal property might be effectually settled as heirlooms. *Held* that as the testator's wish might be effectually carried out by a settlement in English form, the Marquis had acquired no higher right than a life interest in the jewels and plate, and action *dismissed*.

No. 45.

Dec. 3, 1880.
Marquis of
Bute v. Lady
Bute's Trus-
tees, &c.

1ST DIVISION.
Ld. Curriehill.
M.

By trust-disposition and settlement, dated 2d June 1859, Sophia Marchioness of Bute, who died on 28th December 1859, conveyed her whole estate, heritable and moveable, to trustees. The deed was in Scotch form, and was prepared and executed in Scotland.

The fourth purpose of the deed was as follows:—"I direct and appoint that the jewels, watches, seals, pocket and other personal trinkets and ornaments bequeathed to me by the late John Marquess of Bute, my husband, shall be held as heirlooms and settled upon my dear and only child, John Patrick, now Marquess of Bute, and after him on the heirs entitled to succeed to the Bute estates in the county of Glamorgan; and in the event of my dying before my son attains the age of twenty-one, I recommend and trust that the Court of Chancery will appoint as his guardians the foresaid Colonel Charles Stuart, Sir Francis Hastings Gilbert, Baronet, and Lady Elizabeth Moore, whose near relationship entitles them to the office, and in all of whom I have the most perfect confidence; and if any member of the Bute family shall interfere with or endeavour to prevent such appointment, or refuse to apply for and recommend it, then and in that case, or in the event of my son dying without issue, I direct the said jewels, trinkets, and others to be sold at his death by public auction, and the proceeds applied in the erection of almshouses in memory of my mother and my sister Flora, said almshouses to be erected in or near Edinburgh, their birthplace, and to be called the 'Flora Almshouses,' to be used and occupied by the widows and daughters of officers of the British or Indian army in necessitous circumstances, under such conditions and regulations as my trustees may from time to time appoint."

The sixth purpose was,—“I direct and appoint the plate purchased by me from the executors of the deceased Lord Dudley Stuart to be made an heirloom, and settled and secured upon the same series of heirs as are appointed to succeed to the Marquess of Bute's Glamorganshire estates; and in respect a portion thereof is much worn, I authorise any heir in possession to melt down and restore what may at the time be unfit for use.”

By the eighth purpose of the deed the truster further directed and appointed that the residue of her estate should be applied to the purposes of the almshouses above-mentioned, or in such other manner as her trustees should consider most for the honour and benefit of her family.

Lady Bute's trustees, in pursuance of the directions of the trust-deed, delivered the jewels and others and the plate to the Marquess of Bute per inventory, taking from him the following receipt and obligation, dated 12th July 1873:—"And now, seeing that the said Lieutenant-General Charles Stuart, Sir James Fergusson, and Frederick Pitman have handed over to me the jewels, watches, seals, pocket and other personal trinkets and ornaments referred to in the fourth place, and that I have also received the plate referred to in the sixth place of the said trust-disposition and settlement, conform to inventories thereof annexed, and signed by me as relative hereto, but always on the terms and conditions of the said trust-disposition and settlement, and that it is reasonable and proper that I should grant these presents; therefore I bind and oblige myself and my heirs, executors, and successors, at any time (if and when called upon) to concur with the trustees and their successors in settling, by a formal deed or deeds, in such form as may be permitted by the rules of law and equity, the said jewels, watches, seals, pocket and other personal trinkets and ornaments, and the said plate above referred to, upon myself, and after me on the heirs entitled to succeed to the Bute estates in the county of Glamorgan, all in the terms of the said trust-disposition and settlement; and in the event of my death without issue, I direct my executors

or executor, and bind and oblige my heirs, executors, and successors No. 45.
whomsoever to hand over the said jewels, watches, seals, pocket and
other personal trinkets and ornaments to the said trustees and their suc-
cessors in office, in terms of the said trust-disposition and settlement; Dec. 3, 1880.
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Bute v. Lady
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and in the event of my death, leaving issue, I direct my executors or
executor, and bind and oblige my heirs, executors, and successors whom-
soever, to hand over the said jewels, watches, seals, pocket and other per-
sonal trinkets and ornaments, and the said plate, to the heir entitled to
succeed to the Bute estates in Glamorganshire, as above provided."

An action was brought by the Marquess, concluding for declarator that under the trust-disposition above narrated he was entitled to the absolute property of the jewels, &c. and plate, and had right to dispose of them at pleasure. He called as defenders (1) the trustees, and (2) his only child, Lady Margaret Crichton Stuart, Lieut.-Col. J. F. Dudley Crichton Stuart, and his son, Patrick James Crichton Stuart, who were the next heirs of entail to the Glamorganshire estates.

The pursuer pleaded;—(1) That his rights in the jewels, &c. were those of absolute property; and (2) that the direction for their sale had become inoperative, in respect he had attained the age of twenty-one, and, *separatim*, had issue.

The defenders pleaded;—(1) That under the limitations in the deed the pursuer's interest in the jewels was a life interest, similar to the interest he had in the Glamorganshire estates under the deed of entail, and that they had been effectually settled upon him for life within the meaning of the deed, by delivery to him upon the above-mentioned document of receipt and obligation; and (2) that they were bound to carry out the direction in the deed in accordance with the law of England, by which personal property might be entailed so as to be transmissible as heirlooms.

The Lord Ordinary dismissed the action.*

* "NOTE.— . . . The pursuer, however, maintains that, as the mother was a domiciled Scotchwoman, and as her settlement, which is in the Scottish form, was prepared by her agents in Edinburgh, and executed by her in that city, the deed must be construed according to the law of Scotland; that by the law of Scotland an entail of moveables, which is what is truly intended by the directions above recited, cannot receive any effect; that he is therefore entitled to retain the whole of the articles as his absolute and exclusive property, and to alienate them at pleasure, onerously or gratuitously; and that he is not bound to redeliver them to the trustees, or to submit to their being settled or secured as directed by the settlement.

"It may be conceded, and after the recent decision in the case of *Kinnear*, 2 Ret. 765, and 4 Ret. 705, it would be difficult to dispute that, by the law of Scotland, moveables cannot be effectually entailed; but the defenders, who are the trustees of the late Marchioness, and the four persons next entitled to succeed to the Glamorganshire estates, viz., the pursuer's only child, Lady Margaret Stuart, and Colonel J. F. Crichton Stuart, and his two sons, maintain (1) as regards the jewels and trinkets, that the direction, even if the settlement be construed as a Scotch deed, confers upon the pursuer no higher right than a life interest; and (2) that, as regards not only the jewels and trinkets, but also the plate, the settlement must be construed with reference to the law of England, which allows moveables to be made heirlooms, and entailed in connection with landed estates.

"Now, even assuming that the settlement must be construed as a purely Scotch deed, and with reference to the rules of the law of Scotland, which forbid entails of moveables, I should be inclined to hold that, according to the sound construction of the fourth purpose, the direction given to the trustees to hold the jewels, &c. as heirlooms, and settle and secure them on the pursuer and the heirs of the Glamorganshire estates, is qualified by the direction to sell them in

No. 45. The pursuer reclaimed.

Dec. 3, 1880.
Marquis of
Bute v. Lady
Bute's Trustees, &c.

The following minute of admissions was put in in the Inner-House :—
“(1) That under the will of the late Lord Bute, the present Lord Bute, the pursuer, is tenant for life of the Bute estates in the county of Glamorgan, with remainder to his first and every other son successively in tail, with remainder to his first and every other daughter successively in tail, with other remainders over. (2) That by the law of England personal property may be devised and limited as an heirloom to a person for life, with remainder to other persons in tail. (3) That by the law of England personal property so devised or limited as an heirloom will be enjoyed by the tenant for life, and will be inalienable by him, and at his death will pass to and become the absolute property of the first person seised in tail, unless by an express declaration in the settlement vesting has been postponed until his attainment of twenty-one, or his death under that age, leaving issue inheritable under the entail.”

Argued for the reclamer ;—(1) The deed was a Scotch one ; it was in Scotch form, and Lady Bute was a domiciled Scotchwoman. That shewed that Scotch law was that by which the deed fell to be interpreted.¹ By Scotch law, which was alone applicable, an entail of moveables was impossible.² (2) The Lord Ordinary was not entitled to get assistance from the fact of the direction to sell. The clauses were to be construed by themselves. (3) There was no need here to have recourse to English conveyancing. The word “heirlooms” did not necessarily import a reference to the law of England. Even if it did, it was not a word of skill.³ The

the event of the pursuer dying without issue, and to apply the price in the erection of almshouses. This, I think, clearly implies that the pursuer was intended to have merely a life interest in these articles, and that the heirs of the Glamorganshire estates were to take no interest at all in the event of the pursuer dying without issue.

“I am inclined, however, to think that, in giving the directions contained in the fourth and sixth purposes of the settlement, the truster intended her trustees to deal with the jewels, trinkets, and plate according to the rules of English jurisprudence, and that the settlement must be construed on that footing. It is therefore necessary to ascertain how the Courts of England would deal with this settlement ; and at the debate the parties concurred in stating (1) that by the law of England moveables may be competently made ‘heirlooms,’ and may be effectually entailed in connection with land ; (2) that the directions in question are expressed in the proper terms to secure that result with reference to the Glamorganshire estates of the Bute family, which are held under a strict entail ; and (3) that the interest of the pursuer in these estates, and in the jewels and plate, if made heirlooms, is merely a life interest.

“This being so, it appears to me that the trustees have already given to the pursuer all that he is entitled to ask. They have handed to him the articles, per inventory, taking from him at the same time an obligation to concur with them in settling and securing the heirlooms, in terms of the directions, and directing his executors on his death to restore them to the trustees. What is to become of the articles after the pursuer's death is a question on which I do not venture to offer an opinion. In the meantime, the pursuer cannot succeed in his present claim, and the action will be dismissed—a course which I think preferable to pronouncing decree of absolvitor in favour of the defenders.”

¹ Mitchell and Baxter v. Davies, Dec. 3, 1875, *ante*, vol. iii. 208 ; Corbett and Others v. Waddell and Others, Nov. 13, 1879, *ante*, vol. vii. 200 ; Carleton v. Thomson, July 30, 1867, 5 Macph. (H. of L.) 151 ; Thomson's Trustees v. Alexander, Dec. 18, 1851, 14 D. 217 ; Rainsford v. Maxwell, Feb. 6, 1852, 14 D. 450.

² Kinnear v. Kinnear's Trustees, June 5, 1875, *ante*, vol. ii. 765, and June 20, 1877, *ante*, vol. iv. p. 705.

³ Williams on Executors, 726, 731.

case was stronger in the sixth purpose than in the fourth, for there was no ulterior direction in the former. No. 45.

Argued for the defenders ;—The pursuer said the question was one of construction, and not of intention. But the Court, if possible, would give effect to the intention.¹ The intention was that a deed should be executed in English form, by which the jewels, &c. should go with the Glamorganshire estates. It was possible in English law to create a series of life-rents of moveables by the machinery of a trust.² But if Lady Bute's directions were held to be impossible, the jewels, &c. would fall into residue, and could not in any case fall to the pursuer.

At advising,—

LORD PRESIDENT.—This is a question as to the property of certain jewels and plate which were settled by the will of the late Marchioness of Bute. They are claimed by the pursuer, who is her son, the present Marquis, as his absolute property. On the other hand, Lady Bute's trustees maintain that the jewels and plate fall to be settled according to the directions contained in her will.

With regard to the first question, we must ascertain what was the intention of the testatrix, and when we have ascertained that, the only other question is how to carry that intention into effect, or whether it should not be carried into effect at all, which is the contention of the pursuer. The property in question is disposed of by the fourth and sixth purposes of Lady Bute's will, which are in the following terms—[reads as above.]

Now, the provision as to the jewels in the fourth clause is not quite the same as the provision about the plate in the sixth clause. They are the same so far, that in both the testatrix expresses a desire to settle them as heirlooms on her son and the other heirs entitled to succeed to the Glamorganshire estates ; but in the fourth clause there is in certain events an ulterior direction to the trustees to sell the jewels and apply the proceeds in a certain way, and one of these events is that of her son dying without issue.

As far as the question of intention is concerned, I have no doubt whatever. The Glamorganshire estates were settled, as we now have it admitted, by the will of the late Marquis of Bute, in such a way that the pursuer is tenant of them for life, with remainder to his first and every other son successively in tail, with remainder to his first and every other daughter successively in tail, with other remainders over, and the immediate heir after the pursuer is his daughter, and only child, who is a party to this case. That being so, if the testatrix's intention is to be carried out, and can be carried out, I have no doubt the jewels and plate must be settled so that the pursuer shall have the use of them for life, and after his death they shall pass to his daughter if she survives and is at the time of his death the heiress entitled to succeed to the Glamorganshire estates. The event of his dying without issue need not, I think, be considered.

But the pursuer contends, that even though that had been the intention, it cannot be put in effect, because by Scotch law it is impossible to entail moveable goods, and therefore that there is no form of deed by which it would be

¹ Gibson's Trustees v. Ross, July 12, 1877, *ante*, vol. iv. 1038 ; Ferguson v. Marjoribanks, April 1, 1853, 15 D. 637.

² Suttie v. Suttie's Trustees, June 12, 1846, 18 Scot. Jur. 442 ; Shelley v. Shelley, 1868, L. R., 6 Equity, 540.

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possible to bring about the effect contemplated and desired by the testatrix. I think that contention is quite ill-founded. It seems to me to be no matter whether it is or is not possible, according to Scotch law, to settle moveables so as to pass from one heir to another in succession, vesting no absolute property in any one of them; for the purpose here is that they shall go to the heir entitled to succeed to the Glamorganshire estates under an English entail, and it must therefore receive effect by that law. The intention is that these moveables should go along with the estates so settled. I think there is nothing incompetent or improper, far less illegal, in the proposal that a deed should be made—an English deed, if necessary—carrying these moveables along with the estates as heirlooms, if that can be done.

Now, we have it admitted “that by the law of England personal property may be devised and limited as an heirloom to a person for life with remainder to other persons in tail;” and also “that by the law of England personal property so devised or limited as an heirloom will be enjoyed by the tenant for life, and will be inalienable by him, and at his death will pass to and become the absolute property of the first person seised in tail, unless by an express declaration in the settlement vesting has been postponed until his attainment of twenty-one, or his death under that age leaving issue inheritable under the entail.” The lady left these articles along with her property in trust, and gave her trustees certain directions as to how they were to be disposed of. If she had made an entail herself it is possible that might have been ineffectual. But she has conveyed the goods to trustees, and expressed a desire as to their disposal; and if the trustees can in any way carry that into effect they are bound to do so. The trustees, acting under the will, and not apparently entertaining any doubt as to their right to carry these purposes into effect, made an arrangement with the present Marquis of Bute, in the form of a receipt, or deed as it may be called. They handed over to him the jewels and plate, and took a receipt from him which was in this form—[reads as above.] The trustees fell on a plan for securing the object in view, which seems to me a most reasonable one, and they had apparently the full concurrence of the present pursuer in doing so. He has changed his mind now, and seeks to obtain the moveables in absolute property; but that would be a contradiction of the direct wishes of the testatrix, which were given effect to by the arrangement which was embodied in the deed or receipt I have described, by which the object in view was effectually carried out. In the event of certain exceedingly improbable occurrences, such as the bankruptcy of the pursuer, some questions might arise with creditors, but I think that was not in the view of the trustees or the pursuer in coming to that arrangement. It was thought quite enough to take a personal obligation from him, and I think there was nothing illegal in such an obligation, and that it was probably quite sufficient in the circumstances to secure the object of the testatrix; but if anything further were necessary, I think the trustees would be quite justified in calling on the pursuer, in terms of the obligation, to concur in any deed which would be effectual by the law of England to tie up the moveables in the manner desired.

I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD DEAS.—I do not see any reasonable doubt that though these clauses as to the jewels and plate are in a Scotch deed, the jewels and plate may be conveyed as heirlooms by an English deed, if that law recognises that as a thing

that may be done. Nor is there anything to lead me to suppose that by English law it cannot be done. No. 45.

But the question here is a much more limited one. The Marquis of Bute claims a right of absolute property in these articles, and it is as clear as day that from no reasonable point of view has he any such right; for the obligation under which he got and accepted delivery of them is expressed on the footing that he is only to have the lifereit use of them. That, to my mind, is an end of the whole case.

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Marquis of Bute v. Lady Bute's Trustees, &c.

LORD MURE.—I think there is very little difficulty in this case. The whole phraseology of the deed goes to shew that a mere lifereit right in these moveables was intended to be created in the Marquis. It is objected that you cannot make such articles "heirlooms" by Scotch law; but I know of no law to prevent a Scotch person directing things to be made heirlooms with reference to an English estate to which the party in whose favour the heirlooms are to be made over has right according to the law of England. The Lord Ordinary has thrown out this view in the latter part of his note, and I quite concur with his Lordship's remarks. These articles will therefore fall to be dealt with according to the rules of English law.

LORD SHAND.—I agree with your Lordships. It seems to me that the Marquis of Bute acted on a sound view of his legal position when he signed the obligation in 1873, and has taken an erroneous view in bringing the present action. The effect of the provisions of the trust-disposition is that a lifereit right only is conferred upon him. We have nothing to do with the question how far such articles can or can not be entailed by the law of Scotland. The trustees are here directed to entail the jewels and other things on the heirs entitled to succeed to an English estate, and it is therefore a question of English conveyancing how that is to be done. I think there is no difficulty in the case, and that the Lord Ordinary's judgment is right.

THE COURT adhered.

J. & F. ANDERSON, W.S.—BRUCE & KERR, W.S.—TODD, MURRAY, & JAMIESON, W.S.—
Agents.

THE MAGISTRATES AND TOWN-COUNCIL OF EDINBURGH, Pursuers.—
Kinnear—Jameson.

No. 46.

ANDREW PATERSON, Defender.—*Trayner—Moody Stuart.*

Dec. 3, 1880.
Magistrates and Town-Council of Edinburgh v. Paterson.

Street—Edinburgh Roads and Streets Act, 1862 (25 Vict., cap. liii.), secs. 30 and 33—Private Street—Notice to owners sought to be made liable for assessment.—Where the Town-Council of Edinburgh, in terms of section 30 of the Edinburgh Roads and Streets Act, 1862, sent a notice to the "owners of lands and heritages" in a thoroughfare which was not a public street, requiring them to repair the carriage-way, and afterwards executed operations amounting to "the making up, constructing, and causewaying" of a street, and assessed the owners, against whom they brought an action for payment, *held* that the proceedings of the Town-Council were invalid, as they ought to have proceeded under section 33 of the statute, and defenders assolized accordingly.

Observations upon the meaning of the term "private street."

THE TOWN-COUNCIL OF EDINBURGH, as coming in right of the City of Edinburgh Road Trust under "The Roads and Bridges (Scotland) Act, 1878," were applied to in reference to the state of repair of the carriage-way of Dove Lane, and following upon the inquiries they thereupon made

1st Division.
Lord Rutherford Clark.
B.

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and their result, they sent this notice, which was served upon the owners of lands and heritages in the street:—" *Edinburgh Roads Establishment*. Notice is hereby given to the owners of lands and heritages in Dove Lane, a private street within the city of Edinburgh district of roads, that the Magistrates and Council of the city of Edinburgh require the said owners to repair the carriage-way of the said street to the satisfaction of the city road surveyor; that if the said owners shall fail or neglect, within fourteen days from and after the date of this notice, to put the carriage-way of the said street in a complete and efficient state of repair, the Magistrates and Council will forthwith execute all such repairs thereon as to them may seem proper or necessary . . . ; all in terms of 'The Edinburgh Roads and Streets Act, 1862,' sec. 30, and 'The Roads and Bridges (Scotland) Act,' sec. 94.

"NOTE.—Mr Proudfoot, city road surveyor, will give information to any owners who may apply to him at his office, 31 St Andrew Square, as to what repairs are proper and necessary.

"On the carriage-way being put into a complete and efficient state of repair, to the satisfaction of the surveyor, by the owners, or failing them by the Magistrates and Council, and, in the latter case, on the Magistrates and Council being reimbursed in the expense they may incur in and in relation to the carriage-way, they will assume the maintenance of the carriage-way as a public street."

The owners did not proceed in terms of the notice to repair the carriage-way, and the Town-Council thereupon did so at an expense of £272, 15s. 5d., which they assessed upon the owners in the street.

This was an action brought by them for recovery of £104, 8s. 7d., the proportion allocated upon Andrew Paterson, C.A., one of these owners.

The pursuers founded upon secs. 30 and 34 of the Edinburgh Roads and Streets Act, 1862,* and alleged that Dove Lane was a private street, which was in need of repair at the date of the proceedings referred to, and that these clauses justified what had been done.

The defender denied that Dove Lane was a private street,† or in need

* The 30th section of the Edinburgh Roads and Streets Act, 1862, provided as follows:—"In the event of any private street specified in schedule (C) hereunto annexed appearing to the trustees at any time prior to their assuming the maintenance of the same to require repair, and also in the event of any other private street within the district being at any time, in the opinion of the trustees, in need of repair, it shall be lawful for them, so often as the same may happen, to require the owners of lands and heritages in such street to repair the same, by leaving within the dwelling-houses or other premises of such owners respectively a copy of a notice to that effect, which shall be deemed sufficient intimation to such owners; and if such owners shall fail or neglect, within fourteen days from and after the date of such notice, to put the said street in a complete and efficient state of repair, it shall be lawful for the trustees, and they are hereby required, to execute all such repairs upon the said street as to them may seem proper or necessary, and to levy the expenses of such repairs as the same shall be ascertained by an account under the hand of their surveyor, or other officer for the time being, from such owners failing or neglecting as aforesaid, and to recover the same in like manner as the assessment hereby authorised is appointed to be recovered, or otherwise according to law."

The 34th section provided:—"The expenses which may be incurred by the trustees under the provisions of this Act, in making up, constructing, and causewaying the carriage-way of any private street within the district, or in executing repairs on the same, shall be assessed by the trustees on the owners of lands and heritages according and in proportion to the lineal frontage of the same."

† By the interpretation clause "street" was described as including "any square, court, or alley, highway, lane, thoroughfare, or public passage, or place within the district, defined in this Act open to be used by carts and carriages." Private

of repair. He stated further that the notice served upon him was not in terms of the statute, and that any expenditure by the pursuers was not incurred in repairing the lane, but in laying the whole length of it with stone causeway, instead of continuing it in the macadamised state in which it had previously been. He founded upon sec. 33 of the statute,* particularly in the Inner-House, as that under which the proceedings ought to have been taken. No. 46.

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The pursuers pleaded;—1. The defender being owner of lands and heritages having a frontage to the said street, and the private street, Dove Lane, having been repaired by the pursuers, as authorised by the said Acts, and the expense thereof having been duly assessed and allocated upon the defender, he is bound to make payment of the amount as assessed.

The defender pleaded;—1. The defender should be assoilzied, with expenses, in respect that Dove Lane is not a private street within the meaning of the statute libelled. 2. *Esto* that it is a private street, the defender should be assoilzied, in respect that it was in good condition and needed no repair at the date of the notice, and *separatim*, in respect that the proceedings of the pursuers were not in terms of the section founded on.

After proof the Lord Ordinary assoilzied the defender.†

streets were defined as “streets within the district which are or may be maintained by superiors, proprietors, feuars, tenants, bodies politic or corporate, or other persons, and not by the trustees or the road trustees of the county.”

* The 33d section of the statute provided:—“In the case of such private streets as are or may be within the district, and as are not specified in said schedule C, where the carriage-way shall not have been made up and constructed, nothing herein contained shall be held or construed to confer any right on the trustees to compel the making up, constructing, and causewaying of any such street until they have received intimation in writing from the superior that the said street is an open thoroughfare for public use, or until three-fourths of the intended houses in such street shall either have been erected or are in course of being erected, or the areas for such intended houses shall have been feued under an obligation to erect houses, or until the Sheriff on an application by the trustees or any three or more persons assessed in virtue of this Act, setting forth the circumstances of the case, shall determine that it would be for the public advantage that any such street should be made up, constructed and causewayed; but in any of these cases it shall be lawful for the trustees, and they shall be bound, to require the owners of lands and heritages in any such street to make up, construct, and causeway the same to the satisfaction of the surveyor, or other officer of the trustees for the time being, by leaving within the dwelling-house or other premises of such owners respectively a copy of a notice to that effect, which shall be deemed sufficient intimation to such owners; and if such owners shall fail or neglect, within three months from and after the date of such notice, to make up, construct, and causeway any such street as aforesaid, it shall be lawful for the trustees, and they shall be bound, to make up, construct, and causeway such street in such way as to them may seem proper or necessary, and they shall levy the expense, as the same shall be ascertained by an account under the hand of their surveyor or other officer for the time, from such owners failing or neglecting as aforesaid, and shall recover the same in like manner as the assessment hereby authorised is appointed to be recovered, or otherwise according to law.”

† “NOTE.—1. The first question in this case is whether Dove Lane is a private street within the meaning of the Edinburgh Roads and Streets Act.

“It is not disputed that it is a public road which has existed for time immemorial, leading to what was formerly the village of Tipperlin. But it is not said that the road trustees were bound to maintain it, nor does it appear to have ever been maintained by any public body.

“Though a public road, it may nevertheless be a private street within the meaning of the Act. For, by the interpretation clause, ‘private streets’ mean

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The pursuers reclaimed, and argued ;—Dove Lane was not maintained by the County Trustees nor by the town. It was a “private street” within the terms of the Act, which contemplated (sec. 30) that a “private street” should be maintained at the expense of “the owners of lands and heritages” until it was taken over.¹ It was an old public thoroughfare, and so did not fall within sec. 33, which applied to streets opened up for the first time. The term “causewaying” included all modes in which carriageways were constructed or repaired.²

The defender argued ;—The repair of an existing road was what was contemplated by sec. 30. The time given to the proprietors to execute the work under that section was fourteen days ; under sec. 33, under which, and not under sec. 30, the proceedings here should have been taken, it was three months. Sec. 33 clearly applied to the circumstances disclosed in this case.³ But even though that were not so, the Lord Ordinary was right in holding that Dove Lane did not fall under the meaning of “private street” within the Act.

At advising,—

LORD PRESIDENT.—The claim made in the present action is for £104, 8s. 7d., being the share said to be due by the defender of the expense of repairing a private street, in which the defender is an owner, under the provisions of the Edinburgh Roads and Streets Act, 1862. The proceedings have been taken under the 30th section of that statute, and the notice given to the defender, which was dated the 7th of April 1879, expressly bears to proceed upon that section. The objection to the notice, and to the operations which were made upon the street, is, in the first place, that the pursuers have proceeded upon the wrong section of the statute. If the operations which have been made upon

‘streets which are or may be maintained by superiors, proprietors, feuars, tenants, bodies politic or corporate, or other persons, and not by the trustees of the Edinburgh district, or the road trustees of the county.’

“It appears, however, to the Lord Ordinary that, according to the true construction of the Act, the definition implies an obligation to maintain the street. The Act seems to be intended to regulate the enforcement of an existing obligation, and not to create an obligation to maintain a public road.

“If this be so, the pursuers’ case fails ; for they have not proved that the defender, or indeed any other persons, were under an obligation to maintain Dove Lane.

“But even if, as the pursuers contended, it was sufficient to satisfy the definition by the Act that Dove Lane was *de facto* maintained by the conterminous proprietors, they would not, in the opinion of the Lord Ordinary, be entitled to prevail. For in his judgment they have not proved the allegation on which their case in this aspect of it is based.

“2. The pursuers contended that by paying no attention to the notice which was served on him, and in which Dove Lane was described as a private street, the defender is barred from maintaining that it is not a private street. The Lord Ordinary cannot assent to that view. The pursuers proceeded at their own peril, and if they are not within the Act the mere silence of the defender will not bring them within it.

“3. The defender maintained other pleas in defence. But in the view which the Lord Ordinary takes of the case it is not necessary to consider them.”

¹ Miller’s Trustees v. Leith Police Commissioners, June 19, 1873, 11 Macph. 932 ; Kinning Park Police Commissioners v. Thomson & Co., Feb. 22, 1877, *ante*, vol. iv., p. 528 ; Hope v. Edinburgh Road Trustees, Feb. 27, 1878, *ante*, vol. v., p. 694.

² Macgregor, 1877, Second Division (not reported).

³ Campbell v. Leith Police Commissioners, June 21, 1866, 4 Macph. 853, H. of L. 8 Macph. 31.

the street are of the nature of repairs, then confessedly the notice is given under the right section of the statute, section 30. But if the operation was not the repair of the street, but the making or construction of a street for the first time, then the proceedings ought to have been taken under the 33d section of the statute. The construction of a street is called in the statute "the making up, constructing, and causewaying" of the street; the operation under the 30th section is simply repairing; and the points of distinction between the two sections are very important. The trustees under section 30 are entitled to proceed upon their own opinion entirely as to whether a street wants repair; but in the case of "the making up, constructing, and causewaying," under section 33, they cannot so proceed. They are prohibited from proceeding except upon certain conditions, and the condition applicable to the case before us is that the Sheriff on an application by the trustees shall determine that it is "for the public benefit" that this shall be done; and when that deliverance has been obtained from the Sheriff, then they are to give notice, and to allow three months, instead of fourteen days as in the other section, to the owners and occupiers to make up, construct, and causeway the street themselves. The two operations are undoubtedly of a very different character in other respects. The repair of a street may be a very slight affair, and generally is a very much less important affair than the "making up, constructing, and causewaying" of a street for the first time, and accordingly the trustees have much more unlimited power in the one case than they have in the other.

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If, then, what the trustees have done is not to repair the street, but to make up, construct, and causeway it,—that is to say, to make it for the first time,—it is quite plain that they have proceeded under the wrong section of the statute. That, of course, is a matter of fact, and to be determined upon the evidence. David Crawford Proudfoot, surveyor to the Edinburgh Road Trust, said,—“Dove Lane, which I know quite well, is rather a long, narrow place. (Q.) What was its character as regards being a public or private street? (A.) It was a private street until recently, when it came to be constructed. I say that because it was not maintained by the public authorities. With the exception of putting down a little material now and again to prevent danger or accident, they did nothing to it at all. Extending from Morningside Road on the east to Tipperlin Road on the west, it is within the city of Edinburgh district. Tipperlin Road extends from Colinton Road southwards to Morningside Road and the Asylum. . . . The total length of it is 928 feet, and the average breadth of the whole twenty feet, and of the section last done eighteen feet nine inches. Some years ago a row of semi-detached villas was built at the south end of Dove Lane. In 1872 the Edinburgh City Trust paved the carriageway opposite these houses and to the east of the houses with blocks, and grouted the joints with Portland cement. They gave notices to the proprietors similar to those given last year to the defender, under the 30th section of the Roads Act. The notices were similar to No. 7 of process. I was a servant of the trust at the time those repairs were done in 1872, and since that time the Road Trust, and afterwards the Town-Council, have taken charge of that part which was repaired. (Q.) What has been the condition of the western section, which was not repaired from that time until now? (A.) I have seen it often. It was an open piece of roadway, without any proper metal or channels, or anything to give it the character of an average made road. The Road Trust never took it over at that time, or undertook the maintenance of it. I never saw anything put upon it, with

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the exception of some stones and rubbish, which I thought came principally from the gardens adjoining on the north side of the lane. Once or twice I observed barrowfuls of the cleanings of the walks. In consequence of a letter from the town-clerk, dated 20th December 1878, enclosing one from Macrae, Flett, & Rennie, I examined Dove Lane, and reported to Mr Skinner in a letter dated 25th December 1878. The statements in that letter are correct. In consequence of a remit from the Streets and Buildings Committee I again examined Dove Lane, and reported to the committee in a letter addressed to Mr Skinner on 19th March 1879. The statements in that report are correct." [That letter was,—". . . This road extends from the east entrance of Abbotsford Park, Morningside Road, to Tipperlin Road, adjoining the entrance to Viewfield House. The east portion of the road in front of Albert Terrace is maintained by the town. The west portion, extending from the west end of Albert Terrace to Tipperlin Road, is still unmade, and is not maintained by the town. This road is in bad order, and is in much the same condition as the Tipperlin Road adjoining, neither of these roads having yet been properly constructed, and they have not been taken over as public roads . . ."] "Cross.—I first knew Dove Lane ten or eleven years ago. It was not then, and never was, a macadamised road; nor was it ever a made up or constructed road. The magistrates have seldom done anything to it within the past ten years, I think only three or four times altogether; and all that was done was to take a barrowful of stones from some of the other roads and fill up the holes. Except what I have mentioned in regard to depositing garden rubbish, I have not known anybody else mend the road saving the Magistrates. The idea of the parties who laid down the rubbish seemed to be to repair the road. Whatever its necessities, no one seemed to attend to it. I think it was the only direct road between the Morningside Road on the east and the old Colinton Road until the Morningside Road was laid out. I think Dove Lane is a very old road . . . (Q.) Is it correct to describe this road from end to end as simply a beaten track, and brown earth with grass growing over it? (A.) That would be about the character of it from the time I knew it until the Magistrates paved it." The result of Mr Proudfoot's statement is this, that the west portion of Dove Lane, with which we are dealing, was never a made or constructed road or street at all; it was just a public right of way over the surface of the ground, to which nothing had ever been done that could be called construction or making up. And what is it that was done by the Magistrates when they came, in their notice under the 30th section, to deal with this lane? They causewayed it from end to end, and at a very considerable expense, as may be gathered from the amount sued for in this action. The amount expended upon this lane is £272, 15s. 5d. Plainly, that is not the expense of a mere repair of a road of this kind, but the expense of making it; and accordingly the account of the contractor shews very clearly that the operation which he performed under the employment of the pursuers was the laying down and making of a street, with side channels, and all the usual accompaniments of a causewayed street. The kind of causeway is described as ordinary mashed rubble stones, which is not so expensive or so valuable as causeway of a different description; still it is a distinct causewaying of the street.

I am therefore very clearly of opinion that the pursuers here have proceeded under the wrong section of the statute, and the consequence is that their whole proceedings are invalid, and that they cannot be allowed to recover this money.

But this ground of objection to the assessment is not that upon which the Lord Ordinary has proceeded, and it would be quite wrong not to notice his Lordship's grounds of judgment also. I have no hesitation in agreeing with them, and think that they are sufficient also for the determination of this case against the pursuers. I am quite satisfied that this was not a private street within the meaning of the Act of Parliament. A private street is defined in the interpretation clause of the statute to mean "streets within the district which are or may be maintained by superiors, proprietors, feuars, tenants, bodies politic or corporate, or other persons, and not by the trustees or the road trustees of the county." Now, there are two requisites here to distinguish private streets from other streets. The one is, that they are or may be maintained by private persons, being either superiors, proprietors, or something of that kind; and secondly, that they are not maintained by the trustees under this statute, or by the road trustees of the county. If these conditions are fulfilled, then the street becomes a private street, as distinguished from other streets, not as distinguished from public streets, for that is not one of the terms of this statute, but from streets generally, and the word "street" is described as including "any square, court, or alley, highway, lane, thoroughfare, or public passage, or place within the district, defined in this Act, open to be used by carts and carriages." And therefore if there is an open space—no matter whether it be a lane or a court or anything else—or a passage used by carts and carriages which does not answer the conditions of the definition of private streets, then that is a street generally under this statute. In the present case the pursuer's contention is that this is a street which is maintained by the proprietors alongside, and therefore is a private street. The Lord Ordinary is of opinion that unless the proprietors or superiors, or somebody in that position, maintain the street in virtue of an obligation upon them to that effect, the words of the definition will not cover the street. I think it is not necessary to determine that absolutely, but I should rather be inclined to question, is this street, in point of fact, or has it been maintained by the proprietors alongside of it in virtue of any obligation imposed upon them, or is it maintained in any way at all answering to the sort of description of maintenance which would be expected of persons who were under an obligation to maintain it? In short, I do not think it is necessary in this case to prove the obligation independently of the maintenance. If a street is maintained by private proprietors, indicating an obligation upon their part so to maintain it, that, I think, might sufficiently answer the description in this interpretation clause. But here there is not only no appearance of any obligation upon the part of the defender and the other proprietors in the street to maintain this lane, but, in point of fact, as I think the Lord Ordinary holds upon the evidence, it never has been so maintained. I quite agree with him in that view. I think the passage which I have already read from the road surveyor's evidence clearly points in that direction; but there is more evidence to the same purpose, the general result of which is that nobody ever repaired or maintained this lane. It was left entirely to itself. Somebody might lay down a barrowful of stones to fill up a hole, or something of that kind, but beyond that temporary repair, which indicates nothing like a general obligation, nothing has ever been done; and therefore upon both grounds I am clearly of opinion that the pursuers are not entitled to prevail.

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LORD DEAS.—It is very plain that this is a notice to repair given under the

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30th section of the Act, and that it ought to have been a notice to make up and construct the street under the 33d section. I think that objection is quite conclusive, and I do not go any further, because I do not consider it necessary to do so.

LORD MURE.—I agree with your Lordships that this proceeding has been taken under a wrong section of the statute. I think it is plain, from the reading of the 30th and 33d sections, that they relate to totally distinct matters. The 30th section puts it in the power of the authorities to repair the streets that have been made, and are streets under the statute, and recognised as such. The 33d section, on the other hand, is the section which applies to a lane such as this, which had never been before regularly made up into a street. The distinction is palpable on the face of the statute, and the whole question comes to be, whether, as matter of fact, this lane ever was made into a street so as to bring it into the position of what the 33d section contemplates as a made-up street, and so to put it into the power of the Magistrates to enforce the provisions of the 30th section. Now, upon the evidence which your Lordship has referred to—that of the surveyor—and I think there are other witnesses who speak to the same matter, viz., the witness Melville and Mr Niven—it is clear that this lane never was a made-up street in the sense in which that word is used in the statute. In these circumstances I am of opinion that the Lord Ordinary has arrived at a right result in assoilzieing the defender. With regard to the ground upon which the Lord Ordinary has gone, I am also disposed to agree with your Lordship that he has taken a substantially correct view of the statute, but I go principally upon the objection raised as to the application of the 30th section of the Act.

LORD SHAND.—I think the evidence in this case, particularly that of the contractor, and the account of expense incurred with reference to the work done, clearly shew that the operation itself was not a repair, but was the “making up, constructing, and causewaying” of the road for the first time. That being so, I agree with your Lordship in thinking that the proceedings should have been taken under section 33 of the statute. And this is no mere technical point. It is a matter of substance, of very considerable importance to the persons affected; for if what is proposed is for the first time to make up and construct a new road, then the feuars and persons who are to be at the expense of it are entitled to be heard on the question whether the time has arrived for constructing the road.

And, accordingly, I agree with your Lordships in holding that proceedings which really are such as should be taken under section 33 cannot be taken under section 30 under the cover of a mere repair, for if that were allowed it would deprive the feuars of the opportunity of being heard before the Sheriff on the question whether the road ought to be made up at all, or at all events at the time when it was proposed. I may further say that I am not surprised at the course taken by the feuars in this case—the persons whose properties abut on the roadside. They seem to have taken no notice of the notices that were served on them. But these notices merely informed them that what was about to be done was a repair of the road, and that they should ultimately have to pay for the repair. I confess if I had been placed in the position of one of those gentlemen I should have expected that something a great deal less than the making up

and constructing of the road was to take place. But while quite willing to allow the Magistrates to go on and repair the road and levy a share of the expense, I can quite understand that when they found the thing actually done was not a repair, but the construction of a road by causewaying it for the first time at considerable expense, they should take the steps which they have done in resisting payment of the amount. It appears to me that having resisted it their defence is well-founded.

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Upon the other point of whether this is or is not a private street, I confess I have not the same clear opinion as your Lordship has expressed. I think that is a question attended with considerable delicacy. The statute is very broad in its provision, that where streets are maintained by persons whose properties adjoin and not by the trustees, these must be regarded as private streets, and a certain amount of maintenance, short of complete maintenance in good order, may be sufficient to bring a street within that character. I prefer in this case to say that I rest my judgment entirely on the first point with which your Lordships have dealt, and that I am not prepared to concur in the opinion that this is not a private street within the meaning of the Act.

THE COURT adhered.

W. WHITE MILLAR, S.S.C.—MACRAE, FLETT, & RENNIE, W.S.—Agents.

MAJOR WILLIAM BAIRD YOUNG (Mrs Mary Catherine Young or Morison's *Curator Bonis*), Pursuer.—*Kinnear—Graham Murray.* No. 47.

JAMES COTTER MORISON AND OTHERS (Alexander Morison's Trustees),
Defenders.—*Guthrie Smith—Gebbie.* Dec. 3, 1880.
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Election—Judicial Factor—Curator Bonis to Lunatic—Power of election between legal and testamentary provisions.—Where a person is legally incapacitated from availing himself of a right of election between testamentary and legal provisions, he does not lose the right, even though he receive temporary benefit for his maintenance and support out of the estate, and he may exercise it if the incapacity be removed, or, if it be not removed, the right may be exercised by his representatives after his death.

Circumstances which were held insufficient to justify a *curator bonis* for a lunatic in making such an election.

ALEXANDER MORISON of Bognie died, without leaving issue, upon 30th December 1879. He was survived by his wife, to whom, as she was in a state of mental incapacity, William Baird Young, her brother, and one of her next of kin, was appointed *curator bonis* by the Court of Session upon 17th March 1880. At his death Mr Morison possessed moveable property to the extent of £85,000, he owned the estate of Larghan with a rental of £185, and he was heir of entail in possession of the estates of Bognie and Frendraught.

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Mr Morison's trustees, under a general settlement dated 5th April 1876, thereafter proceeded to realise his means and estate, and to intronit with it. After providing for payment of debts, &c., the deed directed that the residue of the testator's estate should be invested, and the whole income expended for the comfortable maintenance and support of his spouse, over and above her marriage-contract and other rights previously conferred upon her. The payment of legacies was to be postponed till after Mrs Morison's death. Upon her death the residue of the estate was to be paid over for the benefit of Dr Scott's Hospital for Decayed Business Men and Women in Huntly.

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Mrs Morison's *curator bonis* having elected to take her legal provisions instead of those conferred upon her by the trust-deed, brought this action against Mr Morison's trustees in order to fix the sums due upon that footing. The summons concluded for declarator that "the said Mrs Catherine Young or Morison is entitled to one half of the moveable estate left by the said deceased Alexander Morison, her husband, in name of *jus relictæ*, and to one third of the free rents of the fee-simple lands in which he was infeft at the date of his death on 30th December 1879, from said date, in name of *terce*;" and further asked for an account of intromissions, &c.

The defenders pleaded that the pursuer, as *curator bonis*, was not entitled on behalf of the truster to claim her legal rights.

A further question was raised upon record, whether the terms of Mr and Mrs Morison's antenuptial marriage-contract did not bar the claim now made, but it will be seen that the Court declined to deal with it at this stage.

The Lord Ordinary, on 30th June 1880, dismissed the action, on the ground that it was prematurely brought.*

The pursuer reclaimed.

It was stated by counsel for the *curator bonis* that his case was to be taken upon the footing that the whole income could not be judiciously spent upon his ward, and that she would not recover.

Argued for pursuer;—As *curator bonis* he was bound to elect whenever the claim for *jus relictæ* opened. It was his duty to do so, as it was beneficial to the estate.¹ It was material to notice the distinction between this case and that of *Cowan v. Turnbull*.² There the whole income belonged to the lunatic ward as undisposed of revenue of the estate. Here the ultimate purpose of the trust was postponed for the wife's benefit. If she were *sui juris* she would be bound to elect, and she was not privileged because she was *non compos mentis*. There were other interests to be protected by the trustees. She was merely a creditor of her husband's executry,

* "NOTE.— . . . Now, *prima facie*, it is not very easy to see what benefit this lady could derive from the present claim of her curator being sustained, and the question is therefore forced upon the Court, whether there are any circumstances disclosed on the face of this record sufficient to justify the present action.

"It is not said, and there is no reason to suppose, that the trustees are mismanaging the trust-estate of the lady's husband, or are misapplying the income; and as they are directed to retain the whole estate during Mrs Morison's lifetime, it is quite clear that if she should ever be restored to health she will then be entitled to raise the whole question of election, which cannot be decided without discussing some difficult matters of domicile and the construction of the English antenuptial contract. My opinion is that the *curator bonis* has failed to present any case warranting the interference of the Court *in hoc statu*.

"Were he to succeed in this action, his ward would not, in my judgment, be in any way benefited, however much her next of kin might be benefited were she to die in her present state of mental alienation. And it is not unimportant to observe that the pursuer, who is brother of Mrs Morison, and consequently one of her next of kin, was appointed one of her husband's trustees, but declined to accept that office, and after having been appointed her *curator bonis*, has in that character raised the present action. On the whole, I am of opinion that the action is, to say the least, premature and uncalled for, and ought to be dismissed; but, of course, it will be in the power of the curator to renew his claim in the event of any material change of circumstances."

¹ *Hannay v. Kennedy*, Nov. 15, 1843, 6 D. 40; *Fraser on Parent and Child*, 512.

² June 13, 1845, 7 D. 872, H. of L., 6 Bell's Appa. 222 (*Lord Cottenham*, p. 238).

and took in satisfaction of a debt.¹ The trustees wished the ward to be maintained at a greater expense than could be judiciously spent upon her. By taking benefit from these provisions she would be barred from making an election later.

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Argued for the defenders;—Election was a matter for the Court. If there was a manifest inequality between the legal and the testamentary provisions, then it was the duty of the curator to elect, but that was not the case here.² The only other interest here was that of the ward's next of kin, and it would be their privilege to elect if she did not recover. These were the terms of the decree of the Court in *Cowan v. Turnbull*. The rule of law was the same in the Court of Chancery.³

At advising,—

LORD PRESIDENT.—The pursuer of this action is the *curator bonis* and also the brother of a lady who is a lunatic, and who is the widow of the deceased Alexander Morison of Bognie. By his general settlement Mr Morison made a provision in favour of his widow, who, at the time of its execution, was a lunatic. He directed his trustees to invest the residue of his estate in a certain way, and to expend the whole income of the said estate “for the comfortable maintenance and support of my spouse, Mary Catherine Young or Morison, and this over and above her legal rights under the marriage-contract between us, dated 19th April 1837, and also under a bond of annuity by me in her favour, dated 18th April 1874, declaring that it shall be imperative on my said trustees to spend the whole of said income for the support and maintenance of my said wife; declaring that if she shall recover her health sufficiently to manage her affairs, my said trustees shall pay her the whole annual revenue of my said estate, and that her receipt therefor shall be a sufficient discharge to them; but if she shall so recover and again become incapable of managing her own affairs, my said trustees shall expend the whole income on her maintenance as before provided; and during the whole time she shall not be capable of managing her affairs, my trustees shall have full power of nominating for her her place of residence.” He postpones the payment of all legacies till after the death of his spouse, and then the residue of his estate is to go to certain charitable purposes. Now, Mrs Morison is stated not to have renounced or discharged in any way her legal rights as wife of Mr Morison, and the summons in this case concludes for declarator that she, the lunatic, is “entitled to one-half of the moveable estate left by the said deceased Alexander Morison, her husband, in name of *jus relictæ*, and to one-third of the free rents of the fee-simple lands in which he was infeft at the date of his death on 30th December 1879 from said date in name of *terce*.” The defenders are called on to count and reckon with the pursuers for the moveable estate, and also for the amount of the rents of the fee-simple lands. The meaning of this summons, of course, is that the *curator bonis* intends thereby to elect for his lunatic ward to take her legal provisions in place of the provisions made for her in her husband's settlement. The trustees object to this, and say that the *curator bonis* has no right to make such an election, and the Lord Ordinary has sustained this defence generally.

The curator maintains that it is for the benefit of the ward, or at least of the

¹ Fisher v. Dixon, June 14, 1840, 2 D. 1121, and July 6, 1841, 3 D. 1182, aff. April 6, 1843, 2 Bell's App. 63.

² Blaikie v. Milne, Nov. 14, 1838, 1 D. 18; Robertson, Jan. 14, 1841, 3 D. 345.

³ In re Hewson, 23 L. J. Chanc. 256; Pope's Law of Lunacy, p. 339.

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ward's estate, that this election should be made, and the chief ground on which he places this contention is, that if he does not now elect to take the legal provisions it will be necessary for him and his ward to accept payment under the settlement of the provisions thereby made by the testator, her deceased husband, and that will operate as an election of the testamentary provisions, and so bar the right of election of the legal provisions in all time coming. If I were satisfied that this would be the effect of adhering to the Lord Ordinary's judgment, I should think the questions raised of great importance, and perhaps of difficulty. But I am not at all satisfied that the right of election would be barred by this lady being maintained by the trustees under her late husband's settlement. On the contrary, I think there is authority, and very clear authority, for holding the opposite, and that although no election should be made at present the right of election could be made, and will be available to this lady if she becomes sane at any time, and if she does not become sane, and dies a lunatic, the right of election will be still available to her representatives after her death. Now, if that be so, it is very plain that the curator has no legitimate interest or right to make this election at present.

One of the difficulties suggested by the pursuer is that in other cases where the right of election has been held to be reserved and not affected by taking maintenance from the deceased's estate, the maintenance taken by the curator on behalf of his ward was not a testamentary provision, but a portion of the estate to which the lunatic had right apart from the provisions of the testator's settlement. That was undoubtedly the case in *Cowan v. Turnbull*. But *Cowan v. Turnbull* is not the only case of the kind that has occurred in our law. There are various cases of that description, and I think it is necessary to call attention to one or two of them which were not referred to in the argument. The first of these to which I shall refer,—which, though not earliest in date, is, I think, of the most importance,—is the case of *Morton v. Young*, 11th February 1813, F. C. This was a case of *legitim*, but it does not appear to me that that makes any difference in the authority of the case, for the principle involved in the right to take *legitim* is the same as that in the right to take *jus relictæ*. The testator in that case was Robert Anderson, who made a will in which he gave a large provision to his only son, but with a substitution in favour of other parties. The son was a lunatic, and if the substitution was to take effect, that of course would defeat the right of *legitim* so far that in the event of the son dying a lunatic, and not being able to make an election, his representatives would take nothing, the substitution being operative. But if the right of election belonged to his representatives in consequence of his continuing lunatic till his death, then the substitution could receive no effect as against their claims. Accordingly this was held, and the interlocutor of the Lord Ordinary in the case (Lord Polkemet), brings out the principle of the judgment very clearly indeed. He “finds that from the acknowledged imbecility or idiocy of James Arnot Anderson he cannot be held to have accepted the settlement executed by his father in his favour, with the substitution to the persons therein mentioned, so as to bar his representatives from repudiating said settlement, and from claiming in lieu thereof, first, his *legitim*, which, on his father's death, fell to him in his own right; and second, his succession to his mother's third of moveables, which had been vested in his person by his father having got him confirmed as executor to his mother: Finds that in consequence of this repudiation only one-third of the funds which belonged to Robert Anderson was carried by his settlement to the substitutes

therein mentioned, while the other two-thirds fell to the nearest in kin of the said James Arnot Anderson ; and appoints Morton and others, the pursuers in this branch of the cause, to give in a state," &c. It was thus held that so long as the party with the right of election is a lunatic, and so incapable of making an election, the failure to make an election cannot tell against either him or his representatives. His representatives upon his death are entitled to make the election, and to repudiate the testamentary provisions, notwithstanding that the lunatic during his lifetime was maintained out of the father's estate. There was a good deal of discussion in that case, and there was some difference of opinion, although very slight, upon the bench, Lord Meadowbank having some peculiar views upon the subject which it is needless particularly to mention. But the opinions of the other Judges are clear. Lord Glenlee said,—“I would concur entirely in what has been stated by my Lord Meadowbank, if it were not for the circumstance that the idiocy of James Arnot Anderson prevented him from making any choice. Till the child had by some act or other precluded himself from making the choice, I think there was nothing to tie him up, and it is the very ground of the interlocutor that no account is to be taken of the will.” Lord Robertson gives a longer opinion, in the course of which he says,—“It is said that the young man accepted of the father's settlement, and that his heirs are bound by the acceptance. But when it was attended to that he was an idiot from his birth, I do not see how he could accept; acceptance is an act of the mind; and he was incapable of doing anything that required an act of the mind.” And Lord Craigie said,—“I think it was rightly decided in the case of *Annandale* that no acts of a man in a state of idiocy could have the smallest influence on the succession to his estate, and that it was not in the power of his tutors to do any act by which the nature of it could be changed. And I think the question is just the same as if his tutors had done no act whatever”—that is to say, had not accepted of any maintenance out of the father's estate.

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The earlier case of *Robertson v. Ker*, which is reported by Kilkerran, by Elchies, and by Clerk Home, and is to be found in the Dictionary at page 8202, is to the same effect, but its circumstances are so complicated, and the opinions of the Judges differed so much upon points not referring to what we are now considering, that I do not trouble your Lordships with any particular examination of it.

Then we come to the case of *Cowan v. Turnbull*, 7 D. 872, H. of L., 6 Bell's Appa. 222, which is a most important authority on this branch of the law, and agrees with those earlier cases, that where a party who has to make an election is a lunatic he cannot make any choice, and nobody is entitled to bind him by making it for him; but that he may make his choice in the event of his recovering from his insanity, and without prejudice also to his representatives making that choice if he never recovers his sanity, notwithstanding that he is maintained out of the estate of the testator, on which the election is to be made. Now, in *Cowan v. Turnbull*, as your Lordships recollect very well, there was a direction to make an entail of lands belonging to the testator and to pay the rents thereof to his son. But the entail could not be made, from the insanity of the heir. The rents of the estate therefore belonged to the heir, not under the authority of the father's settlement, but in his own right as heir, and therefore it was not necessary to take any maintenance out of the testator's estate—that is to say, out of the estate disposed of by the settlement. That

No. 47. was a peculiarity of the case, but the general principle which I have stated
Dec. 3, 1880. was affirmed in the strongest manner by the judgment of the Court. The first
Morrison's conclusion of the summons there must be attended to. It is for declarator
Curator Bonis that "*hoc statu* it is not incumbent upon the pursuer, in the exercise of the
v. Morrison's powers, or in the discharge of the duties of his office of *curator bonis* for the
Trustees. said Thomas Turnbull to elect on his behalf between his right of *legitim* attaching
to the moveable estate and effects of the said deceased William Turnbull,
his father, and the rights provided in his favour by the said William Turnbull's
deed of settlement, and that notwithstanding such election shall not be made by
the pursuer on behalf of the said Thomas Turnbull, and notwithstanding of the
sums necessary for his support and maintenance being supplied from the estate
under the charge of the trustees of his father, in terms of the requisition made
on them by the pursuer as before mentioned, the right of the said Thomas Turn-
bull to make such election in the event of his recovery, or, in the event of his
dying without having recovered, or without having elected, the right of his legal
representatives to claim his *legitim*, shall remain entire and unimpaired." Now,
it must be observed that that conclusion assumes that the curator will not suc-
ceed in vindicating a claim to the undisposed of rents of the heritable estate,
which form the subject of the second conclusion. In that event he seeks for
declarator that even if he should be bound to take money for the maintenance
of his ward out of the father's estate, as disposed of by the settlement, that shall
not prevent either the lunatic, if he recovered, or his representatives, if he did
not recover, from electing to take *legitim*, and the decree of the Court is in
terms of that first conclusion. It is not given in the Court of Session report, but
it is given at length in the report of the case in the House of Lords in Bell's
Appeals. The Court pronounced the following interlocutor, upon 17th June
1845:—"Find, decern, and declare in terms of the first declaratory con-
clusion of the summons; and farther, find and declare that the defenders,
the trustees of the late William Turnbull, are not directed, or entitled,
under the terms of his trust-settlement, to execute an entail of the lands
conveyed to them by that deed, or of the lands to be purchased by them
under the directions thereof, until the period of the recovery or death of Thomas
Turnbull, his son, and that the free income and annual produce drawn and to
be drawn from the estate, heritable and moveable, of the said William Turnbull
by the said defenders, his trustees, between the period of his death and the
execution of said entail, whether the same was acquired by him in his lifetime,
or has been or shall be acquired by the said trustees under the direction of the
said trust-deed, after deduction of all payments which the trustees shall in con-
formity with the direction and authority in the said trust-deed make out of the
said income and annual produce, including such allowance as they shall make
for the support and comfort of the said Thomas Turnbull during all the days
of his lifetime, or until his recovery, is undisposed of by the said deed, and now
belongs, or as the same shall from time to time exist and become due, will
belong to the said Thomas Turnbull absolutely and unconditionally as his own
funds, and that the pursuer as his *curator bonis* is entitled to demand and
recover the same, without prejudice to the right of the said Thomas Turnbull,
or of his legal representatives afterwards, to exercise his right of election, or to
claim *legitim*, as concluded for in the first declaratory conclusion of the
summons, and that the same shall belong to the said Thomas Turnbull, and
form part of his funds, whether effect shall ultimately be given either to the

said legal right of *legitim*, or to the testamentary provision in his favour in his father's deed of settlement." No. 47.

Now that, I think, is a decision in express terms to the effect that I have already mentioned. I may refer in illustration of this to a portion of Lord Campbell's opinion, which I think is very instructive, and in which, dealing with an objection to the form of the decree, he states (6 Bell's Apps., p. 243)—
 "A strong objection was made to the form of the decree, that it would allow the representatives of the son upon his death to claim the *legitim* without accounting for the benefit which he has received under the will. But, my Lords, I think it was quite unnecessary for the decree to make any express provision upon that subject." Then he quotes a portion of the decree, and proceeds,—"Well, then, what is the point which is finally decided, and the only point which is finally decided? Why, it is that the surplus of the intermediate rents and profits shall in all events belong to the son. Upon his death the election may then be exercised, and if the *legitim* is preferred, that can only be done by giving credit, or accounting accordingly."

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Now, I think, upon these authorities we are well entitled to say, that it is a matter of settled law in this country that where a party who has a right of election like the lunatic here is in such a state of mental incapacity that he cannot effectually make his election, the right of election is not lost, either by his failing to make it, or by his taking benefit under the testamentary provisions, so long as he continues in a state of lunacy, and that the right will nevertheless subsist and be effectual either to him, if he recovers his sanity, or to his representatives in the event of his dying without recovering. Now, that being so, it seems to me that there is no legitimate interest in the pursuer of this action to insist upon making the election now. We see well enough that this pursuer has a personal interest in the succession of the lunatic, because he is apparently her sole next of kin, or, at least, he is one of the next of kin, and, therefore, in the event of her death, he would be entitled to succeed to her personal estate in whole or in part. But the interest of all concerned is perfectly protected by the rule of law to which I have just referred, and, therefore, I see no reason for making the election now, or until some change of circumstances such as the Lord Ordinary points at. I think this action was premature, and I am therefore for adhering to the Lord Ordinary's interlocutor dismissing it.

I do not think it necessary to deal with the question arising under the marriage-contract, or to consider whether this lady's legal right, or any portion of it, is barred by the provisions of the marriage-contract. That is a question that will come up for decision when the election is made, if it be made hereafter, but at present it would be quite out of place to decide any question of the kind.

LORD DEAS.—This action is brought at the instance of Major Baird Young as *curator bonis* of his sister, Mrs Morison, who is a lunatic, against the *mortis causa* trustees of her late husband, to have it found and declared that in lieu of the provisions settled upon her by the trust-deed and settlement and otherwise, the pursuer, as her *curator bonis*, is entitled to exercise the option which she might have exercised had she been sane, and to claim one-half of her husband's personal estate as *jus relictae*.

On this footing the pursuer concludes against the trustees for payment to

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There is no material difference between the parties either as to facts or figures.

The trustor died without issue at Edinburgh on 30th December 1879. Both parties admit that at the date of his death he was a domiciled Scotsman, and that his widow would have been entitled, if sane, to have claimed her *jus relictæ* in place of her conventional and testamentary provisions.

The trustor, besides being in possession at his death as heir of entail of the valuable estate of Bognie, was infeft and in possession of the small fee-simple estate of Larghan, also in Scotland, the rental of which was about £185 per annum, and besides the conclusion for *jus relictæ*, the summons contained a conclusion for terce out of this estate, but this conclusion was withdrawn while the case depended before the Lord Ordinary, the pursuer, I infer, being satisfied that it was sufficiently barred by the words of the English marriage settlement, which I shall immediately notice.

By this antenuptial marriage settlement in the English form, entered into in England at a time when the parties happened to be living there, a sum of £2500 and some other provisions of very moderate amount were vested in trustees for behoof of the wife if she should survive her husband.

This settlement or contract contained the following clause:—"Provided always that the provision hereinbefore made for the said Mary Catherine Young shall be, and the said Mary Catherine Young doth hereby accept the same, in satisfaction and bar of the dower or thirds and freebench to which by the common law, or by custom or otherwise, she would otherwise be entitled from, or out of all or any hereditaments in Great Britain or elsewhere, of which the said Alexander Morison now is or shall during the said intended coverture be seized for any estate to which dower or freebench is incident."

By her husband's trust-deed and settlement, however, in the Scotch form, executed at Edinburgh on 5th April 1876, his lunatic wife (for she had by this time become lunatic) was very differently and amply provided for. By this deed the trustor directed his trustees within two years after his death to realise his whole moveable means and estate, and also to realise his heritable estate at such time as might be deemed expedient, and after paying debts and expenses, to invest the residue on heritable securities or others as therein mentioned, "and to expend the whole income of said means and estate for the comfortable maintenance and support of my said spouse, Mary Catherine Young or Morison, and this over and above her legal rights, under the marriage-contract between us," "and also over and above a bond of annuity by him in her favour, dated 18th April 1874, declaring that it shall be imperative on my said trustees to spend the whole of the said income for the support and maintenance of my said wife: Declaring if she shall recover her health sufficiently to manage her affairs, my said trustees shall pay her the whole annual revenue of my said estate, and that her receipts therefor shall be a sufficient discharge to them; but if she shall so recover and again become incapable of managing her own affairs my said trustees shall expend the whole income on her maintenance as before provided; and during the whole time she shall not be capable of managing her affairs my trustees shall have full power of nominating for her her place of residence."

The parties are agreed that Mr Morison's personal estate, to the liferent of

which his widow is thus entitled under his trust-settlement, is of the value of £85,000, besides the £185 of income from his fee-simple estate of Larghan, and the benefit of the bond of annuity mentioned in the trust-settlement secured over the truster's entailed estate, the amount of which at present is £900, to increase to £1800 upon the death of the widow of the previous heir of entail.

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Now, if this had been a case in which the means of maintenance for the lunatic could not be obtained except by claiming her legal rights, or even if by asserting those rights she were to be accommodated and maintained in a style and manner superior to what she could otherwise have been, I should not have doubted that it was competent for the curator to exercise the option in the way it was reasonable to suppose the lady herself would have exercised it had she been sane. The option in that case would have been exercised for the benefit of the lady herself, and not for the mere enlargement of her estate, which is not necessarily the same thing at all. The trustees find it impracticable to obey the direction, which the truster declares to be imperative upon them, to spend the whole trust-income in the support and maintenance of his lunatic wife, and I agree with the observation of the Lord Ordinary in his note that were the curator to succeed in his action "his ward would not be in any way benefited, however much her next of kin might be benefited were she to die in her present state of mental alienation."

Another important consideration unfavourable to allowing the exercise of the option by the curator is that if the lady were to recover her sanity (which, however unlikely, we cannot assume to be impossible), we have no means of knowing that she would approve of her husband's most liberal settlements in her favour being repudiated while she had been unable to judge for herself. Generally speaking, widows of well constituted minds whose husbands have left them liberally provided for are most anxious to do with the means so provided for them whatever they think the husband, if alive, would have approved of, and would shrink from the apparent ingratitude implied in a repudiation of his settlement. On these grounds, I am for adhering to the interlocutor of the Lord Ordinary.

LORD MURE.—If it were necessary now to decide the question, whether the curator should be allowed to elect on behalf of the ward, I should have had considerable difficulty in coming to a conclusion satisfactory to my own mind. If the interests of third parties, or in other words, if the interest of the estate, were alone to be considered, there might be strong grounds for saying that it was desirable, so far as regarded the relatives of this lunatic, that the election should now be made, and this was strongly pressed upon us. But these are not the only interests which we require to consider. For on this question I am disposed to agree with Lord Deas that the interests of the lunatic herself must also enter very materially into our consideration, and I think that these interests might not be properly secured if the election were now to be made. I have always understood it to be a general rule, in regard to the management of a lunatic's estate, that when a curator was appointed it was his duty to preserve the estate in substantially the same condition in which it was at the time of the appointment, so that if the party should recover the estate should be handed over in as nearly the same condition as it was when the curator was appointed to manage it. Now, this lady may recover, and, as Lord Deas has

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remarked, it is not at all improbable that she might, in the circumstances, prefer to have the very large annuity her husband has settled upon her, to the half of the moveable estate. It is by no means impossible that she might come to that conclusion, so that if the curator were to be allowed to elect for her now the important question would at once arise,—Could she, if she became sane, repudiate that election, and insist upon returning to the provisions made for her by her husband in his settlement? If she were to do so, grave questions and complications might arise, as to which I offer no opinion. But keeping that possibility in view, I think the reasons why the election should not now be made are so strong that I am not prepared to sanction it.

With regard to the cases referred to by your Lordship, I have only to add that a perusal of them has led me to the same opinion as that expressed by your Lordship, and, on the whole matter, I have come to the conclusion that the interlocutor of the Lord Ordinary should be adhered to.

LORD SHAND.—I agree with your Lordships in holding that the curator is not entitled, in present circumstances, to exercise the right of election claimed, and that the action should be dismissed; and, in doing so, I adopt entirely the grounds of opinion which have been so well stated by your Lordship in the chair. If I were of opinion that the representatives of Mrs Morison at her death would be precluded from the right of election which the curator now desires to exercise, I could not have agreed in the judgment, for in that case I think it would only be reasonable and proper that the curator should make the election now, and that it would be his right and duty to do so in order to prevent loss to the estate under his care. I agree with Lord Deas and Lord Mure in thinking that, if an election were now to be made, the question for the curator is, what is for the benefit of the lunatic? It appears to me, however, to be clear that the curator, in judging for another in such circumstances, is bound to make that election which would tend to enlarge his ward's estate, unless there be some personal or other benefit or advantage to the ward which it is important to retain, and for which a sacrifice of estate should be made. In the present case, if this right of election were now exercised as the curator desires, the lady would at once be put in possession of a large estate, which would not only be amply sufficient for all her requirements, but would provide a large fund which she could dispose of if she recovered, or which would go to her representatives in the event of her not recovering. If it be assumed that the right to *jus relicte* has not been renounced by the marriage-contract the state of the facts is simply this, that this lady has a legal right to £40,000, while her husband by his settlement has left her a provision of very much smaller value. She might, no doubt, if of sound mind, adopt the settlement, and renounce her legal rights. Her curator could not, however, in my opinion, take this course, and so practically give up a valuable legal right belonging to his ward, and if the circumstance of his drawing the annuity, or of the trustee's spending the income of the estate on his ward were to exclude the right to elect the legal provisions hereafter I should hold that the curator must have and exercise the right now. It is quite true, as has been observed, that if Mrs Morison should recover she may possibly desire to adopt her husband's will, and to renounce her legal rights to this large estate; and it is right that an opportunity for that should be left open. This, I think, may be safely done without prejudice to the ward's estate. Failing her recovery, the right of election will belong to her representatives, for I think the authorities are

clear that the lunatic's representatives have the right after her death to make an election. No. 47.

This case does not present a feature which sometimes occurs where, owing to the pressing interests of other parties in the division of a general trust-estate, there may be a necessity for an election being made. In such cases I should have no difficulty in holding that the Court should authorise an election to be made, and if the present had been a case of that kind I cannot doubt that the election must be to take the legal provisions.

No such necessity here exists, and on the grounds I have stated I am of opinion that this action should be dismissed.

THE COURT adhered.

TODD, MURRAY, & JAMIESON, W.S.—ADAMSON & GULLAND, W.S.—Agents.

ISABELLA IRELAND (Ireland's Executrix) AND ANOTHER, Pursuers.—
Rhind.

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THE NORTH OF SCOTLAND BANKING COMPANY, Defenders.—*Moncreiff.*

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Bank—Cheque—Refusal to cash cheque on ground of depositor's insolvency.
—A bank which held on account current £413 belonging to an executry estate refused to cash a cheque for £100 drawn on the account, on the ground that the estate was insolvent, and that the bank, which had a claim for £130, intended to apply for sequestration of it. *Held* that the bank was not entitled to withhold payment of the cheque.

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ISABELLA ROGERS BUTCHART OR IRELAND was decerned and confirmed executrix on the estate of her deceased husband William Ireland, and Alexander Gilruth Fleming, agent, Dundee, became cautioner for her in the confirmation. He was also Mrs Ireland's confidential agent, and assisted her in collecting the moneys due to the executry estate.

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The moneys so collected were lodged with the North of Scotland Banking Company at their branch office at Dundee on account current in name of "A. G. Fleming, for behoof of the representatives of the late William Ireland, hardware merchant, Dundee." The account was regularly operated upon by Mrs Ireland and Mr Fleming as funds were required for the working of the executry. At 30th January 1880 the balance at the credit of the account amounted to £413, 5s. 3d.

On 29th January 1880, Mrs Ireland, requiring the sum of £100 for executry purposes, asked Mr Fleming to draw a cheque upon the account for that sum, which she countersigned as executrix. Prior to this time Fleming had granted a trust-deed for behoof of his own creditors. When the cheque was presented at the bank payment was refused, on the ground of the insolvency of the executry estate, and of Mr Fleming, and the cheque was protested.

Mrs Ireland and Mr Fleming thereupon presented a petition in the Sheriff Court at Dundee, praying the Court to ordain the North of Scotland Banking Company to pay to them the sum of £100, with interest thereon at the rate of five per centum per annum from 30th January till payment.

In the answers to this petition the defenders stated that the estate of William Ireland was insolvent, and that they had presented, or were about to present, a petition to the Court for sequestration of the said estate. (This was done on 27th March 1880 and sequestration awarded.) They further averred that they were large creditors on the said estate, and that they had used an arrestment of these funds in their own hands, which was still in force. Subsequently it was admitted that the amount of the debt due to the bank by Ireland's executry was £130.

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On 28th May 1880 the Sheriff-substitute (Cheyne) decerned in terms of the prayer of the petition, and, on appeal, the Sheriff (Maitland Heriot) on 22d June adhered.

The defenders appealed to the Court of Session.

When the case came on for hearing the appellants moved that the case be sisted to allow of notice being given to the trustee in the sequestration, on the ground that the sequestration deprived the pursuers of their title to sue, and pleaded further, "right of retention, at least until a valid and sufficient discharge is delivered to them, and their own claim, or the dividend effeiring thereto, paid or satisfactorily provided for, in respect of the insolvency of the estates of the deceased and the insolvency of the male pursuer."

At advising,—

LORD PRESIDENT.—I think this is a very clear case. Mrs Ireland was the widow and executrix of the deceased William Ireland, hardware-merchant and jeweller in Dundee, and the other pursuer, Mr Fleming, was the cautioner on her confirmation, and her confidential agent. The monies belonging to the executry estate which she had realised, or was in the process of realising, were lodged in the North of Scotland Banking Company's Bank, and the account-current which the executrix had in the bank was operated on in the usual way. She lodged money as it came in, and drew on it as occasion required for the purposes of the executry. It is true, no doubt, that the account was in the name of Mr Fleming, and bore to be in his name for behoof of the representatives of William Ireland, and it is easy enough to see why that was the case; it was to secure Fleming as cautioner for the executry estate. The course taken was perfectly right and proper. Of course Mr Fleming was entitled, on behalf of himself and Mrs Ireland, to draw on the account so long as there were any funds. That being so, we must see what are the averments of Fleming and the answers of the bank as contained in condescendences 3 and 4. It is there stated (Cond. 3) that "the pursuer, A. G. Fleming, lodged the said monies so collected and recovered by him on behalf of the co-pursuer, as executrix, on account-current with the defenders at their branch office at Dundee, in name of A. G. Fleming for behoof of the representatives of the late William Ireland, hardware-merchant, Dundee. The amount standing at the credit of that account at this date, exclusive of interest, is £413, 5s. 3d. sterling, and this sum is due by the defenders to the pursuer, A. G. Fleming, on behalf of the co-pursuer, Isabella Rogers Butchart or Ireland, as executrix foresaid and the sole representative of the said deceased William Ireland." (Answer 3) "Admitted that the male pursuer lodged certain monies in an account-current in his name for behoof of the representatives of the late William Ireland, hardware-merchant, Dundee, with the defenders' branch at Dundee, and that on 30th January 1880 the balance at the credit of that account amounted to £413, 5s. 3d. Explained that these monies formed part of the estate of deceased William Ireland." (Cond. 4) "That the pursuer, Isabella Rogers Butchart or Ireland, requiring the sum of £100 sterling for the purposes of the said executry, got her agent, the pursuer, A. G. Fleming, to draw a cheque upon the said account for said sum, which he accordingly did, and which she countersigned as executrix of the said deceased William Ireland. Said cheque, which is dated 29th January 1880, and is herewith produced, was, on 30th January 1880, duly presented for payment at the defenders' said branch office at Dundee, but payment thereof was illegally and

unwarrantably refused, and the said cheque was duly protested for non-payment, in consequence of which the pursuers have sustained loss and damage, for which action is reserved, and in consequence of which this action is rendered necessary." (Ans. 4) "Admitted that a cheque for £100 was presented for payment on 30th January, and refused."

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Now, on these facts it is perfectly plain that unless the bank has some very special defence to offer, they did wrong in refusing to cash the cheque. We must, therefore, consider the circumstances, and that as at the date of the presentation of the cheque. Now, the bank, it is admitted, had more than sufficient money to meet the cheque, and the cheque was drawn by the person in whose name the money stood, and was farther indorsed by the executrix to whom the bank knew that the money belonged. Was there then anything in the circumstances to justify the refusal? It is not said that at that date the estate of the deceased had been sequestrated, or that there was any prospect of such sequestration. No doubt there is an averment that "the defenders have presented, or are about to present, a petition to the Court for sequestration of the estates of William Ireland," but at the date of the presentation of the cheque they had not presented their petition, and did not do so until March following, and therefore there is nothing to deprive the executrix of her proper title to administer the estate, and nothing to prevent her agent and cautioner from drawing out sums necessary for carrying on the executry. It is said that Mr Fleming had executed a trust-deed for behoof of his own creditors, but I do not see what the bank has to do with that. This sum was lying in Mr Fleming's name in his representative character, and the bank was not entitled to conclude that he was going to commit a fraud when he presented the cheque. There is nothing more plain than this, that while a customer has funds in a bank his right to draw on his account is absolute, unless the bank has a right of retention over the money, or some other equally good answer. I am very clearly of opinion that there was no ground whatever for the bank refusing to cash this cheque, and I think we should adhere to the interlocutors appealed against.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT pronounced this interlocutor:—"Refuse the appeal, and decern: Find the respondents entitled to expenses; allow an account," &c.

ROBERT MENZIES, S.S.C.—CARMENT, WEDDERBURN, & WATSON, W.S.—Agents.

MARY COOK, Pursuer.—*Nevay*—*J. M. Gibson*.

DAVID RATTRAY, Defender.—*Millie*.

No. 49.

Parent and Child—Filiation—Period of Gestation.—Where in an action of filiation intercourse was proved to have taken place at an unascertained date between 287 and 314 days prior to the birth of the pursuer's child, held that the fact that the pursuer herself deponed to a date which gave the lengthened period of gestation of 305 days was not enough to overcome her testimony that the child which was born was the fruit of the intercourse which had then taken place.

Dec. 4, 1880.
Cook v.
Ratray.

THIS was an action of filiation and aliment brought in the Sheriff Court of Forfar at the instance of Mary Cook, farm-servant at Gask, in the parish of Kirkden, against David Ratray, farm-servant at Drummie-termont, in the parish of Dunnichen. Gask and Drummie-termont were about three miles apart.

2D DIVISION.
Sheriff of
Forfarshire.
M.

No. 49.

The pursuer's child was born on 19th August 1879.

Dec. 4, 1880.
Cook v.
Rattray.

The evidence was to the effect that the pursuer and defender had been acquainted for some years, and that on two occasions between Whitsunday and Martinmas 1878 the defender, along with a friend named Kettles, visited the pursuer at Gask. The first of these occasions was admittedly beyond the period of possible gestation. The second occasion was deponed to by the pursuer herself as "five weeks before Martinmas" (O. S. 22d November) 1878; by the defender as "shortly before the term of Martinmas" 1878; by Kettles as "six weeks and two days before the term of Martinmas 1878," and by Elizabeth Millar, a fellow-servant of the pursuer, as "four or five weeks before Martinmas 1878." On this second occasion the pursuer and defender spent an hour alone together about eleven o'clock at night in the stable or byre of the farm, while Kettles and Elizabeth Millar remained in the kitchen. The pursuer deponed that sexual intercourse took place on that occasion, and that the child of which she was delivered on 19th August 1879 was the fruit of that connection.

The Sheriff-substitute (Robertson) assoilzied the defender.*

The Sheriff (Maitland Heriot) recalled his Substitute's interlocutor, and found "in fact that the pursuer has proved that the defender is the father of the pursuer's child," and in law that he was liable in terms of the conclusions of the summons.†

The defender appealed.‡

LORD JUSTICE-CLERK.—This is a narrow case, and the evidence is not all that could be desired. I will not say how I should have dealt with it had this been the Court of first instance. But the Sheriff has bestowed much attention on it, and I do not see sufficient reason for disturbing his judgment.

The question of fact is, whether the defender is right in his contention that what took place was outwith ten calendar months prior to the birth of the child. If within the ten months, as we are satisfied that intercourse did take place, he

* "NOTE.—On the pursuer's own shewing this child was begot five weeks before Martinmas, that is, on or about the 17th of October 1878. It was born ten months after this. The Sheriff-substitute thinks it cannot be the defender's child."

† NOTE.—(After stating that as the result of the evidence it must be held that intercourse took place on the second occasion spoken to by the witnesses)—"Any peculiarity there is in the case is as to length of time that is said to have elapsed between the conception and the birth. There is no doubt some difference as to the exact date of the above visit. Kettles would place it so early as 'six weeks and two days' before Martinmas. Cook names it as 'five weeks' before Martinmas, Millar as 'four or five weeks' before Martinmas, and Rattray as 'shortly before the term of Martinmas.' There is no precise agreement between any of the parties as to this date. The Sheriff is inclined to think that Kettles is stretching a point in favour of his friend. If it were five weeks before Martinmas, the birth would be 305 days after conception. If four weeks, 298 days, and if only shortly before Martinmas, it might be 287 days. Had it been even quite fixed that 305 days was the true period of gestation, the Sheriff is doubtful if he would have been entitled to go further than the Court of Session did in the case of *Boyd*, 17th June 1843, 5 D. 1213. But as it is not fixed that an interval of 305 days must have intervened, while the interval may not have been longer than from 287 to 298 days, the Sheriff is of opinion that in the circumstances the pursuer is entitled to prevail."

‡ *Authorities*.—*Boyd v. Kerr*, June 17, 1843, 5 D. 1213; *Gibson v. M'Fagan*, March 20, 1874, *ante*, vol. i. 853; *Henderson v. Somers*, July 7, 1876, *ante*, vol. iii. 997.

must be held to be the father of the-child. But if outwith the ten months, No. 49. then he maintains that the proof of paternity is insufficient.

Now, the woman is entitled to give her oath in supplement. But then her ^{Dec. 4, 1880.} oath must be to the effect that the intercourse on which she relies took place at ^{Cook v. Rattray.} a date when the conception of the child actually born was physically possible. If she fails to fix the intercourse at such a time that this Court can hold it to be the possible cause of the conception which took place then her proof must fail. The question here is whether the woman has so fixed the date or not. If the extreme point of time spoken to be taken, six weeks and two days before Martinmas, that would make the period of gestation 313 days, a period which has never yet been accepted in our Courts as possible. Four weeks before Martinmas, on the other hand, would make the period one which, though perhaps unusual, must be assumed to be possible. The medium period, or five weeks before Martinmas, is just on the doubtful margin. I cannot but think that the date might have been more accurately cleared up. But, as the evidence stands, I do not see sufficient ground for reversing the judgment of the Sheriff.

LORD GIFFORD.—There is clear proof that on a certain night prior to Martinmas 1878 the pursuer and defender were together under circumstances which admit of only one inference. The defender says that may be so, but the occasion was more than ten calendar months prior to delivery, and therefore the intercourse could not be the cause of the conception. That might or might not be a good defence if the proof of the fact was clear. But the proof leaves the date very indefinite, and I am therefore of opinion that, the intercourse being clearly proved, we cannot hold it impossible that it was the cause of the conception which at one date or another certainly did take place.

LORD YOUNG.—I have come to be of the same opinion, but I confess not without some difficulty. Both parties have been examined here, and the opinions which your Lordships have given, and in which I concur, involve this, that one of them, the defender, is not speaking the truth, and we therefore do not believe him. He says that he went with his friend Kettles to the farm-house where the pursuer was residing late one night, and induced the pursuer and her fellow-servant to rise from their beds and admit them; and that while Kettles and the other girl remained in the kitchen he went with the pursuer to the byre, but though they remained away about an hour, that nothing took place between them. Now, this we do not believe. And it is a material consideration in viewing the remaining evidence, because we do believe the pursuer when she swears that intercourse then and there took place. Of that intercourse she farther swears that the child she bore on 19th August following was the fruit. She must know if this was the case, and she swears that it was.

But then it is urged that she is not to be believed, because it is impossible that a child born on 19th August could have been begotten on the occasion spoken to. Now, if this were so, either of absolute certainty or even with great probability, we should yield to it, and it must outweigh the evidence of the pursuer. But I am of opinion that this Court cannot, as matter of judicial cognisance, accept it as either impossible or extremely unlikely that a child born on the 19th August could have been begotten on the date referred to by the pursuer. I know of no authority in law which says that intercourse taking place five weeks before Martinmas cannot produce a child born on 19th August

No. 51.

The defenders reclaimed to the First Division.

Dec. 7, 1880.
Miller v. Gir-
van and Port-
patrick Rail-
way Co. &c.

The declaratory conclusions were departed from when the case came before the Inner-House.

Argued for the reclaimers;—The arrestments attached nothing. A mortgage bond is *prima facie* not a proper subject for arrestment.¹ The

“*Prima facie*, the bank is not debtor, but creditor, in the mortgage, and in that view nothing was attachable or attached by the arrestments. But the pursuer alleges, in the first place, that no consideration was given by the bank for the mortgage, and that if the mortgage is to be regarded as valid the bank is still bound to advance the amount to the railway company, or, in other words, is debtor to the railway company in the nominal amount of the mortgage, and that the debt has been validly arrested. The bank admits that at the date of the mortgage the railway company had a small balance at their credit in the books of the bank, that the mortgage was granted in security of future overdrafts to be allowed by the bank, and that subsequent to the date of the mortgage overdrafts were allowed to the extent of £2095 still unpaid, and that no further advance has been made by the bank. To the extent, therefore, of about £900 the bank has admittedly not advanced the sum contained in the mortgage.

“In the next place, the pursuer maintains, alternatively, that the mortgage is wholly inept, and that it should be cancelled. It is maintained, both for the bank and for the railway company, that the pursuer had no title, either as a creditor or as a shareholder of the company, to inquire into the circumstances connected with the mortgage. The pursuer, however, maintains that in both capacities he is entitled to such an investigation, and that, in the event of its being held that the bank is not indebted to the railway company, he is entitled to have the mortgage declared to be *ultra vires* of the railway company, and illegal as a security for a future debt, and on other grounds, and he has conclusions to that effect, being reductive conclusions under another name.

“It is, to say the least of it, doubtful whether as a shareholder he is entitled to insist upon any of the conclusions of this action. He is certainly not entitled to sue the conclusions of forthcoming in any character but that of creditor of the company. But it is unnecessary to consider that question of title, because I think that, as a creditor, he is entitled at all events to be allowed a proof of his averments, and to expiscate all the facts connected with the granting and subsistence of the mortgage. He cannot get payment of the debt contained in his decree, because the railway company say that they have no funds, and that they have exhausted their borrowing powers.

“Now, it appears to me (1) that the pursuer, as a creditor of the company, has an undoubted interest and title to shew that the mortgage is altogether illegal and ought to be cancelled, in which case the railway company's borrowing powers may still be exercised to the extent of £3000; (2) that as the mortgage was admittedly not granted in consideration of a present payment of £3000, and as the full amount has admittedly not been advanced, he has both interest and title to ascertain the whole circumstances under which it was granted. Thus it may turn out that the bank, at the date of the mortgage, became absolutely bound to pay £3000 to the company, in which case the amount, in so far as not already advanced, would appear to be a debt or obligation by the bank arrestable by the creditors of the company—see Bell's Com. ii. p. 219, and cases there cited; or it may turn out that the obligation of the bank was of a more limited character, or that there was no obligation at all; and in either of these cases the question would arise whether or how far the mortgage was a security for a future debt, and so ineffectual. All these are matters as to which I think investigation should be allowed; but as some of the alleged facts may admit of proof only by the writ or oath of the bank all such questions which may arise are reserved to be dealt with at the proof.”

¹ Bell's Com. (7th ed.) pp. 67 and 69; Haddow v. Campbell, 1796, M. 763; Dick v. Goodall, June 1, 1815, Fac. Coll.; Johnston v. Commercial Bank, March 11, 1858, 20 D. 790, 30 Scot. Jur. 427.

bank were not in the position of debtors to the railway company; they were not bound to advance money on the mortgage bond. It was within the powers of the railway company to grant this mortgage.¹

No. 51.
Dec. 7, 1880.

Miller v. Girvan and Portpatrick Railway Co. &c.

Argued for the respondents;—The acceptance and registration of a railway mortgage implied liability on the acceptor. Every such bond has the force and effect of a completed assignation by 8 and 9 Vict. c. 17, sec. 46, *et seq.* A debt due had therefore been arrested.² The granting of the bond was *ultra vires* of the company, as it was granted, not for the purpose of raising capital, but to secure a cash credit, which was not allowed by the company's private Act, secs. 7 and 9.³

At advising,—

LORD PRESIDENT.—This action, as regards its first conclusion, is one of furthcoming, and I understand that that is the only conclusion which we have to dispose of, as the other is given up. Treating the case, then, as one of furthcoming, the question arises, whether the arrestment here used was effectual? Now, the averments of the pursuer are not numerous, and although they are very general they are quite distinctly stated. He avers, first, that “on 17th December 1878 the Girvan and Portpatrick Railway granted to and in favour of the defenders, the Commercial Bank of Scotland, the arrestees, a bond or mortgage bearing to be in consideration of the sum of £3000 paid to the railway company,” and that mortgage was thereafter registered in the books of the railway company in terms of the statute. He then avers,—“No consideration was paid, or has since been paid, by the bank for the said bond or mortgage, and on the assumption that the same was legally issued and accepted the bank were at the date thereof, and still are, bound to pay to the railway company the par value thereof, with interest at five per cent till payment. At the time when it was issued and accepted, and for more than a month thereafter, the railway company was not in any way indebted to the said bank.” And then he says, with reference to a certain overdraft mentioned in the answer for the bank, that it was not applied to meet current expenses. Now, as I read that, it means that at the time this bond was executed, delivered, and registered, no money was presently paid or advanced by the bank, but that thereafter certain money was advanced by the bank to the railway company, for that is clearly implied from the latter part of the statement; and then further he avers,—“The said bank are thus liable to pay to the railway company the sum contained in the said bond, with interest as aforesaid. By virtue of the warrant contained in the said extract decree the pursuer on 3d April 1880 used arrestments in the hands of the defenders, arrestees, conform to schedule. The said sum of £3000, with interest, was thereby effectually arrested, and the present action is brought to have the same made furthcoming to the pursuer.” That last statement is an inference in law rather than a statement of fact, and on its correctness the pursuer's case depends. He says that the bank is now owing to the railway company the sum contained in this mortgage bond for £3000. He admits that it may be found that some of it has been paid, and that he is only entitled to get

¹ Lindley on Partnership, 1, 619; Campbell's case, Dec. 14, 1876, L. R., 4 Chan. Div. 470; Regent's Canal Iron Co., April 11, 1876, L. R., 3 Chan. Div. 43.

² Companies Clauses Act, 1845, 8 and 9 Vict. c. 17, secs. 46, 47, 48, &c.; Lindley on Partnership, 1, 271.

³ Girvan and Portpatrick Railway Company Act, 1877, secs. 7 and 9.

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At advising,—

LORD PRESIDENT.—This action, as regards its first conclusion, is one of forthcoming, and I understand that that is the only conclusion which we have to dispose of, as the other is given up. Treating the case, then, as one of forthcoming, the question arises, whether the arrestment here used was effectual? Now, the averments of the pursuer are not numerous, and although they are very general they are quite distinctly stated. He avers, first, that “on 17th December 1878 the Girvan and Portpatrick Railway granted to and in favour of the defenders, the Commercial Bank of Scotland, the arrestees, a bond or mortgage bearing to be in consideration of the sum of £3000 paid to the railway company,” and that mortgage was thereafter registered in the books of the railway company in terms of the statute. He then avers,—“No consideration was paid, or has since been paid, by the bank for the said bond or mortgage, and on the assumption that the same was legally issued and accepted the bank were at the date thereof, and still are, bound to pay to the railway company the par value thereof, with interest at five per cent till payment. At the time when it was issued and accepted, and for more than a month thereafter, the railway company was not in any way indebted to the said bank.” And then he says, with reference to a certain overdraft mentioned in the answer for the bank, that it was not applied to meet current expenses. Now, as I read that, it means that at the time this bond was executed, delivered, and registered, no money was presently paid or advanced by the bank, but that thereafter certain money was advanced by the bank to the railway company, for that is clearly implied from the latter part of the statement; and then further he avers,—“The said bank are thus liable to pay to the railway company the sum contained in the said bond, with interest as aforesaid. By virtue of the warrant contained in the said extract decree the pursuer on 3d April 1880 used arrestments in the hands of the defenders, arrestees, conform to schedule. The said sum of £3000, with interest, was thereby effectually arrested, and the present action is brought to have the same made forthcoming to the pursuer.” That last statement is an inference in law rather than a statement of fact, and on its correctness the pursuer's case depends. He says that the bank is now owing to the railway company the sum contained in this mortgage bond for £3000. He admits that it may be found that some of it has been paid, and that he is only entitled to get

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the unpaid balance, but still his leading contention is that the bond having been granted and registered without consideration, the express consideration is now due as a debt by the bank to the railway company. I am clearly of opinion that there is no such debt due. The first question that would naturally arise for consideration is whether the transaction that was actually entered into between the bank and the railway company was a legitimate transaction, and within the powers of the railway company's officials. We are not dealing with this case after full inquiry into what actually took place, but I think it is sufficient to deal with the matter as it stands alternatively, either on the footing that the transaction which took place between the bank and the railway company was a legitimate transaction and within the powers of the directors of the railway company, or that it was beyond them and illegal. In the first place, if the transaction was a legitimate one, one sees plainly that the bond was given by the railway company as a security for advances to be afterwards made. So much is quite apparent on the face of the pursuer's own averments. I should be sorry to pronounce any opinion that such a transaction is illegal, but I do not wish at present to decide one way or the other. I am anxious, on the contrary, not to be supposed to lend any countenance to the contention that the giving of that mortgage bond in security for advances is necessarily illegal. But supposing it to be legal, what is the relation between the bank and the railway company? Is it that of debtor and creditor? It is certainly that of debtor and creditor; but then who is the debtor? The debtor is the railway company, and not the bank. The railway company is debtor for the sums advanced, for which the bank, no doubt, held a security. The bank can never be the debtor in the event of this being a legitimate transaction of granting security for advances to be made, and in the event of the advances made being less than the amount of the mortgage bond it is quite clear the bank cannot be debtor for the balance, no matter what the amount is, or whether it is an ordinary cash credit bond or any other description of deed, the bank is not compelled to advance to the full amount of the security. The bank in making advances is not paying a debt, but granting a loan, the amount of the loan depending on circumstances. The value of the security may fluctuate, the condition of the debtor may alter for the better or worse, and many considerations may require to be taken into view by the managers of the bank in order to determine to what extent they will advance upon any given security, or what margin they may think it necessary to retain. Therefore the relation between the bank and a customer—dealing with a security of this kind—can never be said to have been of such a nature as to make the bank indebted in any sum of money to the customer.

But then take the other alternative, that this was altogether an illegal proceeding on the part of the railway company, that the directors had no power to impignorate the property of the company by a mortgage bond of this kind for advances to be made. In that case it appears to me that the legal consequence is that the mortgage having been granted for an illegitimate purpose, and being *ultra vires* of the directors, is good for nothing, and that the only remedy open to the company is to have it cancelled or delivered up to them. Nor, if that be so, can the arresting creditor stand in a better position than the railway company, their debtor, and the arresting creditor cannot, by his diligence, secure anything that his debtor was not in a position to demand from the arrestee, and so in that alternative also there is no money due by the bank to the railway company.

LORD DEAS concurred.

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LORD MURE.—I am of the same opinion, and I have little to add. I think the question really depends on the averments in the fourth—it may be the third and fourth—articles of the condensation. It was, however, maintained alternatively that the granting of such a mortgage to a bank was beyond the powers of the railway company; and if that were so, it is difficult to understand how the bank could be bound to pay money on such a bond, or how there could be any money in the hands of the bank to arrest and to be made forthcoming under this action. That argument, if pushed to its legitimate extent, would, I think, be fatal to the pursuer's claim. But the point was, as I understand, not insisted on, and I give no opinion as to whether what was here done was beyond the powers of the company or not. The question therefore really comes to be whether, when there has been delivery of a mortgage by a railway company to a bank in security for advances to be made, an arresting creditor of the railway company can attach the advances that might be made upon the bond, though they have not yet been even demanded. On that question I am not prepared to hold that the arresting creditor can be in any more favourable position than if he were arresting money which might on a certain event be handed over to his debtor, as, for instance, under an ordinary cash credit bond, which is substantially the position in which this bank and the railway company here stand towards each other. Now, in such a case the bank would not be bound in all circumstances to hand over the balance between the amount of the mortgage and the advances already made on demand to the debtor in a cash credit bond. That was settled in *Johnston v. Commercial Bank*, 20 D. 790. Looking at the case in that light there was here no indebtedness on the part of the bank to the railway company, and I am therefore of opinion that these arrestments have failed to attach anything which can be made the ground of an action of forthcoming.

LORD SHAND.—I am of the same opinion.

The averments on which Mr Miller, as a creditor of the railway company, maintains his right to recover the sum sued for from the Commercial Bank are that the company, on 17th December 1878, delivered a mortgage for £3000 to the bank, which they accepted, and which was registered in their names, and that although that mortgage was delivered no consideration was paid for it. It is said that these two things being proved, the legal result is that the bank became indebted on 17th December 1878 in the sum of £3000, and are due that sum still in so far as it has not been paid to the railway company. I cannot assent to that proposition. It depends entirely on what was the arrangement or footing on which the mortgage was delivered and taken whether any legal liability of a pecuniary kind arose on the part of the bank. If any arrangement inferring such liability had been averred the Court would be entitled to take the necessary means of getting at the truth as to what the precise terms of that arrangement were. Here, however, there is no such arrangement averred. The matter is simply left on the bare statement that the deed was delivered and that no money was given for it, and taking the case in that aspect of it I should say that the legal result as to the bank is not that they became debtors in the amount specified in the mortgage, but that having got the mortgage, and no consideration having been paid for it, they are bound,

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No. 51. if required, to give it back to the railway company. In that view it is not maintained that the arrestment is of any avail to attach the mortgage as a *nomen debiti*.

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patrick Rail-
way Co. &c.

If, however, the record is to be read as containing by implication an averment that the mortgage was delivered to the bank as a security for future advances, I confess I see no reason to doubt that the security would be perfectly good in the hands of a creditor holding it for the amount of his advances. The right of the creditor in that case would be to hold till the advances were paid. The right of the party to whom the advances were made would be on the repayment of the advances to get the mortgage back. It is said that the Court is to infer that there was an obligation on the bank not only to advance the sum they have advanced, and which is stated by them to have been £2000, but the further sum of £1000, making £3000 in all. I have no difficulty in holding that such an obligation is not to be inferred from anything said on this record, and further, that even if the arrangement averred and proved had been an undertaking similar to the granting of a cash credit bond for £3000, the bank's obligation could not be attached by a creditor, for the reasons your Lordship has fully explained. Such obligations are not enforceable in all circumstances, and whatever the future pecuniary position of the person obtaining the credit may be. The very fact that diligence has been done under which the money would be carried away by creditors, so that the person who had opened the account would not have the benefit or use of the fund as a means of credit, would, I think, be generally speaking a sufficient reason to entitle the bank to decline to make the farther advance demanded, not on that ground only, but also because the use of the diligence of arrestment and forthcoming would sufficiently shew the seriously embarrassed position of the debtor.

On these grounds, I agree in holding that the arrestments are bad.

THE COURT sustained the first plea in law for the defenders, and dismissed the action.

RONALD & RITCHIE, S.S.C.—HENRY & SCOTT, S.S.C.—MELVILLE & LINDESAY, W.S.—Agents.

No. 52. MRS ELIZABETH DUNCAN OR BURNS, Pursuer.—*R. Johnstone—Kennedy*.
ALEXANDER GILRUTH FLEMING, Defender.—*Rhind—Millie*.

Dec. 7, 1880.
Burns v.
Fleming.

2D DIVISION.
Sheriff of For-
farshire.
I.

Lease—Heritable and Moveable—Fixtures as between landlord and tenant.—Fleming occupied a cottage and piece of garden ground as yearly tenant for a period of ten years. His occupancy had commenced when the cottage was built and while the garden ground was rough and uncultivated. During his tenancy he planted ornamental shrubs, and laid out terraces with turf and gravel walks, access to the different terraces being got by sets of wooden steps. When removing from the subjects Fleming prepared to remove the shrubs, turf, wooden steps, and gravel on the walks. In an action at the instance of the landlord the Sheriff (Maitland Heriot) held that the tenant was not entitled to remove shrubs and turf, but allowed him to remove the wooden steps and the gravel from the walks. The landlord acquiesced in the Sheriff's judgment, but the tenant appealed to the Court of Session. The Court dismissed the appeal, Lord Gifford and Lord Young expressing strong opinions that the gravel on the walks was *pars soli* and not removable.

JOHN MACPHERSON, W.S.—ROBERT MENZIES, S.S.C.—Agents.

WILLIAM M'LEOD & COMPANY, Pursuers and Respondents.—*Kinnear—Rhind.*

No. 53.

C. A. HARRISON (Receiver on Blews & Sons' Estate), Defender and Reclaimer.—*Asher—Keir.*

Dec. 7, 1880.
M'Leod & Co.
v. Harrison.

Sale—Stoppage in transitu—Ship.—A & Sons, Moscow and Birmingham, purchased goods from B & Co., Glasgow, to be shipped by C's "first steamer from Leith to Riga to A & Sons' orders." By the bills of lading, which bore that the goods had been shipped by A & Sons, the purchasers, they were to be delivered in good order at the port of Riga, "unto the agent of the R. D. Railway Company, to be by them forwarded in transit to A & Sons, Moscow." A & Sons became insolvent, whereupon B & Co. stopped the goods at Riga when in the hands of the railway company. *Held* that the goods were still *in transitu* when stopped.

WILLIAM BLEWS & SONS, bell and brass-founders at Birmingham, West 2^d Division, Bromwich, and Moscow, by order, dated 27th March 1877, purchased from William M'Leod & Co., metal-merchants, Glasgow, a quantity of gas-piping. The terms of agreement entered into between the parties were that the goods should be paid for by six months' bill from date of shipment and bill of lading, and were to be shipped free on board by Messrs M'Gregor & Co.'s of Leith first steamer from Leith to Riga, to Blews & Sons' orders.*

Lord Adam.
R.

By second order of same date William Blews & Sons purchased from W. M'Leod & Co. another quantity of piping, on exactly similar terms.

* "Letter, Wm. Blews & Sons to Wm. M'Leod & Co., Glasgow.

"Birmingham, March 2d 1877.

"Gentn.—We hope to induce an indent for the following, if you can quote us low prices and liberal credit.

"We had contracts out during the last year which prevented our placing our pipe orders except in one channel, but we have no doubt we can place two or three fair orders during the ensuing six months if you can offer us good terms.

1500 2" Mains single sockets.	} F. O. B.
260 2" . double .	
50 2" Thimbles	

Leith.

—Yours respectfully,

WM. BLEWS & SONS."

"Letter, Wm. M'Leod & Co. to Wm. Blews & Sons, Birmingham.

"Glasgow, 3d March 1877.

"Gentn.—In reply to your favour of the 2d we offer you pipes as follows:—

1500 2" S. & F. pipes,	at £5 10 0 per ton.
250 2" Double Socket do.,	at 5 12 6 .
50 2" Thimbles,	at 10 5 0 .

F. O. B. Leith.

"Terms, 4 months' bill from date of invoice.—Yours truly,

"WM. M'LEOD & CO."

"Order F, 313/1.

Birmingham, 27th March 1877.

"1500 C. I. Mains 2-inch single sockets," &c.

"Prices as per your quotation—terms, 6 months' bill from date of shipment & B/L.

"Must be shipped by Messrs M'Gregor & Co.'s first steamer from Leith to Riga to our orders.

WM. BLEWS & SONS."

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William Blews & Sons themselves corresponded with Messrs Macgregor & Co., and arranged with them as to the freight.*

On 20th April 1877 the goods were duly despatched, in two parcels, by W. M'Leod & Co. to Messrs Macgregor & Co. Invoices thereof were sent to William Blews & Sons, who granted their acceptance for the amount at six months from the 18th April.

The goods arrived at Leith, and were shipped by Messrs Macgregor & Co. on board their first steamer, "The Waverley," to Riga. Separate bills of lading were made out for each parcel of goods, and were handed to Messrs Blews & Sons. The bills of lading were dated "Leith, 24th April 1877," and bore "Transmarine goods traffic, Leith to Moscow *via* Riga in transit.

"Shipped in good order, and well conditioned, by William Blews & Sons, . . . care of Messrs Kniep & Werner, Riga . . . and are to be delivered in the like good order and condition at the aforesaid port of Riga, unto the agent of the Riga Dunaburg Railway Company, or to their assigns, to be by them forwarded in transit to Messrs Wm. Blews & Sons, Moscow; freight for the said goods, Leith to Moscow, including Riga charges, being hereby agreed upon to be 30½ ceps per pood to be paid in Moscow, with primage and average accustomed, and charges as stipulated."

On 12th May 1877 William Blews & Sons issued a circular stating that they had been compelled to file a petition for liquidation, and following thereon Charles Augustus Harrison, accountant, Birmingham, was appointed receiver and manager on their estates.

On receipt of this circular William M'Leod & Co. wrote on 15th May 1877 to Messrs Macgregor & Co. requesting them to stop the goods *in transitu*, and on 30th May 1877 Messrs Macgregor wrote back that their agents had been successful in laying an embargo—the consignees protesting—on the pipes at Riga while in hands of the Riga Dunaburg Railway Company.

In these circumstances, William M'Leod & Co. raised an action in the Court of Session against Charles Augustus Harrison, concluding for payment of the sum of £269, 7s. 5d., with interest thereon from 21st October 1877 at 5 per cent, being the price alleged to be due to them for the said gas piping. In the pursuers' condescendence 5 it was averred that

* "Letter, Wm. Blews & Sons to Wm. M'Leod & Co., Glasgow.

"Birmingham, 10th Apl. 1877.

"Gentlemen,—We have written and write again to-day to Messrs M'Gregor, Leith, and in reply to your inquiry, we beg to inform you that we shall arrange the rate of freight with Messrs M'Gregor.

"We await your further favours reporting progress of shipment.—And remain, Gentlemen, yours respect'ly,
W. BLEWS & SONS."

"Shipping Order, Wm. Blews & Sons to D. R. Macgregor & Co., Leith.

"Birmingham, 10th April 1877.

"Gentlemen,—Please ship the undermentioned goods:—

MARK.

CONTENTS.

"Ex. Messrs M'Leod & Co., Glasgow.

"M.G.C.

1750 cast-iron pipes

50 " sockets.

"To Moscow, over Riga at through rate, Leith to Moscow. By your first steamer to Riga, c/o Messrs Kniep & Werner, Riga. Freight payable at Moscow.

"A set of 4 B/L to be made out as shipped by William Blews & Sons to William Blews & Sons, Moscow. The whole set to be sent to us here.—And oblige, yours respectfully,
WILLIAM BLEWS & SONS."

"In point of fact the pipes were stopped by the pursuers (through Messrs Macgregor & Company acting for them) at Riga, while they were *in transitu*, and before they were delivered to the said William Blews & Sons, or any one on their behalf. The said pipes were stopped either in the hands of Messrs Macgregor & Co. or of the said Dunaburg Railway Company in the course of transit to Blews & Sons. If Messrs Macgregor & Co., or the said railway company, were acting for Blews & Sons at all (which they were not), they were agents solely for transit to them."

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In answer the defender stated,—“Admitted that the pipes were stopped at Riga. Explained that neither the pursuers nor Macgregor & Co. had any right to stop the pipes. Denied that the pipes were stopped *in transitu* or before they were delivered to Blews & Sons. Explained that the goods had been delivered to them before they were shipped at Leith, and that they were shipped by them as stated in the bill of lading.”

The pursuers pleaded, *inter alia*;—1. The pursuers having sold to William Blews & Sons the goods mentioned in the condescendence, and William Blews & Sons having become insolvent and bankrupt at and prior to the time when the goods were delivered to them, or to any agent on their behalf for custody, the pursuers were, the price being unpaid, entitled to stop the goods *in transitu*, and the goods were validly stopped *in transitu* in manner above set forth. 2. In respect of the stoppage *in transitu*, condescended on, the pursuers are entitled to decree against the defender for the price of the goods sold by them to William Blews & Sons, with interest thereon from the date when the bill which was granted for the said price became payable.

The defender pleaded, *inter alia*;—1. The statements for the pursuers are not relevant or sufficient to support the conclusions. 3. The goods having been delivered to Messrs Blews & Sons, and shipped by them at Leith, the pursuers were not thereafter entitled to stop them *in transitu*.

On 20th July 1880 the Lord Ordinary issued the following interlocutor:—“The Lord Ordinary having heard counsel for the parties, decerns and ordains the defender to make payment to the pursuers of the sum of £269, 7s. 5d. sterling, with interest thereon at the rate of £5 sterling per centum per annum from the 21st day of October 1877 until payment.”*

* His Lordship's note, after setting forth the facts of the case, proceeded as follows:—“The only question argued to the Lord Ordinary was whether this was an effectual stoppage of the goods while *in transitu*.

“The Lord Ordinary is clearly of opinion that it was. It appears to him that the goods were directed to be delivered to William Blews & Sons at Moscow, and nowhere else, and that the *transitus* lasted until the goods arrived at their destination in Moscow. The only ground on which the defender maintained that the stoppage was ineffectual is that set forth in his third plea in law, that the goods were delivered to William Blews & Sons, and were shipped by them at Leith. By this it is not meant that the goods were actually delivered to William Blews & Sons, but that Macgregor & Company were their agents, and that delivery to Macgregor & Company was the same in law as delivery to them. In the case *ex parte Rosevear China Clay Company*, April 24, 1879, L. R. 11 Chancery Division, 560, it was held that delivery of goods by a vendor to a carrier, hired by the purchaser, is only constructive, not actual delivery, inasmuch as the contract with a carrier to carry goods does not make him the agent or servant of the person with whom he contracts. The goods in the present case were shipped in a general ship, but the same has been decided in the case where the goods were shipped in a ship chartered by the purchaser for the purpose,—*Brendston v. Strang*, April 21, 1868, L. R. 3 Chancery App. 588. It appears to the Lord Ordinary that the goods in this case were at the time of the stoppage in the custody of a third person intermediate between the sellers, who had parted

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The defender reclaimed, and during the discussion asked leave to amend his record by adding thereto the following additional statement of facts after his answer 5 :—

“ At all events the goods were delivered to Blews & Sons at Riga.

“ The agents for Blews & Sons at Riga and Revel are Kniep & Werner, shipping agents at these ports, to whose care the goods were consigned by bills of lading. Kniep & Werner act as the general and shipping agents of Blews & Sons, and have a running account with them, in which the usual agency commission is charged. The disbursements made amount to £3000 or £4000 annually.

“ On the arrival of the ‘Waverley’ at Riga, and on or about 4th May 1877, the goods were discharged and delivered to Kniep & Werner as agents for Blews & Sons.

“ On 6th May 1877 notice was received by Kniep & Werner from the Riga and Dunaburg Railway Company that the goods would, on being handed over to them, be detained until the arrival of instructions.

“ On 13th May Kniep & Werner, having thus been warned of the risk of stoppage, lodged protest against the proposed detention, and asked whether the railway company had received orders which would admit of the goods being forwarded by them.

“ On same day the railway company informed Kniep & Werner that they had left it open to Helmsing & Grimm, acting for Macgregor & Company, to lodge an attachment within twenty-four hours.

“ On 17th May, and before resolving to hand over the goods to the railway company, Kniep & Werner communicated with Mr Grimm, and received from him an assurance that no attachment would follow. In reliance on this assurance, Kniep & Werner cleared the goods, and paid the duty and charges thereon, amounting to Rs.2300, with a view to forwarding them by the Dunaburg Railway to Moscow, and handed them to a wharf warehouseman, to be loaded in trucks and delivered to the railway company. They were accordingly loaded and delivered to them.

“ On 18th May, and after the goods had been delivered to the railway company, Kniep & Werner were informed by the company that Helmsing & Grimm, in the name of Macgregor & Company, had handed in a notarial protest against forwarding the goods to Moscow.”

And also to amend the record by adding the following plea in law :—

“ 4. At all events, the goods having been delivered to Messrs Blews & Sons at Riga, and handed over by them to the railway company on the assurance above stated, the pursuers were not entitled thereafter to stop them *in transitu*.”

Argued for the reclaimer ;—On the case as originally stated the stoppage was incompetent when the goods were delivered to Messrs Macgregor & Company, agents to William Blews & Sons ; the bills of lading being in the name of the purchasers there was actual delivery of the subjects, and there could be no stoppage *in transitu* thereafter.¹ Further, the goods

with, and the buyer who had not yet acquired, actual possession, and therefore were liable to be stopped by the unpaid sellers. See also *ex parte Watson*, February 15, 1877, L. R. 5 Chancery Division, 35 ; *ex parte Barron*, March 12, 1877, L. R. 6 Chancery Division, 783 ; *ex parte Cooper*, February 20, 1879, L. R. 11 Chancery Division, 68 ; *ex parte Golding, Davis, & Co.*, February 12, 1880, L. R. 13 Chancery Division, 628.”

¹ *Schotsmans v. Lancashire and Yorkshire Railway*, Jan. 16, 1867, L. R. 2 Chan. App. 332 ; *Turner v. Trustees of Liverpool Docks*, May 26, 1851, L. J. 20 Exch. 393 ; *MacLachlan on Shipping*, 589 ; *Bell's Comm.* (7th ed.), 232, and note ; *Morton v. Abercromby*, Jan. 7, 1858, 20 D. 362, 30 Scot. Jur. 193 ; *Wright v. Mitchell*, Feb. 10, 1871, 9 Macph. 516, 43 Scot. Jur. 235.

were to be delivered at Leith, no mention of Moscow being made in the contract. Even if it were held that delivery had not taken place at Leith it certainly had at Riga, as stated in the proposed amendment.

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Argued for the respondents;—The stoppage was competent. The goods could not be held to have been delivered till they arrived at Moscow where they were to be handed over to Blews & Sons. Macgregor & Company were merely carriers, and the goods were in their hands as such.¹ The proposed amendment was incompetent at this stage of the case, and the question must be argued on the footing that delivery took place at Leith, or not at all.

At advising,—

LORD JUSTICE-CLERK.—When the case was first argued we thought the goods when stopped were still *in transitu* to Moscow, and not delivered in the sense of having completed the *transitus*; but then it is stated on the other side by the purchasers that the *transitus* did end at Riga by the goods being specially delivered to their agents, and that therefore they must be considered to have been completely delivered. If that were so, I think it would have modified the matter, because though the question might run into shadowy subtleties, yet the question would be a simple one of fact as to whether the goods were in the hands of the pursuers to be forwarded, or in the hands of the purchasers' agents when they had reached Riga.

We have here an amended statement of facts, which I am not inclined to allow to be added to the record. It is a singular statement that information was given to the railway company that the goods on arrival might be stopped by the creditors of the purchasers (and it is clear that Macgregor & Co. knew that there were circumstances which would make such stoppage competent); that it came to the early knowledge of Knip & Werner, the purchasers' agents, that the goods might be stopped, and that they therefore refrained from clearing them and paying the duty and charges thereon, but in the end they did clear them with a view to forwarding them by the Dunaburg Railway to Moscow, and handed them to a wharf warehouseman to be loaded in trucks and delivered to the railway company, and that they were then stopped *in transitu*. But then it is averred that they were cleared on the understanding that there should be no attachment of the goods while on the railway. This is an unsatisfactory statement even if relevant, and I do not think that parole proof of a conversation of this kind is sufficient to justify us in allowing an amendment or in allowing further proof in the case.

On the merits of the whole case I think, as I thought before we heard argument on the proposed amendment, that the goods were stopped while *in transitu* on their way to the purchaser, and that therefore the Lord Ordinary is right in the view which he has taken.

LORD GIFFORD.—I am of the same opinion. And first as to the proposed amendment: It appears to me to be simply an appeal at a late stage to the discretion of the Court. There is no reason why we should not have had the information at first, and I therefore agree with your Lordship that the amendment ought not to be allowed. I do not think, in any view, that it would much alter the case. It would simply involve inquiry as to what took place at Riga, and looking to the position of parties I think it would be hardly

¹ *Authorities*.—Cases cited in Lord Ordinary's Note.

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fair to commit them to a new inquiry of this kind. I do not think the amendment relevant, and it looks just like a change of case from the beginning. Secondly, as to the merits. I do not think the transit ever terminated. Moscow was the place of business of the purchasers, and not Riga. The goods were just as much *in transitu* when on their way to Moscow as at Leith, though necessarily they went into the hands of successive carriers, and some one must carry them; the sellers were in good time in stopping them before they had reached their destination, and they thus were enabled to secure that the goods should not go to the bankrupt purchasers' creditors, and were saved from being left to take their chance in a mere ranking against the debtors' estate.

LORD YOUNG.—I am of the same opinion. It is certain that the destination of the goods was Messrs Blews & Sons, Moscow. We heard argument formerly as to whether the goods, in a question with the sellers at least, were delivered when they were given into Macgregor & Co.'s hands at Leith. We thought not, and that Macgregor & Co. were only the sellers' agents to forward the goods to their destination. Now, the question is, had these goods reached their destination, or had the buyers ended their destination and substituted another before they were stopped? I am clearly of opinion on the evidence that the goods were stopped before they reached their destination and while on their way, and that they were therefore stopped *in transitu*. The idea is very well expressed in the bill of lading quoted by the Lord Ordinary—"To be delivered in the like good order and condition at the aforesaid port of Riga unto the agent of the Riga Dunaburg Railway Company or to their assigns, to be by them forwarded in transit to Messrs William Blews & Sons, Moscow; freight for the said goods, Leith to Moscow, including Riga charges, being hereby agreed upon to be 30½ cops per poood, to be paid in Moscow, with primage and average accustomed, and charges as stipulated." And it was while the goods were being thus forwarded in transit to Blews & Sons, Moscow, that they were stopped. It would have been a different case if Blews & Sons had changed their order and instructed their agent at Riga to keep them there as their destination, and we allowed the defender time to enable him to make a statement to this effect and put it on record. But we have got no such statement, but only an account of what must necessarily happen in one way or other to all goods on their way from Leith to Moscow by Riga. With respect to the allegation that the goods were sent to the Dunaburg Railway Station on the assurance of Helmsing & Grimm that they would not be stopped, the averment is not made properly. An averment which goes to bar a party of a legal remedy otherwise competent ought to be precise and substantial; and further, it is an averment which raises a new issue, and is only important on the assumption that the defender has failed on his original issue that the law of transit did not apply. I do not think the defender would be entitled to lead evidence on the new issue without paying all previous expenses, and as the estate was originally a small one, it is scarcely likely he would deem it worth while to go further into the matter, even if the averment were precise enough to induce us to admit it.

I therefore concur that the additional amendment ought not to be allowed, and that the Lord Ordinary's interlocutor should be affirmed.

THE COURT adhered.

R. P. STEVENSON, S.S.C.—J. K. LINDSAY, S.S.C.—Agents.

WILLIAM BAIRD, First Party.—*A. Graham Murray*.
 AGNES KIRKWOOD BAIRD AND OTHERS, Second Parties.—*Ure*.
 ROBERT WATSON (Factor *loco tutoris* to Jane Watson Baird and James
 Baird), Third Party.—*Rankine*.

No. 54.

Dec. 8, 1880.
 Baird, &c. v.
 Watson.

Heritable or Moveable—Succession—Conversion.—A testator, whose estate consisted in nearly equal proportions of heritage and moveables, directed his trustees, after paying debts, &c., and certain small special legacies, "with regard to the residue of my means and estate," as soon after his death as possible, "to pay and convey the same" equally among his four children, the issue of children predeceasing the period of payment and conveyance to be entitled to their parent's share. In the event of a child's predecease without leaving issue that child's share was to accresce to the others and the issue of predeceasers. The deed then proceeded,—"To enable my trustees to carry out the purposes of this settlement . . . I confer upon them all requisite powers, . . . and particularly power to sell my heritable estate." The personal estate was sufficient to enable the trustees to pay all debts and special legacies. *Held* that by the terms of the settlement the estate was moveable *quoad* succession.

ROBERT WATSON of Burnstyle died on 21st October 1878, survived by ^{2D} DIVISION. four children, two sons and two daughters. By his trust-deed and R. settlement, dated 20th December 1877, he conveyed his whole estate, heritable and moveable, to trustees, whom he directed, after payment of special legacies and his deathbed and funeral expenses,—“(Fourthly), With regard to the residue of my means and estate, I direct my trustees, as soon after my death as possible, to pay and convey the same equally to and among my sons, the said Robert Watson junior and George Watson, and my daughters the said Agnes Watson or Lambie and Jean Watson or Baird, widow of the deceased James Baird, potato merchant in Glasgow; declaring that in the event of any of my said children predeceasing the period of payment and conveyance to them leaving issue, such issue shall be entitled to the share which their parent would have taken on survivance; and further, in the event of any of them predeceasing the said period without leaving issue, then the share which such predeceaser would have taken on survivance shall accresce to his or her surviving brothers and sisters and the issue of any brother or sister who may have deceased leaving issue, such issue always being entitled to the share which their parent would have taken on survivance, which provisions in favour of my said children shall be accepted by them in full of all legitim or other claims competent to them by or through my decease.”

After providing for the debiting of certain advances made to some of his children against their shares the deed proceeded as follows:—"And to enable my trustees to carry out the purposes of this settlement and of any codicils thereto I confer upon them all requisite powers, and particularly (but without prejudice to the said generality) power to sell my heritable estate, in such lots, at such prices, and with such warrandice as they may think proper; declaring that in the event of my said heritable estate being exposed to public sale it shall be lawful for and competent to any of the beneficiaries under these presents to bid for and purchase the same; and also declaring that my said trustees shall have full power to sell any part of my moveable estate either by public roup or private bargain to any of my said beneficiaries."

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Dec. 8, 1880.
Baird, &c. v.
Watson.

At the date of Mr Watson's death the estate consisted of land of the value of	£2300	0	0
Feu-duties,	8600	0	0
Heritable bonds,	5350	0	0
And personal estate,	4350	0	0
	<hr/>		
	£20,600	0	0

The personal estate was amply sufficient to meet the special legacies and debts, &c.

Mrs Jane Watson or Baird, one of the testator's two daughters, only survived her father about a month, as she died on 18th November 1878. She was survived by four children, William Baird, Agnes Kirkwood Baird, Allan Watson Baird, and George Baird. Another son, Robert Watson Baird had predeceased her, leaving two pupil children, Jane Watson Baird and James Baird.

A question having arisen as to whether the trustor's estate was to be considered heritable or moveable as regarded the manner in which the children of Mrs Baird should take, a special case was prepared setting forth the above facts. William Baird, Mrs Baird's eldest son, was the first party to the case, and claimed the greater part of the share effeiring to his mother as her heir in heritage. The other three surviving children and the pupil children of the predeceasing son, Robert Watson Baird, to whom their uncle, Robert Watson, had been appointed factor *loco tutoris*, were the second and third parties, and contended that the succession was moveable, and fell to be divided accordingly.

The following questions were submitted for the opinion and judgment of the Court:—“(1) Is the first party entitled to one-fourth of the heritable estate, consisting of said land and feu-duties, which the said Robert Watson of Burnstyle died possessed of or the proceeds thereof? or Is the share of the said Robert Watson's estate originally destined by the said trust-disposition and settlement to the said Jane Watson or Baird, to be held as moveable or at least divisible equally among her issue? (2) Are Robert Watson Baird's children entitled to participate in the whole or any part of the share originally destined to the said Jane Watson or Baird *per stirpes* or *per capita*?”

Argued for the first party;—The trustor's estate was not converted. It remained in the position in which he left it. The proportion of heritage falling to his daughter, Mrs Baird, therefore remained heritable, and went to her heir-at-law. The moveable part fell to be divided among her other children. According to the decided cases three elements were taken into consideration in questions of conversion,—(1) the condition of the estate, whether *per se* divisible or not; (2) the terms of the clause conveying the shares to the beneficiaries; and (3) the number and condition of the beneficiaries. 1. The nature and condition of the estate here was not such as to render conversion necessary even in the sense of the strongest cases in that direction.¹ The estate could easily be divided among the beneficiaries without being sold. 2. There was nothing in the use of the words “pay and convey” a “share” to necessarily suggest an intention of conversion, nor did a power of sale point necessarily in the same direction. Such words had been used and power given in

¹ Lord Advocate v. Blackburn's Trustees, Nov. 27, 1847, 10 D. 166, Lord Fullerton there; Buchanan v. Angus, May 15, 1862, 24 D. (H. L.) 5, 34 Scot. Jur. 502, 4 Macq. 374.

cases where it had been held that conversion had not been operated.¹ 3. No. 54. The decisions upon the number and condition of the beneficiaries had been somewhat varied, but conversion had seldom, if ever, been sustained where the original number was so small as here, viz., four.² Dec. 8, 1880. *Beird, &c. v. Watson.*

Argued for the second and third parties;—Everything in this deed and in the circumstances of the case pointed to conversion. The intention of the testator clearly was that the whole estate should be realised and the shares paid in money.³

LORD JUSTICE-CLERK.—I do not think it necessary to recapitulate the authorities which Mr Murray has fully quoted to us. I am of opinion that there are no grounds on which we can suppose that this testator meant his property to be kept together. On the other hand, everything points to a contrary result. He gave his trustees a power of sale in order to enable them to carry out the purposes of his settlement, and that indicates that in his opinion his intention could not be carried out without this power of sale. Without going more fully into the case, and it being clear that the heritable property was only held as an investment, that the direction appears to contemplate payment in money, that there is a considerable number of beneficiaries, and that the bequest is a bequest of residue, everything seems to lead to the result that there was conversion here.

LORD GIFFORD.—I am of the same opinion, and I arrive at it partly from the nature of the estate, which is of a complex nature—a small piece of land, feudalties of considerable value, and heritable bonds. There is also a destination over to issue and not to heirs in heritage. It is plain that this estate was meant to be dealt with as a whole, and equal shares of it were to go to each child. On the whole, I think this estate has been made moveable by the settlement.

LORD YOUNG.—I am also of the same opinion, and, I must confess, without any difficulty. No case could have been more clearly stated or ably argued than this has been. The only general rule which we can deduce from the authorities, one way and the other, which have been quoted to us, is that we must in each case endeavour to collect from the whole provisions of each deed what the intention of the testator truly is. If a testator leaves a heritable estate and indicates no intention that it should be converted then it must remain heritage, and similarly with moveable property. Either kind of property may be converted by clear directions to that effect, or by such directions as indicate without doubt that such was the testator's intention.

¹ *Buchanan v. Angus*, *supra*, p. 234, note 1; *Durie v. Coutts*, M. 4624; *Cathcart v. Cathcart*, May 26, 1830, 8 Sh. 803, 5 F. 620; *Patrick v. Nichol*, Dec. 7, 1838, 1 D. 207, 14 F. 191; *Strachan v. Moubray*, Feb. 21, 1843, 5 D. 687, 15 Scot. Jur. 318; *Lord Advocate v. Williamson*, March 16, 1843, 2 Bell's App. 89; *Lord Advocate v. Smith*, June 15, 1854, 17 D. (H. L.) 14, 26 Scot. Jur. 533, 1 Macq. 760, Paters. Ap. 379; *Gardner v. Ogilvie*, Nov. 25, 1857, 20 D. 105, 30 Scot. Jur. 65.

² *Fotheringham's Trustees*, July 2, 1873, 11 Macph. 848, 45 Scot. Jur. 519; *Auld v. Anderson*, Dec. 8, 1876, *ante*, vol. iv., p. 211; *Hogg v. Hamilton*, June 7, 1877, *ante*, vol. iv., p. 845.

³ *Somerville's Trustees v. Gillespie*, July 6, 1859, 21 D. 1148, 31 Scot. Jur. 636; *Mackenzie v. Mackenzie*, Feb. 14, 1868, 6 Macph. 375, 40 Scot. Jur. 202; *Boag and Others v. Walkinshaw*, June 27, 1872, 10 Macph. 872; *Nairn's Trustees v. Melville*, Nov. 10, 1877, *ante*, vol. v., p. 128.

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This will indicates clearly and satisfactorily to my mind that the testator intended his children or grandchildren to take their shares in the form of money. He was a great-grandfather, because his daughter, Mrs Baird, was a grandmother, and if she had predeceased him leaving, say, twelve children, they would take directly under the will, and it would be extravagant to hold that these children should take as heirs in heritage.

The very language of the clause conferring the power of sale points to the result at which your Lordships have arrived. It was plainly in his mind that a sale of the heritable estate was requisite before the will could be executed as he intended. It is the very test of conversion, whether sale of heritage is necessary to carry out the will. "Requisite" is the word used here, and that is as strong a word as necessary; indeed, they may be said to be interchangeable. I am therefore, for the reasons now assigned, entirely of the same opinion as your Lordships, and I am glad that we can take this view, as it certainly leads to the most equitable distribution of this estate.

THE COURT pronounced this interlocutor:—"Find that the character of the estate of the testator, Robert Watson, as impressed on it by his trust-disposition and settlement, was moveable, and therefore find (first) that the share of his estate originally destined by his said trust-disposition and settlement to Jane Watson or Baird is moveable, and divisible equally among her issue; and (second) that the children of Robert Watson Baird are entitled to participate equally in the proportion of said share to which he would have had right had he survived the said Jane Watson or Baird, his mother, and decern."

J. GILLON FERGUSON, W.S.—J. YOUNG GUTHRIE, S.S.C.—A. P. PURVES, W.S.—Agents.

No. 55.

Dec. 9, 1880.
Seton v.
Paterson.HENRY SETON, Pursuer.—*Brand.*Rev. J. A. PATERSON, Defender.—*Shaw.*

Locatio Conductio—*Riding horse hired for road galloped in grass field—Consequential damages.*—A riding horse hired at the ordinary rate for a day's ride was ridden at a gallop in a grass field. While there it split its pastern bone, and six weeks after, when almost recovered, it died of inflammation caused by a twist in the bowels. In an action at the instance of the owner against the hirer for the value of the horse held (*diss.* Lord Gifford) (1) that the galloping the horse in a grass field was a departure from the implied conditions of the contract, and that the accident must be held to have been caused by the fault of the defender; (2) that the death of the horse being presumably attributable to the want of exercise consequent upon the injury, the rider was liable in the value of the horse.

2D DIVISION.
Sheriff of
Midlothian.
I.

ON 22d June 1880 Henry Seton, horsehirer, Edinburgh, raised an action in the Sheriff Court at Edinburgh, against the Rev. J. A. Paterson for £35, 11s. 6d., "being the loss and damage sustained by him by and through the defender's reckless, violent, and wrongful or illegal usage of a chestnut mare belonging to the pursuer while on hire by the defender on or about the 13th day of March 1880." In his condescendence Seton stated that Mr Paterson hired the mare from him on the day in question. "It was distinctly understood that the hiring was for the purpose of using the mare for riding in a moderate and reasonable way, and that she was to be subjected to no violent or dangerous exertion." He then proceeded to aver that while Mr Paterson had the horse out on hire its pastern bone was broken in consequence of the "reckless, violent, and

wrongful or illegal manner" in which she had been ridden; that she never was again fit for work, and finally, on 1st May, died of inflammation of the bowels; "but the inflammation and her inability to cope therewith and consequent death were caused or induced by the wrongful conduct aforesaid of the defender, and by the mare being unable to take sufficient exercise." The sum of £35, 11s. 6d. sued for was stated to be made up of £27, the price alleged to have been paid for the mare shortly before the hiring in question, and the balance of £8, 11s. 6d. as expense of keep and attendance from the date of the hiring until her death.

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Mr Paterson defended the action, and while he admitted that the mare had become lame while he was riding her, he denied that he had been guilty of any such recklessness as the pursuer alleged. He also averred that the inflammation of the bowels, of which the mare died, was totally unconnected with the lameness.

Pleaded for Seton ;—(1) The defender having hired the mare in question from the pursuer in good health and condition, and having returned her seriously injured and damaged, he is liable in reparation to the pursuer of the loss and injury thence arising, unless he shall prove that he used the animal in a proper and legal manner, and that the injuries arose from an accident over which he had no control. (2) The defender having used the mare in a reckless, violent, and wrongful or illegal manner, he is liable to the pursuer in reparation of all loss and damage arising in consequence. (3) The mare having been permanently injured and rendered useless by the fault of the defender, he is liable in reparation of its value, and of the expenses to which the pursuer has been put. (4) The animal in question having been wrongfully injured by the defender, and having died before recovering therefrom, and, as averred in the condescendence, through the fault of the defender, he is liable in damages as prayed.

Pleaded for Paterson ;—(3) The death of the animal in question not having been due to the fault of the defender, *et separatim* said death being due to causes entirely unconnected with the fracture in respect of which the action is brought, the defender falls to be assolized.

The Sheriff-substitute (Hallard) allowed a proof, from which it appeared that Mr Paterson had been in the habit of hiring riding horses from Seton for some years, and had on the occasion in question hired the mare in question in the usual way for an ordinary ride. He had been accompanied by a friend who had also hired a riding horse from Seton, and after riding by road some four miles into the country they had entered a grass field and there, as Mr Paterson put it, had ridden "at a hand gallop or canter," or, as his friend deponed, at "a brisk canter or easy gallop." Thereafter the mare had become lame, and was left at a farm until sent for, at Mr Paterson's request, by Seton. The mare while under treatment for her lameness, which was due to having split the pastern bone of one of her fore feet, was in Seton's stables, but was attended by a veterinary surgeon named by Mr Paterson. She died on 1st May. The result of a *post mortem* examination shewed that she had twisted her colon, and inflammation of the bowels had supervened, causing death. Seton deponed,—"I have three rates of hire, 3s. an hour for a saddle horse, and for a day, according to distance, from 10s. 6d. to 15s.; when used for military purposes, where there is any galloping or any risk, a guinea a-day; and for hunting purposes the charge is two guineas a-day. I saw the defender on the morning of 13th March. He asked me if he could get the same mare that day, to ride out with a friend, as he had liked her so much. I said, 'Certainly.' On that particular day I warned him to be careful. It was certainly within the understood conditions on which I hired out

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this mare that the hirer was not to gallop her across a field, or make her canter in a field. I never would have given permission for that to be done. It is a dangerous thing for a mare to do that. I have not the slightest doubt, after hearing the evidence to-day, that taking the mare off the road and galloping her in a field was the cause of the accident. I have seen a number of similar cases. . . . I do not object to a rider, hiring as the defender did, taking a gallop along the road with the horse—a moderate gallop. My objection is to galloping in a field or on the grass with troops. I charge a guinea a-day when the horse is galloping in a field with troops. I have no doubt that the people who hire from me go round by Duddington and the Queen's Park. It is very wrong if they go on the grass there. It is not worse for a horse to gallop along a soft green sward than to gallop along a hard macadamised road, provided it be moderately done; and if moderately done, I would not charge a guinea a-day. What I object to is when the galloping is reckless, and unduly violent. In the majority of cases, in my experience, where fractures like the one in question occurred, unless the animal was of great value, it was destroyed." The veterinary surgeons examined for the pursuer deponed that the want of exercise, following on her lameness, might be conducive to inflammation of the bowels, but that there was no necessary connection between the injury and the inflammation. A veterinary surgeon, a witness for the defender, deponed,—“The mare died through exhaustion, from extreme pain and twist in the bowels—sphacelus of the bowels. That was a condition exceeding inflammation, amounting almost to apoplexy of the bowels, from the arresting of the circulation. I saw the pursuer, and suggested a *post mortem*. I made it myself. I found what I have just described—a twist in the colon, with very extensive congestion of the blood vessels of the bowels, amounting to apoplexy in that part of the bowels which was involved in the twist. Her rolling had caused the twist. The mare died from one of two causes. She might have been rolling in her stall, as many horses do, or she may have contracted colic or abdominal pain. She might have been rolling on account of that, and so have produced the twist. There was no indication about her bowels to shew what had been the cause of the original colic. I examined her bowels very carefully to see if there was any sign of over-feeding, and there was not. In my opinion, it had no connection whatever with the split pastern. Such a twist as I saw would necessarily be fatal, and it is common.”

On 20th October 1880 the Sheriff-substitute (Hallard) pronounced this interlocutor:—“Finds in point of fact—1, That the defender hired the mare in question from the pursuer for a ride on 13th March last; 2, that in the course of said ride the defender took the mare from the road into a grass field, and had a gallop or canter there; 3, that on said occasion the defender was accompanied by a friend of his, the witness M'Ewan, who hired his horse from the pursuer, went over the same road, and the same field, at the same pace, and returned his animal to the pursuer in a perfectly sound condition; 4, that the mare in question was discovered to be going lame just as the defender and his friend M'Ewan came out of the grass field above mentioned; 5, that the cause of lameness was discovered to be split pastern; that the animal was placed under treatment, and was in the course of getting better when she was seized with inflammation of the bowels, of which disease she died on 1st May; 6, that split pastern is an injury which may arise from mere accident in the legitimate use of a horse, and does not necessarily imply any improper or reckless use thereof; 7, that there was no necessary connection between the accident of 13th March and the death of the animal on 1st May; 8, that no *culpa*

has been proved against the defender, nor circumstances from which *culpa* can necessarily be inferred: Finds in point of law that the facts above found imply no liability against the defender: Therefore sustains the defences: Assoillies the defender from the whole conclusions of the libel: Finds him entitled to expenses.*

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Seton appealed to the Court of Session.

Argued for Seton;—The galloping of the mare in the field being in breach of the implied conditions of the contract under which she was hired the defender was liable for the consequences. The death of the mare being directly connected with the injury inflicted by the defender he was bound to make good her value.¹

Argued for Paterson;—The mare had been used quite properly, and the injury was just one of the risks which a person who hired out riding horses had to lay his account to. In any view there was no direct connection between the split pastern bone and the twisted colon which had caused the death.

LORD YOUNG.—I think it is a pity the parties did not settle this case for themselves. The defender seems to have been in the habit of hiring riding horses from the pursuer, and to have been satisfied with them. It would probably have been wiser and better for the pursuer to have kept his customer, and arranged this matter. Although there was thus every inducement to settle this case extrajudicially on reasonable terms the parties have preferred to go on with this action, and we have now to decide between them.

I am of opinion that the Sheriff-substitute has gone wrong here. It was not, I think, according to the implied condition in the contract upon which this horse was hired that the defender should open the gate of a field and take the horse into the field and gallop it there. That such a thing is probably done frequently may be true, but we have no evidence of it. People are often willing to run risks, and if no harm ensues no more is heard of it. But if the hirer of a riding

* "NOTE.—The mare got her pastern split on 13th March, in the course of the defender's ride to Cramond that day. She was galloped in a grass field in the course of that ride. On these two facts the pursuer's case rests. His contention was that they infer *culpa* and its resulting liability, the connection between the accident and the death being taken for granted.

"Even on that assumption the Sheriff-substitute is unable to accept that conclusion. He has just reperused the evidence of the defender, and his friend Mr M'Ewan, and is more than ever impressed with its trustworthiness. The stoppage in the field mentioned by one of these gentlemen, and omitted by the other, is too trifling a discrepancy to have any weight. Both horses were treated that day in precisely the same manner,—one went lame, and the other did not. The inference, strengthened by Professor Williams' opinion, is, that the split pastern was an accident of the ride, for which no one is to blame.

"But even were *culpa* proved, much more is needed for the pursuer's success. His claim of damages is one and indivisible. It is damages for the loss of a mare which died by the defender's fault. Now, it is proved beyond a doubt that between the death of the mare and the accident there was no necessary connection. She was more liable to inflammation of the bowels while under treatment for split pastern than before. The evidence goes no further than that special care was needed, and if special care had been given she might not have died. For the lack of the special care the defender is not liable.

"But it is sufficient for the defender's relief from any liability that there is no proof of *culpa* against him. Direct evidence there is none, and no sufficient ground for such an inference."

¹ Oliphant on the Law of Horses, p. 250.

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horse does a thing like this, which he is not entitled to do, and having taken a horse sound and well into a field brings it out again with its pastern bone split, he must bear the consequences. We have not to consider whether a field might not be, in point of fact, safer than a road, but I think it incumbent on a hirer of a horse, if he acts as this defender did, to establish the fact that it was safer. The pursuer has made out a case which proves that there was an irregularity in the way in which this horse was treated, and that an injury followed in consequence. That being so, I think that there is liability. There is nothing in the Sheriff-substitute's remark that the other horse which was subjected to the same treatment remained uninjured. If there had been twenty horses galloped in this field there is no probability that all their pastern bones would have been broken.

There being thus *prima facie* liability the next question is, what is the amount of damage? Here, again, I am perplexed by the Sheriff-substitute's view, that the claim of the pursuer is one and indivisible, and so that however wrong the defender's conduct may have been this action cannot be maintained against him unless the death of the horse be held directly attributable to the wrong done by the defender. That seems to mean that if you injure a horse never so grievously the owner of the horse shall not recover unless he can prove that death resulted directly from the injury. That is not so; the death of the horse may not be the result of the injury and yet the action will be quite good.

But I am not satisfied that the death of this horse and the injury are so disconnected as to free the defender from liability.

The horse's pastern bone was broken, and it was accordingly laid up and unable to take exercise. Now, there is no doubt that a horse so confined to the stable without exercise and under treatment is more likely to take inflammation of the bowels. There is a likelihood that the horse being injured and laid up took this disease more easily than it otherwise would have done, and being, in consequence of its condition, a worse patient, it died of the disease. That being so, I am not prepared to say that this defender by using the horse otherwise than the implied conditions of the contract allowed did not make himself liable for the animal's death. I think he is liable. The pursuer, in my opinion, is entitled to the value of the horse.

I would suggest that we should find that owing to the fault of the defender the pursuer's horse was severely injured, and assess the damage at £27.

LORD GIFFORD.—In such a case I am most unwilling to dissent, but I really am not able to concur in the judgment proposed. I doubt if *culpa* accounting for the injury or causing the damage has been shewn. If there was any *culpa*, it was certainly *culpa levissima* or *levis culpa* at the most. The field appeared reasonably safe, and there was no apparent danger. We have nothing to do with trespass, and we are not in any question with the owner of the field or with the farmer complaining of trespass. Suppose the field had been a friend's field, and the defender had gone in to have a canter on the grass in a smooth and perfectly safe paddock, that surely, if *culpa* at all, would have been *culpa levissima*, and we have no evidence of the nature of the field, whether it was safe or not. Not a question is put on this subject, and no cross questions, and the reason is obvious. The only case stated against the defender is, not that he went to a dangerous place, but only that he rode in a violent and reckless manner. This is the only charge he had to meet, and so the evidence is confined to that point

alone. The defender had frankly gone to the pursuer and told all that had happened. The pursuer knew where the field was, or might have known. If it had been part of the pursuer's case that the field in which the defender took his canter was a dangerous field—a field into which by reason of its condition the defender had no right to go—I think he would have stated in his condescendence, and would have been bound to state, that fact, and that that was a fact which he relied on, and he has not done so. I am therefore inclined to hold that the defender went into a place quite suitable and safe for his purpose. It would be hard to say that a man may not ride or canter on grass when he hires a horse for a pleasure ride. Even Seton himself does not say that. It is “reckless galloping” he complains of.

But, again, assuming that there is *culpa*, I am not satisfied that the value of the horse is the measure of damages. No doubt the horse died, and so the pursuer claims its value. But was its death caused by anything that the pursuer did? I think not. I do not think it sufficiently appears that the injury to the pastern of the horse was the cause of the inflammation that led to its death. That might be a thing more or less likely, but there is certainly evidence that the death arose from a twist of the colon or intestine, occasioned by the animal rolling in its stall, but this was after its pastern was better. There is no necessary connection between the broken pastern and the twisted or knotted colon and the resulting inflammation; it is only proved that the inflammation is likely to be aggravated when the horse is kept tied up in its stall. But at all events a twist in the bowel seems from the *post mortem* examination to have been the cause of death, and how we are to hold this gentleman liable for that I cannot see. I think he made a fair offer to pay for all the damage which happened to the animal when in his hands, and on the whole I incline to the judgment of the Sheriff.

LORD JUSTICE-CLERK.—This is a narrow case, and your Lordships are not at one on the result to which the Court should come. I must say that all along my feeling has been in favour of the view taken by Lord Young, whose opinion I adopt.

To take a horse, which has been hired for a ride along a road, into a grass field and gallop it there is to go beyond the implied conditions of the contract on which the horse was hired. There is no evidence as to the practice in such cases, but the pursuer says that he would not have hired out the horse at the rate which he charged for that ride if he had known it was to be treated as the defender treated it. It is common sense that if a hirer takes a horse at the low rate for an ordinary ride and gallops it in a field he must take the risk of any injury which may result.

Having thus reached the conclusion that there is liability, there is no difficulty in following Lord Young as to the amount of damages. I therefore, on both points, concur in his Lordship's opinion.

THE COURT pronounced this interlocutor:—“Find that owing to the fault of the respondent (defender) the appellant's (pursuer's) horse suffered injury, to his damage, and assess the damage at £27 sterling: Therefore sustain the appeal: Recall the judgment of the Sheriff appealed against, and decern: Find the appellant (pursuer) entitled to expenses in the Sheriff Court and in this Court, and remit,” &c.

DANIEL TURNER, S.L.—JAMES M'CAUL, S.S.C.—Agents.

No. 56.

Dec. 10, 1880.
Young's Trustees v. Janes,
&c.

ELIZABETH STOTT BLACK AND OTHERS (Young's Trustees), Real Raisers.
W. D. B. JANES AND OTHERS, Claimants.—*Lord Adv. M'Laren—Martin.*
MARGARET THACKWRAY HARRIS AND OTHERS, Claimants.—*Trayner*
—*R. V. Campbell.*

Succession—Legacy to "nearest in kin"—Intestate Moveable Succession Act, 1855, 18 Vict. c. 23, sec. 1.—Held (rev. judgment of Lord Lee) that a legacy to a person's "nearest in kin" was not to be construed as a legacy to his heirs in mobilibus.

Question, whether a legacy to next of kin was to be construed as a legacy to nearest relations, or as a legacy to next of kin as defined by the law of moveable succession.

Observed, that the Intestate Moveable Succession Act, 1855, adopted the common law definition of next of kin.

1ST DIVISION.
Lord Lee.
B.

ON 2d March 1852 the late Rev. Peter Young and his wife executed a mutual trust-disposition and settlement. The trustees were directed to pay certain legacies, and the deed contained the following residuary clause:—"In the last place, as to whatever residue there may be of our said property after fulfilling the foresaid purposes, we wish and direct it to be divided and disposed of in such way as we or the survivor of us two shall direct by any future writing under our hands, or the hand of the survivor of us two, made at any time, which writing we hereby declare to be like these presents, part of our said deed or deeds of settlement, and as binding on you, our trustees, as if it had been engrossed therein, and failing such writing disposing of said residue, then the said residue shall be equally divided among the nearest in kin of us both who shall be alive at the time of the death of the survivor of us two: That is to say, one-half to the nearest in kin equally amongst them of me, the said Peter Young, and the other half to the nearest in kin equally amongst them of me, the said Maitland M'Culloch or Young, who shall be alive at the time of the death of the survivor of us two."

Mrs Young died in March 1853 without having executed any deed.

Mr Young died on 28th September 1864, having made various codicils by which he altered the legacies, but did not alter the destination of residue.

The trustees entered upon possession of the trust-estate.

Miss M'Adam, to whom Mr Young had bequeathed the liferent of the estates, died on 28th January 1879. After her death the estate fell to be divided among the persons in whom it had, by the residuary clause, vested on the death of Mr Young.

The half of the estate destined to Mr Young's relatives was paid without dispute after the action had been raised. The half destined to Mrs Young's relatives was claimed by (1) W. D. B. Janes and others, as representatives of John Robert M'Adam, a nephew of Mrs Young who was alive at the date of Mr Young's death; and (2) Margaret Thackwray and others, as children of Thomas Thackwray, another nephew of Mrs Young, who had died before the date of Mr Young's death.

The Lord Ordinary pronounced this interlocutor:—"... Find ... according to the sound construction of the said mutual disposition and settlement the other half thereof, destined to the nearest in kin of the said Mrs Maitland M'Culloch or Young alive at the time of the death of the said Peter Young, is payable to the heirs *in mobilibus* as at that date entitled to succeed *ab intestato* to the said Mrs Maitland M'Culloch or Young, including not only the said Robert John M'Adam, who died at Montreal on 4th February 1869, but also the children of Mrs Young's deceased nephew, Thomas Thackwray, as coming in place of their father, and also the children of

any other nephew or nephews of Mrs Young who may have survived her but predeceased her said husband." * No. 56.

Dec. 10, 1880.
Young's Trustees v. Janes, &c.

* "NOTE.—Apart from the authorities on the subject, the Lord Ordinary might have had difficulty in admitting among the nearest in kindred of Mrs Young, along with her nephew John Robert M'Adam, the children of a nephew who predeceased the prescribed period of distribution. He should have been disposed to regard 'nearest in kin' (an expression frequently used as synonymous with next of kin, *e.g.*, Bell's Pr., section 1861) as pointing to propinquity in degree, as well as to the order of succession provided by the common law of Scotland; and he should have thought it questionable whether a statutory provision, applicable to cases of intestate succession, could be applied to the interpretation of such a term in a mutual settlement which was made before the statute was passed which changed the law of moveable succession.

"But the Lord Ordinary is of opinion, upon the authorities, that the expression may be read as meaning those relations ~~who are entitled to take the succession according to law~~; and that in deeds like that which is founded on in this case it ought to be so read, unless there are expressions to be found in it which indicate an intention to use it in a different sense. It was a part of the mutual settlement of Mr and Mrs Young that the survivor should have full power to direct the disposal of the residua. Indeed, it was the express purpose of the deed that the longest liver should have 'absolute right' to the whole property. The question, therefore, as to the meaning of the residuary bequest in favour of the nearest in kin of Mrs Young alive at the death of the survivor must be considered to have been made by Mr Young on the day of his death, for the purpose of disposing of his own property. It is entirely disencumbered of any notion of personal predilection on the part of Mrs Young, and no difficulty arises from the deed having been made before 1855, or from one of the parties having died before that date.

"In such a case the meaning of the expression will depend on the nature of the subject which forms the subject of the destination. If it be an heritable estate, the heir-at-law, according to the rules of succession in heritage, would presumably be called although another relative might be nearer in degree. Of this the case of *Connell v. Grierson*, Feb. 14, 1867 (5 M. 379), affords an example. If, on the other hand, it be a moveable succession that is referred to (as in the present case) those entitled to succeed at law as heirs *in mobilibus* will be held to be favoured unless there be something in the deed, as in the case of *Scott v. Scott* (H. L., May 10, 1855, 2 M.Q. 281), which shews that the testator did not desire to adopt the legal order of succession. But the expression is not held to be a technical term signifying exclusively those who would succeed according to the common law as it stood prior to 1855. The cases of *Nimmo v. Murray's Trustees*, June 3, 1864 (2 M. 1144), and *Maxwell v. Maxwell*, December 24, 1864 (3 M. 318), seem to the Lord Ordinary, in this view, to have an important bearing on the present case. In *Nimmo's* case the expression was 'my own nearest heirs and successors.' This was held to include the descendant of a sister who had predeceased the testator, along with a brother who had survived him. In *Maxwell's* case the bequest was to John Maxwell, 'his heirs, executors, and assignees.' This was held to mean the heirs *in mobilibus*, according to the law of intestate moveable succession, as altered by the Act 18 Vict. cap. 23. Unless, therefore, it could have been shewn that the term nearest in kin, as used in the settlement of Mr and Mrs Young, was intended to exclude the children of a nephew predeceasing the time of the survivor's death, in the event of any nephew or niece being then alive, there seems to be no reason to doubt that the children of Thomas Thackwray are entitled, as in place of their father, who predeceased, to a share of the succession along with John Robert M'Adam, who survived, or those who represent him.

"The case of *Cockburn's Trustees v. Dundas*, June 10, 1864 (2 M., 1185), is not inconsistent with the decision in *Nimmo's* case. In that case there seems to have been no claim for the children of the deceased grandchildren, and it was pointed out in *Maxwell v. Maxwell* that there were specialties, which are fully

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The claimants W. D. B. Janes and others reclaimed, and argued ;—The Intestate Moveable Succession Act of 1855 made a distinction between next of kin and heirs *in mobilibus*, and the words of mutual settlement were not intended to favour any but the nearest in blood of the spouses. Children of a nephew had no claim. At the time the deed was made nephews would have excluded grandnephews in intestate succession, and the testators meant that their property should go to the nearest in blood. The change of the law by the Moveable Succession Act could not affect the meaning of words used in a deed made prior to the passing of the Act.

At advising,—

LORD PRESIDENT.—The question in this competition depends on the construction of a clause in the mutual settlement of the late Mr and Mrs Young, which is dated 2d March 1852. After providing a number of legacies the deed contains the following residuary clause :—“ In the last place, as to whatever residue there may be of our said property after fulfilling the foresaid purposes, we wish and direct it to be divided and disposed of in such way as we or the survivor of us two shall direct by any future writing under our hands, or the hand of the survivor of us two, made at any time, which writing we hereby declare to be like these presents, part of our said deed or deeds of settlement, and as binding on you, our trustees, as if it had been engrossed therein, and failing such writing disposing of said residue, then the said residue shall be equally divided among the nearest in kin of us both, who shall be alive at the time of the death of the survivor of us two : That is to say, one-half to the nearest in kin equally amongst them of me, the said Peter Young, and the other half to

brought out in the opinion of the Lord Justice-Clerk. But for these specialties the Lord Ordinary sees no reason to doubt that the opinion of Lord Neaves would have been given effect to. He held that the testator meant to bequeath the succession to those who should be his heirs *in mobilibus*, or in heritage, at the time of distribution, and that the Intestate Succession Act should receive effect, and be imported into every will in which the testator leaves his succession to heirs and executors alive at the time of distribution. This was just what had been held in *Nimmo's case*, and none of the other Judges indicate that their decision in that case was in any degree shaken.

“ It was observed in argument that the expression ‘ next of kin,’ or ‘ nearest in kin,’ was not dealt with in these cases. The observation is a just one, and there is no doubt that the statute of 1855 itself draws a distinction between ‘ next of kin ’ and the children of those who, if they had survived, would have been among the next of kin. The question, however, is, What is the meaning of the expression as used in a testamentary deed of this kind ? And, upon that question, the Lord Ordinary thinks that a very sufficient answer is to be found in the opinion of the Lord President in the case of *Ferrier v. Angus*, January 21, 1876 (3 R. 396)—‘ The ordinary sense of the words “ (nearest in kin) ” would be the heirs *in mobilibus* of the spouses ; that is, the next of kin of each at the time of his or her death.’ There was no competition in that case between one of the next of kin and the children of another who had predeceased. But the Lord Ordinary considers that this description of the class shews that the expression ‘ next of kin ’ in a legacy is not presumed to exclude any of those who are heirs *in mobilibus* according to the law of moveable succession. The opinion of the Lord Justice-Clerk in the more recent case of *Webster v. Shinnie* (6 Rettie, 102) is still more adverse to the suggestion that the term must always be read in its strict legal signification. Speaking of the statute, 4 Geo. IV. c. 98, he said,—‘ I read the expression “ next of kin ” to mean nothing whatever but the heir *in mobilibus aâ intestato*.’

“ The Lord Ordinary did not understand that there was anything in the settlement indicative of an intention to use the term in a different sense, unless the words themselves have such different meaning.”

the nearest in kin, equally amongst them, of me, the said Maitland M'Culloch or Young, who shall be alive at the time of the death of the survivor of us two." No. 56.
 Mrs Young died in 1853 without having executed any deed. The husband died Dec. 10, 1880. Young's Trustees v. Janes, &c.
 eleven years afterwards, and the chief alteration which he made was to bequeath a liferent to Miss Jane M'Adam. The period of time at which the bequest of residue is to be determined is the death of Mr Young, which occurred on 28th September 1864. The half of the succession, which went to the next of kin of Mr Young, has been disposed of without competition. But as to Mrs Young's half a competition has arisen in the present process between the representatives of a nephew who survived the period of the death of the survivor of the spouses and the representatives of a nephew who predeceased that period. The reclaimers, W. D. B. Janes and others, are the representatives of the nephew who survived the period, and Mrs Harris and others are the representatives of a nephew who predeceased that period. At the death of the survivor of the spouses there was only one person alive answering the description of next or nearest of kin of Mrs Young, but the representatives of the nephew who predeceased maintain that under the operation of the Intestate Succession Act, or taking it as construing the terms of this settlement, they are entitled, among them, to an equal share with the nephew who survived. The whole question turns on the meaning of the words "nearest in kin of us two who shall be alive at the death of the survivor of us two."

I rather think that this is the first time, at least since the passing of the Intestate Succession Act, that we have had to determine the meaning of the words "next or nearest of kin" as used in a testamentary disposition of moveables. It seems to me that the representatives of a nephew who predeceased the survivor of the spouses were not at that date nearest of kin in any sense of the term. They were not nearest in blood, because they were a degree further off than the nephew who survived. Nor were they nearest of kin at common law, because by the common law of Scotland there was no representation in moveables, and nearest in kin alive would take in preference to representatives of the same degree of propinquity who had died.

It is still more clear that they were not next of kin in the sense of the Intestate Succession Act, as it appears that the only persons who are called next of kin in that Act are the next of kin by the common law. In the first section these expressions occur—"In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next of kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children, who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled." It must be observed that the term "next of kin" is used not as meaning representatives of those nearest in blood, but in the same meaning as the term has at common law. Further, we have the enactment—"Provided always that no representation shall be admitted among collaterals after brothers and sisters' descendants, and that the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto in preference to the children or other descendants of any predeceasing

No. 56. next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office." Now, here again there is a sharp distinction between those who are to come in as representatives and the next of kin. It appears to me that the term next of kin has never been used in the sense of including those who by statute are admitted to a share in the succession.

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Looking to the first paragraph of the Lord Ordinary's note, he appears to have been inclined to take that view, but seems to have thought that he was precluded from doing so by the authorities. I think his Lordship has misunderstood the authorities, for the cases of *Nimmo*, *Connell*, and *Maxwell* are all different from this. In none of them was there the expression "next or nearest of kin." In *Nimmo v. Murray's Trustees*, June 3, 1864, 2 Macph. 1144, the expression was "nearest heirs and successors." In *Connell v. Grierson*, Feb. 14, 1867 (5 Macph. 379), the expression was "own nearest of kindred and their heirs and assignees and disponees whomsoever." In *Maxwell v. Maxwell*, Dec. 24, 1864, 3 Macph. 318, the expression was "his heirs, executors, and assignees." Now, all these expressions have special reference to intestate succession. They plainly describe the parties who, in the event of the testator dying intestate, would take the succession, heritable or moveable. That is surely open to a different construction from an expression which has reference to the blood connection of the parties. In *Nimmo's* case I think the distinction was pointed out in my opinion. I say, "It is given to 'my own nearest heirs and successors.' Now, I very much agree with Lord Benholme in thinking that in the construction of a clause of this kind an important distinction exists between words which express near propinquity or nearness in blood, and words which express the relation between the testator and those whom he calls in regard to his succession. Parties may be nearest in blood and yet may not be the heirs or the only heirs who will take the succession, and therefore there may be great difficulties and ambiguities in the construction of words which import merely propinquity or nearness in blood which will not arise in a case where the words used simply refer to the relation between the testator and the parties called as taking his succession. Now, keeping that in view, I cannot think that in a deed of this kind 'my own nearest heirs and successors,' unless there be something very peculiar in the context or in the general scope and purpose of the deed, can bear any other construction than 'my nearest heirs, or my nearest heirs *in mobilibus*,' according to the nature of the subject." It appears to me that the cases referred to by the Lord Ordinary have not much application here except by way of distinction.

But it seems to be contended that in some other cases opinions have been expressed at variance with that construction of the words "nearest of kin," which I think is applicable here; and in particular a reference was made to the case of *Ferrier v. Angus*, Jan. 21, 1876 (*ante*, vol. iii. 396), in which I am reported to have said that the ordinary meaning of next of kin would be heirs *in mobilibus* in relation to the deed then under consideration. But it must be observed that there was no competition between next of kin and heirs *in mobilibus* in that case. It was conceded on both sides that the next of kin in the common law sense were the parties entitled to succeed, and the case referred only to the point of time at which their interest vested. That case of *Ferrier* occurred in the year 1876, and in the very same year another case occurred in this Division of the Court in which we had an opportunity of expressing our

views on the Act of Parliament, and what was then said was quite in accordance with what had been said in the case of *Ferrier*. The question in the case of *Muir*, No. 56. Dec. 10, 1880. Nov. 3, 1876, *ante*, vol. iv. 74, was whether a mother could be confirmed executor Young's Trustees v. James, &c. as next of kin. The commissary-depute found that "a mother is not one of the next of kin of her children, and that the petitioner is therefore not entitled to be confirmed executor-dative *qua* one of the next of kin," and he dismissed the petition. Now, we agreed with that finding. I said—"I am not disposed to differ from the commissaries in holding that a mother is not one of the next of kin of her children in a certain sense of the term." But I proceeded to say that the commissaries had dealt too strictly in dismissing the petition, and that if the petitioner was entitled to be confirmed *qua* mother, they might have allowed the petition to be amended, and have confirmed her as executrix *qua* mother, and accordingly a remit was made to the commissaries to have her confirmed in that character. This shews that persons called to a share of the succession by the statute are not thereby made next of kin. All this leads to the conclusion that when you find the term "next of kin" or "nearest of kin" in a settlement like this you are to read the words as expressing propinquity of blood; whether nearest according to the precise relation of each individual to the testator, or according to the lines of succession in moveables by the common law of Scotland, is of no consequence in this case, for the nephew who survived the period in question in this case answers both descriptions—he was both nearest in blood to Mrs Young, and by the common law would have succeeded to her moveable estate. 2

When that question arises, however, it will require consideration, and all the more so that in England the term "next of kin" has been interpreted as meaning nearest in blood, and not according to the lines of succession. That law was very properly referred to as having determined in England this question, or one very like it, viz., the meaning of "next of kin" in a will in reference to the statute of distributions, from which our Act was in great measure copied. The same distinction was there recognised between those specially called to the succession by the statute and the next of kin at common law, and it was decided, after due consideration of the subject, that next of kin in a will meant those nearest in blood to the testator, and not the heirs *in mobilibus*. That was laid down in the case of *Elmaley v. Young* (2 My. and K. 82), and afterwards in *Withy v. Mangles* (10 C. and F. 215), where Lord Cottenham delivered a very full and important judgment on the subject.

On the whole matter I have no doubt here that the parties who are to take the succession are the representatives of the nephew who was the surviving nearest in blood at the death of the survivor of the spouses, and not those who would have been called to the succession by the Intestate Moveable Succession Act, 1855.

LORD DEAS.—The parties favoured by the residuary clause are the next of kin who shall be alive at the death of the survivor of the spouses, and the question is who the testator meant by these words. This is a question of intention, and all the circumstances are to be taken into account in order to determine who are the favoured parties. I have no doubt that the parties meant to be favoured here were the blood relatives of the testatrix who might be alive at the death of the survivor. In that conclusion I am confirmed by the observations of your Lordship on what has been held in the general case. I therefore concur.

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LORD MURE.—The question we have to determine is, who, under the mutual settlement executed in 1852, are to be considered to fall under the words by which the residue is made over to “the nearest in kin of us both who shall be alive at the death of the survivor of us two.” Do these words mean the next of kin in the ordinary common law sense, or do they mean those who are entitled to succeed under the Intestate Succession Act of 1855? I agree with your Lordship that they cannot be held to include parties who are called to the succession by the Act of 1855; because, under the words of that Act, there is a plain distinction between next of kin in the ordinary sense and those who are called to the succession by the operation of the Act. One main object of the Act was to introduce representation in moveables, which did not exist before the Act was passed. The words “next of kin” are very distinctly defined by Mr Erskine (iii. 9, 2), where he says,—“It is a universal rule in the legal succession of moveables that the next in degree of blood to the deceased, or the next of kin, succeeds to the whole, and if there be two or more equally near, all of them succeed by equal parts.” Then he goes on to say,—“The right of representation in heritage by which remoter heirs represent their ascendants has no place in the succession of moveables.” The phrase “next of kin,” therefore, by the law of Scotland, meant the nearest in degree of blood who succeeded to the estate, and there was no representation in moveables. But by the Intestate Succession Act of 1855 the principle of representation was introduced, and a different class of persons called to the succession; so that there is a plain distinction between next of kin in blood and the parties called to the succession by the operation of the Act.

LORD SHAND.—I concur in the opinions delivered. It appears to me to be clear that the term next of kin or nearest of kin, according to the primary and natural sense of the words, means the nearest in blood. Assuming that we are deciding the point for the first time, I have no doubt that the provision here is in favour of the nephew, the nearest relative of the testator. The Lord Ordinary appears to have held the same view, but to have conceived that, in consistency with the authorities to which he refers, and to the opinions of the Judges in former cases, he was bound to include the whole of the heirs *in mobilibus*, though some of these stood in a remoter degree of relationship to the deceased. Now, I agree in the view which has been expressed by your Lordship in the chair in regard to these cases. In the expression here used, “nearest in kin,” relationship is implied, while in the cases referred to by the Lord Ordinary the expressions used did not refer to relationship in blood, but to succession under the old law. In the case of *Connell v. Grierson*, Feb. 14, 1867, 5 Macph. 379, there is a very instructive note by Lord Kinloch, which expresses very much my views in the present case. It is true that this Division of the Court recalled his interlocutor, but on the ground that the testator intended by nearest of kindred the nearest blood relation according to the rules of succession in heritage,—still giving the succession to the nearest in blood.

I desire to keep open the question to which your Lordship referred in the concluding part of your opinion, whether, if the nearest blood relation was not the nearest in the line of moveable succession he would still be held to be the next of kin. That question does not arise here, as the nephew who was alive at the opening of the succession was both the nearest in blood to the testatrix and next in line of moveable succession according to the common law.

THE COURT pronounced this interlocutor:—"Recall the Lord Ordinary's interlocutor, in so far as it finds that the half of the residue of the estate of the Rev. Peter Young and Mrs Maitland Young 'destined to the nearest in kin of the said Mrs Maitland M'Culloch or Young alive at the time of the death of the said Peter Young, is payable to the heirs *in mobilibus* as at that date entitled to succeed *ab intestato* to the said Mrs Maitland M'Culloch or Young, including not only the said Robert John M'Adam, who died at Montreal on 4th February 1869, but also the children of Mrs Young's deceased nephew, Thomas Thackwray, as coming in place of their father, and also the children of any other nephew or nephews of Mrs Young who may have survived her but predeceased her said husband:' In place thereof, find that said half of the residue, according to the sound construction of the deed of settlement of the spouses, vested at the death of the said Peter Young on 28th September 1864 in the now deceased John Robert M'Adam, being a nephew, and, as such, the sole nearest in kin of the said Mrs Young, then alive, and now belongs to the claimants W. D. B. Janes and others, as his representatives, to the exclusion of the other claimants, Mrs Margaret Harris and others, as representatives of Thomas Thackwray, another nephew of the said Mrs Young who predeceased the said Peter Young: Find the claimants Janes and others entitled to the expenses of the competition against the other claimants, Margaret Harris and others: Allow an account of said expenses to be lodged, and remit," &c.

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J. & F. J. MARTIN, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

*EDWARD FAIRFAX STUDD, Pursuer.—*Asher*—H. Johnston.
EMMA BEATRICE BAYLY OR STUDD AND OTHERS, Defenders.
CHARLES COOK, Curator *ad litem* for E. A. Studd and G. Studd.—
Kinnear—*Maconochie*.

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Succession—Foreign—Destination—English entail of Scotch estate, effect of—Titles to Land Act, 1868 (31 and 32 Vict.) c. 101, secs. 19 and 20—Conveyancing Act, 1874 (37 and 38 Vict.) c. 94, sec. 46.—An Englishman left a will in the English form by which, *inter alia*, he devised all such of his lands, &c., situate in the counties of Devon, of Inverness in Scotland, &c., as consisted of "freehold of inheritance," "to the use of my elder son, E. F. S., and his assigns, for his life, without impeachment of waste, and after the death of the said E. F. S. to the use of the first and every other son of the said E. F. S. successively, according to their respective seniorities in tail male, with remainder to the use of," &c. It was admitted that this was a valid settlement "in tail male" of the English estates, according to the law of England. Under a subsequent clause E. F. S. took, as residuary devisee or legatee, all property not otherwise disposed of. He was also the testator's heir-at-law.

The testator left an estate in Inverness-shire held of a subject-superior. E. F. S. claimed this estate as conveyed to him absolutely by the above clause, the destination not being such as by the law of Scotland imported any restriction or limitation of his right, or, alternatively, as forming part of the residue, or as intestate succession. His claim was opposed on behalf of his pupil children.

The parties agreed, by minute, on an interpretation of the meaning and effect, according to the law of England, of the terms used by the testator in the above clause. According to this interpretation the Inverness-shire estate would have been a "freehold of inheritance" had it been situated in England, and the incidents of an English settlement in tail male following on a tenancy for life, as therein described, were, in the opinion of the majority of the Court, substantially

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the same as those of a Scotch conveyance in liferent allanarly and in fee, with a simple destination to the heirs-male of the body of the fiar, subject to this condition, that the fiar should take no disposable estate till the death of the liferenter. *Held* (diss. Lord Justice-Clerk, rev. judgment of Lord Curriehill) (1) that under the Titles to Land Act, 1868, sec. 20, the testator's will was to receive effect according to its true import and effect with reference to heritable estate, to the same extent as with reference to moveable estate; (2) that that import and effect were ascertainable by means of the interpretation afforded by the parties, and could be carried out substantially, without inconsistency with the practice or with the policy of the law of Scotland, by giving the pursuer a liferent allanarly, and the heir-male of his body a fee (postponing vesting of the fee during the pursuer's life), with a destination over to the other substitutes; (3) that a registrable title, in accordance with such true intent and meaning, fell to be made up under the said Act and the Conveyancing Act, 1874; and (4) claim of E. F. S. repelled.

The Lord Justice-Clerk, in dissenting, *held* that the intention of the testator was to make an English entail of a Scotch property, that there was no equivalent in the land laws of Scotland for an English entail, and that to sustain the defenders' contention would be to authorise land in Scotland to be held in a manner which the law of Scotland did not recognise.

Opinion (per Lord Justice-Clerk) that the 20th section of the Titles to Land Act, 1868, did not place bequests of land on the same footing as bequests of moveables, to be carried into effect according to the intention of the testator as gathered from his testamentary deed, a registrable title being made up, if necessary, by the execution of a conveyance or other deed in conformity with that intention, but merely made a bequest of lands (in words which would have been, prior to the passing of the Act, *habile* to convey moveables only) equivalent to a general disposition of lands, on which a title could be made up as upon a general disposition; that, therefore, conditions and qualifications must enter the record precisely as they were contained in the testamentary deed which was to be equivalent to a general disposition, and could have no effect, by reason of the testator's intention merely, if they were incompatible with the land laws of Scotland.

2D DIVISION.
Ld. Curriehill.
M.

MAJOR-GENERAL EDWARD MORTLOCK STUDD, of Oxtou, Devon, was a domiciled Englishman, possessed of large property, both real and personal, in England, and of the estate of Banchor in Inverness-shire.

General Studd died in 1877, leaving a last will in the English form, whereby he appointed his widow, Emma Beatrice Bayly or Studd, and others, his trustees, and, *inter alia*, made a settlement in tail male of his real property in the following terms:—"I devise all such and such parts of my manors, messuages, lands, and hereditaments, situate in the counties of Devon, of Inverness in Scotland, of Stafford, and of Warwick, and of my estates called The Four Dwellings, The Quinton, and The Farm at 'Bell End,' whether in Worcestershire or Staffordshire, or elsewhere, as consist of freehold of inheritance (which several hereditaments are hereinafter called 'Edward's Freehold Estate') to the use of my elder son, Edward Fairfax Studd, and his assigns, for his life, without impeachment of waste, and after the death of the said Edward Fairfax Studd to the use of the first and every other son of the said Edward Fairfax Studd successively, according to their respective seniorities in tail male, with remainder to the use of my trustees during the life of my younger son, Alnod Earnest Studd, upon the same trusts as hereinafter declared concerning the real estate next hereinafter devised to my trustees, and called 'Alnod's Freehold Estate,' and after the death of the said Alnod Earnest Studd, to the use of the first and every other son of the said Alnod Earnest Studd successively, according to their respective seniorities in tail male, with remainder to the use of the first and every other son of the said Edward Fairfax Studd successively, according to their respective seniorities

in tail, with remainder to the use of the first and every other daughter of the said Edward Fairfax Studd successively, according to their respective seniorities in tail, with remainder to the first and every other son of the said Alnod Earnest Studd successively, according to their respective seniorities in tail, with remainder to the first and every other daughter of the said Alnod Earnest Studd successively, according to their respective seniorities in tail, with remainder to the use of my said wife and her assigns during her life or until she shall marry again, without impeachment of waste, and after her death or marriage, to the use of Marie Von Linsingen and Augusta Linsingen (the two daughters of my nephew, Count Linsingen of Hanover), and the child or children of the Reverend William Collett, of Hawstead, in the county of Suffolk, by his late wife, my niece, formerly Cecil Augusta Linsingen, their heirs and assigns, as tenants in common, in equal shares.”

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By subsequent clauses General Studd farther devised his copyhold property, and bequeathed his leasehold property in the same counties “upon such trusts, and with and subject to such powers, provisoes, and declarations as shall correspond with the uses, trusts, powers, provisoes, and declarations hereinbefore limited and declared of and concerning Edward’s freehold estate, as nearly as the different tenures and quality of the hereditaments and rules of law and equity will permit.”

By a further clause in his will General Studd devised and bequeathed all property, of whatever description, “not otherwise disposed of by this my will,” to the use of his trustees upon trust, that they might realise the same, pay his debts and legacies, and provide for annuities, and stand possessed of the residue “in trust for the said Edward Fairfax Studd, his executors, administrators, and assigns;” and added,—“And I declare that my trustees shall have the fullest powers of determining what property passes under any specific devise or bequest contained in this my will, or any codicil hereto, and of apportioning blended trust-funds, and of determining whether any monies are to be treated as capital or income, and generally of determining all matters as to which any doubt, difficulty, or question may arise under or in relation to the exercise of the powers, or the execution of the trusts of this my will, or any codicil hereto.”

Under this will the question arose how the estate of Banchor in Inverness-shire, which was the only heritable property of any description held by the testator in that or any other county in Scotland, fell to be dealt with.

The debts and legacies left by General Studd had all been paid, and the annuities provided for.

Edward Fairfax Studd was the eldest son and heir-at-law of his father, General Studd.

The estate of Banchor was held of the Earl of Moray as superior thereof.

Edward Fairfax Studd claimed the estate absolutely in fee, without any restriction or limitation of his right, on these three separate grounds :—(1) That such was the result of the destination ; (2) and *separatim*, that it fell into residue ; or (3) fell into intestacy.

He accordingly raised an action of declarator against his father’s trustees, against his own pupil children, Edward Arthur Studd and Gladys Studd, and against the other tenants in tail and remainder men under his father’s settlement. He concluded for decree of declarator that the lands of Banchor, with the teinds thereof, “have vested in the pursuer in fee absolutely, and without any restriction or limitation whatsoever, in virtue of the conveyance or destination thereof contained in the said last will and testament of his father, the said Edward Mortlock Studd :” Or otherwise, and alternatively, that they fell “under the residuary clause contained in

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the said last will, whereby the said trustees are directed to hold the whole property of every description "not otherwise disposed of by the said last will or any codicil thereto in trust, after payment of certain debts, legacies, and annuities, for the pursuer, his executors, administrators, and assigns; and that all the testator's debts, and the legacies and annuities left by him, having been paid or provided for, the pursuer is now entitled to the same absolutely: Or otherwise, and alternatively," "that the said Edward Mortlock Studd died intestate *quoad* the said lands and the teinds thereof, and that the right to the same has now vested in the pursuer as his heir-at-law."

The pursuer pleaded;—(1) The devise or conveyance of such of the testator's manors, messuages, lands, and hereditaments, situate in the county of Inverness, as consist of freehold of inheritance, being habile and sufficient to carry the said estate of Banchor, with the teinds thereof, the destination thereof is not such as by the law of Scotland imports any restriction or limitation of the pursuer's right, and he is therefore entitled thereunder to the said estate absolutely in fee; or (2) *separatim*, the language of the said special devise or conveyance being incapable of interpretation according to the law of Scotland, the said estate of Banchor, with the teinds thereof, falls to be dealt with as part of the residue of the testator's estate, and the pursuer is entitled thereto under the residuary bequest in his favour contained in the said will; or (3) *separatim*, the said estate of Banchor and the teinds thereof are intestate succession of the said deceased Edward Mortlock Studd, and fall to the pursuer as his heir-at-law.

The defenders appeared, and pleaded;—(1) The defenders, the trustees of the late General Studd, are bound, under the provisions of his last will, to make up a title in their own names to the estate of Banchor, with the teinds thereof, and thereafter to execute a deed of strict entail, settling the estate on the series of heirs prescribed in the said last will; or (2) *separatim*, the right of the pursuer in the estate of Banchor, with the teinds thereof, being limited by the terms of the said last will to a right of liferent only, he is not entitled to decree in terms of the first conclusion of the summons. (3) The terms of the special devise or conveyance of the lands in Inverness-shire being effectual to convey the estate of Banchor, it does not fall to be dealt with under the residuary clause of the will, or as part of the testator's intestate succession.

To obviate a remit to the Court in England or to English counsel the parties lodged a minute in which they stated that they were agreed that, according to the law of England—"First, the term 'freehold of inheritance' denotes an estate or right in lands which (as is the case with all lands in England) are held in fee of the Crown, or of a subject superior (to the exclusion of copyholds and leaseholds), and such that the estate or right is not merely for life or a term of years, but on the death of the holder, without having exercised such power of disposition as the law allows him, will descend to his heir general or to the heir of his body, according as the estate is a fee-simple or an estate tail.

"Second, The devise of 'Edward's freehold estate' 'to the use of my eldest son, Edward Fairfax Studd, and his assigns, for his life, without impeachment of waste,' contained in the clause of Major-General Edward Mortlock Studd's will, above quoted—(1) conferred upon the pursuer, at the testator's death, an estate for life, without the intervention of trustees; and the incidents of that estate are generally—(2) that, as such tenant for life, the pursuer is entitled to possession, both natural and civil; and by virtue of the Settled Estates Act, 1877, section 46 (re-enacting the provisions of an earlier Act), he can of his own authority let leases for agriculture or occupation (subject to conditions imposed

by the Act), for a period not exceeding twenty-one years; (3) that in virtue of the clause 'without impeachment of waste,' he may cut timber in a husbandmanlike manner for his own benefit, and open mines, quarries, and the like, as well as work existing ones, and permit build- ings, fences, and the like to dilapidate with impunity, but may not wantonly pull down houses or fell ornamental timber, or commit other injury of a like nature; and (4) that he is entitled to convey away or assign absolutely his life estate, and that it can be attached by his creditors, and on bankruptcy or liquidation by arrangement his life estate passes to his trustee in bankruptcy or liquidation. Dec. 10, 1880.
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"Third, the devise contained in the same clause,—'After the death of the said Edward Fairfax Studd, to the use of the first and every other son of the said Edward Fairfax Studd successively, according to their respective seniorities, in tail male, with remainder to the use of my trustees during the life of my younger son, Alnod Ernest Studd,' &c.—(1) Confers upon the eldest or only son of the pursuer, on the birth of such son, a vested estate or interest, as tenant in tail male, which will take effect in possession on the death of Edward Fairfax Studd, unless such estate in tail male has previously come to an end by the death of the son without leaving issue male. This estate cannot be disappointed by the act of the pursuer or by his creditors. The second and every subsequent son of Edward Fairfax Studd takes a like estate, but always in remainder expectant on the death and failure of issue male of the elder son or sons; and on failure of all sons and their issue male, the trustees of General Studd take an interest for the life of Alnod Ernest Studd. (2) On any son of the pursuer attaining the age of twenty-one years he will be in a position (subject and without prejudice to the estates and interests prior to his own) to bar the entail, *i.e.*, to disentail by the execution of a deed (which must be enrolled in Chancery). Such deed will be effectual not only against his own issue, but also against the remainder men or substitutes, if the deed be executed after the death of the pursuer, or if the pursuer be a consenting party thereto. But if executed in the lifetime of the pursuer without his consent, it will only be effectual to bar the issue of the party executing it. (3) On the pursuer's death the first tenant in tail male, whoever he may then be, will be entitled to possession, and at or after twenty-one years of age will be in a position by his own deed alone to bar the entail to all effects, so far as he may not previously have done so. (4) That if the entail be not barred by the tenant in tail it will descend on his death to his heir in tail male,—that is to say, his eldest son or the issue male of such eldest son, such son or issue taking by descent, and not as a beneficiary named by General Studd. (5) That an estate in tail male or in tail can be made available by creditors for payment of the debts of the tenant in tail, whether in expectancy or in possession, to the same extent as he himself could dispose of it for his own benefit."

The Lord Ordinary, on 9th July 1880, pronounced this interlocutor:—"Finds (1) that according to the sound construction of the last will of the deceased Major-General Edward Mortlock Studd of Oxton, in the county of Devon, dated 21st April 1877, and codicil thereto, dated 14th November 1877, the lands of Banchor, in Inverness-shire, belonging to the testator at the time of his death, were destined by him to his eldest son, Edward Fairfax Studd, and to the heirs-male of his body in fee; whom failing, to the testator's trustees during the life of the testator's younger son, Alnod Ernest Studd, and after his death to the heirs-male of the body of the said Alnod Ernest Studd; whom failing, to the heirs-female of the body of the said Edward Fairfax Studd; whom failing, to the heirs-female of the body of the said Alnod Ernest Studd; whom failing,

No. 57. to certain other persons named: Finds (2) that the said bequest imports a right of fee in said lands in the person of the said Edward Fairfax Studd: Therefore decerns and declares in terms of the first conclusion of the summons: Dismisses the other conclusions of the action, and decerns," &c.*

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* "NOTE.—The difficulty in the present case arises from the not uncommon practice of a person ignorant of the rules regulating the conveyance of real property in one country attempting to settle such property by means of an instrument prepared according to the rules of another country in which the rules of conveyancing are entirely different.

"The late General Studd was proprietor of estates in various counties in England, and also of the estate of Banchor in Inverness-shire, in Scotland, the succession to all of which he regulated, or attempted to regulate, by his last will and testament, which is in the English form, and is dated 21st April 1877, and codicil thereto, dated 14th November 1877. Although by that will he appointed trustees, he did not devise these estates to the trustees, but he devised them directly to his eldest son, Edward Fairfax Studd, and other parties, in the following terms, viz."—(quotes clause, recited *supra*).

"Now, the first question that is raised in the record is whether the estate of Banchor is truly and within the sense of this settlement a 'freehold of inheritance.' This is a technical English term; but the parties have concurred in stating, in the joint minute, No. 13 of process, that its meaning by the law of England is 'an estate or right in lands, which (as is the case with all lands in England) are held in fee of the Crown, or of a subject-superior (to the exclusion of copyholds and leaseholds), and such that the estate or right is not merely for life, or a term of years, but on the death of the holder, without having exercised such power of disposition as the law allows him, will descend to his heir general or the heir of his body, according as the estate is a fee-simple or an estate tail.' The estate of Banchor, with the teinds thereof, was acquired and held by General Studd in fee-simple, and by the ordinary feudal tenure of land in Scotland, and I have therefore no hesitation in holding that it passed under the devise as a 'freehold of inheritance.' And if I had had any doubt upon the point, it would have been removed by the fact, that the trustees of the will have the fullest powers of determining what property should pass under any specific devise or bequest in the settlement, and have in the record expressly declared that they hold the estate of Banchor to have been effectually carried by the devise now under consideration. But a much more important and difficult question is whether the estate passed under this devise to Edward Fairfax Studd as his absolute property, or is devised to him merely as tenant for life, and after his death to the other persons specified in the will, as under a settlement of strict entail. And he has brought the present action for the purpose of having it judicially declared that the subjects in question are vested in him in fee absolutely and without any restriction or limitation whatsoever. The parties who are called as defenders are the trustees of the will, and his own pupil children, to whom a curator *ad litem* has been appointed.

"These defenders stated in the record a plea to the effect that the devise is truly a devise to the trustees, and that they are bound, under the provisions of the will, to make up a title in their own names to the estate of Banchor, and thereafter to execute a deed of strict entail thereof, settling it on the series of heirs described in the will. But the defenders now admit in the joint minute (No. 13 of process), that the estate passed under the devise to Edward Fairfax Studd and the other heirs, without the intervention of the trustees. The other plea stated by them, and which is now to be disposed of, is to the effect that whatever may be the nature of the ulterior destination the right of Edward Fairfax Studd is strictly limited to a right of life. In support of this plea it is urged that the will must be construed according to the law of England, and that the same effect must be given to the devise of the Scotch estate of Banchor as would be given by the Courts of England to the devise of the estates

Against this interlocutor Charles Cook, W.S., the curator *ad litem* to No. 57. the pursuer's children, reclaimed.

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in that country. Now, there seems to be no doubt, and indeed the parties are agreed, that by the will the English estates are virtually settled in the terms of a strict entail, that is to say, that they pass in the first instance to Edward Fairfax Studd as tenant for life, or, as we should term it, for his liferent use alienably, but with more extensive powers of administration than are usually enjoyed by a liferenter in this country; and after his death to the heirs-male of his body in succession, whom failing to the parties specified in their order, all under the rules of strict entail according to the law of England.

"Now, I need hardly say that an entail of lands in Scotland cannot be constituted, according to the law of this country, except in strict compliance with the statutory rules which regulate entails. It is true that, where an estate is conveyed to trustees, with directions to them to entail it upon a certain series of heirs, the trustees would be bound to obey these directions, and to impose upon the beneficiaries under the trust the fetters of a strict entail, although the settlement containing these directions does not, in the general case, specify the restrictions, and is not itself prepared in the form of a deed of entail. But where, without the intervention of a trust, the estate is directly conveyed either *inter vivos* or *mortis causa* to a series of heirs, it will, although effectual as a conveyance of land, be wholly ineffectual as an entail, unless the prohibitory, irritant, and resolute clauses required by the entail statutes are expressed at length in the deed, or unless under the provisions of recent legislation the conveyance contains a clause expressly authorising registration of the entail in the Register of Taillies. Now, there is nothing of that kind in the present case, and the will is wholly inoperative as an entail of the estate of Banchor; and whatever may be held to be the nature of the right to that estate conferred by the will upon Edward Fairfax Studd and his sons, and the other parties called to the succession, it is not a right which is limited by the fetters of a Scotch entail.

"But it is said that it is apparent upon the face of the will that, whatever effect may be given to other parts of the devise, the only right which Edward Fairfax Studd was intended by his father to take under this will was a right of liferent, 'without impeachment of waste,' the effect of the addition of these words being, according to the admission of parties, to confer upon him various extensive powers of administration. These are stated in the joint minute to be, *inter alia*, power to take possession of the estate, both natural and civil, to let leases for agricultural occupation for twenty-one years, to cut down timber in a husbandmanlike manner for his own benefit, and open mines, quarries, and the like, as well as work existing ones, and permit buildings, fences, and the like to dilapidate with impunity, but not wantonly to pull down houses, or fell ornamental timber, or commit other injury of a like nature.

"Now, assuming this to be the true construction of the devise according to the law of England, the question to be decided is whether this Court is bound to give effect to that construction, or is entitled to construe the terms of the will as if it had been a Scotch instrument settling the succession of the Scotch estate. I am of opinion that, as the subject is a landed estate in Scotland, it must be construed with reference to the rules of conveyancing in operation in Scotland. I think this doctrine is pretty clearly recognised in the cases of *Weir*, 1 S. 192, and of *Mitchell and Baxter*, 2 Ret. 208. And it humbly appears to me that if this devise is read with the aid of the explanation of its technical terms contained in the joint minute, it simply resolves itself into a conveyance or bequest of Banchor by General Studd to his eldest son, Edward Fairfax Studd, in liferent, and the heirs-male of his body in fee, and thereafter to a series of heirs, subject to the restrictions of an English entail, to which, as I have explained, effect cannot be given in this country. But, according to a long series of decisions from the case of *Newland*, such a destination to A and his children, born and to be born, but unnamed, even although followed by a destination to other parties, truly imports a fee in A, although the interposition of a trust might have the effect of restricting A to a bare liferent. Upon that

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Argued for the curator ;—(1) Though not itself an entail according to the law of Scotland, the testator's devise was equivalent to a direction to entail, and must receive effect. The trustees were bound to make up a title under the Conveyancing Acts, and then execute a strict entail in favour of the series of heirs contained in the devise. (2) If this was not the case, then the testator's intention must be ascertained, and must receive effect. By the 20th section * of the Titles to Land (Scotland)

point I think it only necessary to refer to the case of *Macintosh v. Gordon*, 4 Bell's App. 105, as contrasted with the case of *Rose v. King*, 9 D. 1327, and to the earlier case of *Seton*, Mor. 4219, as contrasted with *Robertson*, Mor. Fiar, Absolute and Limited, App. 2.

"But it is maintained that although such is the rule now universally applied in Scotland in interpreting destinations in these terms, it will not be extended to cases where it clearly appears from other considerations that the testator meant to limit the right of the father to a bare liferent, or at all events to something considerably less than a right of fee. Now, undoubtedly, it may be said that in the present case General Studd obviously intended and expected that the same effect would be given to his wishes regarding his Scotch estates as he knew would be given to them as regards his English estates, and as Edward Fairfax Studd was undoubtedly to be limited to a liferent in England as regards the English estates, he should not have any higher right in the Scotch estates. But I do not think that that is the sound view of the case. The parties have admitted that the will of General Studd contemplated a deed of strict entail of the whole of these estates, not only upon Edward Fairfax Studd as tenant for life, but also upon the heirs-male of his body, and the other parties specified. Yet it is quite certain that so far as the entail is concerned the will cannot receive effect in Scotland, and to that extent at all events the will of General Studd cannot receive effect. But if I were to hold that Edward Fairfax Studd is merely to take a right of liferent, then on his death the heirs of his body would, contrary to the will of General Studd, take the estate in fee-simple. Now, this would, I think, be making for General Studd a will entirely different from that which he clearly intended to make. How is it possible for this Court to say that if General Studd had contemplated such a result in the case of his grandsons he would still have limited his son to a bare liferent? It therefore appears to me that it would be a mistake to construe one part of this devise according to the English rules, and the remainder according to our own rules—and that, on the whole, the only safe and satisfactory course to follow in dealing with this devise of a landed estate in Scotland is to construe the whole according to the well-known rules of Scotch conveyancing, and to hold that it is truly a destination of the estate to the pursuer in liferent, and to the heirs of his body in fee, whereby he is entitled to the fee of the property. He will thus obtain decree in terms of the first conclusion of the summons; and as in consequence the other conclusions become unnecessary, these may be dismissed."

* 31 and 32 Vict. c. 101, sec. 20.—"From and after the commencement of this Act it shall be competent to any owners of lands to settle the succession to the same in the event of his death, not only by conveyance *de presenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies on the ground that the grantor has not used with reference to such lands the word 'dispone,' or other word or words importing a conveyance *de presenti*; and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the

Act, 1868, the testator's intention expressed in a testamentary or *mortis causa* deed or writing with respect to heritage was to receive effect just as a similar intention expressed with respect to moveables always had received effect. The testator's intention having been ascertained, it was incumbent on the trustees to carry it out, provided it was not inconsistent with the policy of Scotch law, and this they were enabled to do not only by the Act of 1868 itself, but also more expressly by the 46th section * of the Conveyancing Act, 1874. (3) Now, the intention of the testator was to place his Scotch estate in exactly the same position as his English estate. From the minute lodged by the parties it was apparent that the incidents of the English entail¹ which the testator had made were exactly similar in all substantial points to a Scotch liferent allanarly, the vesting of the fee being postponed during the liferenter's life, and a fiduciary fee being vested in the meantime in the person of the liferenter.² This being the case, what was to hinder the testator's intention receiving effect? Certainly not the difficulty of carrying it into execution. For the 46th section of the Act of 1874 provided machinery whereby the trustees might adapt the registrable conveyance, which it was incumbent on them to grant, exactly to the testator's intention as interpreted in the joint minute. They might even express in the conveyance to be granted all the conditions and limitations which it was there said that an English entail imported, and yet the deed of conveyance would contain nothing inconsistent with a Scotch liferent allanarly in the terms above-men-

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same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof by the grantor of such deed or writing in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create and shall create in favour of such grantee or legatee an obligation upon the successors of the grantor of such deed or writing to make up titles in their own persons to such lands, and to convey the same to such grantee or legatee; and it shall be competent to such grantee or legatee to complete his title to such lands in the same manner and to the same effect as if such deed or writing had been such a general disposition of such lands in favour of such grantee or legatee, and that either by notarial instrument or in any other manner competent to a general disponee."

* 37 and 38 Vict. c. 94, sec. 46.—"Where in any *mortis causa* conveyance, grant, or testamentary deed or writing purporting to convey or bequeath lands within the sense and meaning of the 20th section of the Titles to Land Consolidation (Scotland) Act, 1868, and appointing trustees or executors, the words of conveyance, grant, or bequest are not expressed to be in favour of such trustees or executors, it shall nevertheless be lawful for such trustees or executors to complete a title to such lands in their own persons to the same effect and in the same manner as if the conveyance, grant, or bequest had been expressed to be in favour of them as such trustees or executors, and that by notarial instrument or in any other manner competent to a general disponee; and to hold, administer, and dispose of such lands for the purposes of such *mortis causa* conveyance, grant, or testamentary deed or writing: Provided always that nothing herein contained shall prevent any disponee, grantee, or legatee to whom such lands may be expressly conveyed, granted, or bequeathed by such *mortis causa* conveyance, grant, or testamentary deed or writing, from completing a title thereto in his own person in terms of said recited Act, when the completion of such title shall not be at variance with the purposes or directions of such *mortis causa* conveyance, grant, or testamentary deed or writing."

¹ Montgomerie v. Eglinton, Aug. 18, 1843, 2 Bell's App. 185.

² Seton, 1793, M. 4219; Ross v. King, June 22, 1847, 9 D. 1327, 19 Scot. Jur. 561.

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tioned. The reclaimers were therefore entitled to be assoilized from the conclusions of the action, and it should be left to the trustees to grant a conveyance, or to the pursuer, if he chose, without the intervention of the trustees, to make up a title in conformity with the testator's intention.

Argued for the respondent;—(1) There were no directions to entail, and, moreover, it was admitted that the devise, according to English law, was effectual without the intervention of the trustees; an entail in the sense understood in Scotland was therefore out of the question. (2) The devise did not import a liferent allenary and a fee with substitutions. Prior to 1868 this question could not have arisen. By the 20th section of the Act of that year any deed or writing duly executed containing with reference to lands words which would, if used in a will or testament with reference to moveables, be sufficient to confer on the grantee of such moveables a right to receive the same, shall be "taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof by the granter of such deed or writing in favour of the grantee thereof." The devise contained in General Studd's will was therefore equivalent to a general disposition in favour of the respondent and the series of heirs named after him, whatever the meaning and effect of the destination might be. It was a misreading of the statute to suppose that anything else than the testamentary deed or writing was requisite to make a registrable title. That deed was made the equivalent of a general disposition, and upon it a title might be made up as upon a general disposition by notarial instrument in the ordinary way. The testator's will was therefore itself the conveyance, and it was not the case that the trustees or any one else were to find out what the intention of the testator was, and grant a registrable conveyance or make up a registrable title other than the will itself, for the purpose of carrying that intention into effect as nearly as the law and practice of Scotland would admit. Farther, the 46th section of the Act of 1874 had no application. The intervention of the trustees was not necessary, and would be contrary to the conception of the testator's deed, for admittedly the devise was one directly in favour of the respondent without the intervention of the trustees. (3) The devise then being equivalent to a general disposition, the real question was, could the destination contained in it receive any effect in Scotland? The Lord Ordinary had held that it was to receive effect so far as it was a destination known to Scotch law, but that conditions and restrictions, powers and relaxations proper to the law of entail in England, appended to it directly or by implication, could receive no effect, and therefore that the destination was nothing more than a liferent to a father and a fee to his eldest son *nasciturus*, which, as occurring in a conveyance of Scotch heritage, imported a fee to the father. Either this construction must be given to the terms of the destination, or it must be held void from uncertainty, in the sense of inapplicability to the system of the Scotch land laws. The intention of the testator was to make an entail of his Scotch estate, which should have all the effect of the entail which he had made of his English estate. It was maintained on the other side that though this was not possible a liferent allenary and a fee postponed till the death of the liferenter was substantially the equivalent in Scotland for an English entail. But a comparison of the incidents of an English entail and a Scotch liferent allenary at once disclosed how untenable this proposition was. The incidents of an English entail all arose by virtue of statute. The constitution of the entail itself depended on statute, and the limitations as well as the relaxations all depended on statutes, and on a very complicated series of statutes indeed of a similar

nature to the entail statutes in Scotland. The incidents of a Scotch No. 57.
liferent allanarly all depended, on the other hand, on the common law of Scotland. To say that the position of an English tenant for life, whose Dec. 10, 1880.
every act depended for its validity on English statutes, was the same as Studd v.
that of a Scotch liferenter allanarly was preposterous. Moreover, all that Studd, &c.
was attempted to be said was that a liferent allanarly was the nearest substitute which could be found in Scotland for an English entail. The identity of the two destinations was not maintained. To sustain the reclaimers' contention would therefore be not to carry out the testator's intention, but only to go as near it as the land laws of Scotland would admit. The testator's intention was clearly to make an English entail of a Scotch estate. That being admittedly impossible, the reclaimers were for doing something quite different, of which the testator had never dreamt. The best illustration that could be given was to suppose matters reversed, and that a Scotchman had included an English estate in a conveyance in liferent allanarly of Scotch property, or in a Scotch strict entail—would the Courts in England entertain for one moment the proposition that they were to inquire what the incidents of these estates were, and substitute for them the nearest equivalent known to the law of real property in England? Either therefore the Lord Ordinary's judgment was right and ought to be affirmed, or the destination could receive no effect, as inapplicable to the law of heritable property in Scotland.¹ (4) If so, then the estate fell into residue or intestacy, in either of which cases the respondent was entitled to decree under the alternative conclusions of his summons.

At advising,—

LORD GIFFORD.—This is an interesting case, involving the consideration of principles which have a very wide and general application. In particular, it involves the question how far the law of Scotland, dealing with heritable estates in Scotland, will give effect to an English will devising or disposing of Scotch heritage, and settling it as an English estate tail might be settled so as to carry out in Scotland as nearly as possible, and by means of appropriate Scotch deeds, whatever can be shewn from the will to have been the real intention of the testator in reference to his heritable estate in Scotland, such intention not being contrary to the law of Scotland, or such as the law of Scotland will refuse to recognise or enforce.

In the present case the Lord Ordinary has so far given effect to the late General Studd's English will as to hold that it effectually conveyed his Scotch estates of Banchor and others in Inverness-shire to his eldest son, Edward Fairfax Studd, the present pursuer, but he has refused to give effect to the English will in so far as it imposed or might be held to impose limitations or conditions upon that conveyance, and although such limitations or conditions would have been quite effectual if the estate of Banchor had been situated in England. Accordingly the Lord Ordinary has pronounced decree of declarator finding that the pursuer, Edward Fairfax Studd, is under his father's will absolute and fee-simple proprietor of the said estates of Banchor and others, and that "without any restriction or limitation whatsoever;" that consequently he may dispose of these estates at pleasure, either onerously or gratuitously, and may disappoint all hopes of succession thereto which either his own children or his brother

¹ Yeats v. Thomson, June 5, 1835, Lord Brougham's opinion, 1 S. and M. 837; Weir v. Laing, Dec. 6, 1821, 1 S. 191.

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Alnod Ernest Studd, or his issue, or the other persons named in General Studd's will, might have had to the said Scotch estates. The Lord Ordinary has reached this conclusion, although he assumes that it is contrary to the intention of the late General Studd as expressed in his last will and testament, and this on the ground that the rules affecting the conveyance of Scotch heritage do not admit of effect being given to the limitations and conditions which General Studd intended should be applicable to his Scotch as well as his English estates.

The result of the Lord Ordinary's judgment is that while the pursuer, Edward Fairfax Studd, must take the heritable estates in England devised to him by his father's will under all the conditions, restrictions, and limitations provided by the will, yet he takes the estate of Banchor and others in Inverness-shire, Scotland, free from those conditions, restrictions, and limitations, although he takes the estate in Scotland as well as in England under the same will and under the same words of the same will, and although his father, the testator, intended that the same conditions, restrictions, and limitations should apply to the estates in Scotland as to the estates in England. Thus the pursuer would take the estates in Scotland under his father's will, and yet might defeat his father's intention in relation to these estates, while he must give effect to the father's intention in relation to the English estates. The father's will will receive effect as to the lands in England devised to the pursuer, while as to the lands in Scotland the devise will be effectual, but the conditions upon which it is made will be disregarded and will receive no effect.

Now, I do not say that a result like this may not sometimes be inevitable, for conditions or restrictions which are lawful in one country may sometimes be unlawful in another, or they may not have been effectually imposed according to law, or there may be no machinery applicable or appropriate in Scotland for enforcing conditions which may be easily rendered effectual in England. There may possibly be such cases, but I think I may say that a result like this is always to be regretted, and should only be admitted if it can be shewn to be inevitable. A Court of equity (and in the interpretation and carrying out of wills and of *mortis causa* settlements, equity and the effectuation of the true intention of the testator is always a paramount consideration) will always be unwilling to refuse effect to what is plainly a testator's intention, reasonable and legal in itself, and it will be especially averse (the testator's words being the same) to give one effect to these words in Scotland and a different effect to the same words in England, according as the estates devised are situated in the one country or in the other.

Now, I am of opinion that in the present case the result reached by the Lord Ordinary is not inevitable. I think that the will of the late General Studd, according to its true import and meaning, can be given effect to in Scotland, and in reference to the Scotch heritable estate, in the same way as it will receive effect in England in regard to the English heritable estates—that in both countries the legal will of the testator can be made effectual in nearly the same degree, and with substantially the same result, although it may be that appropriate deeds or procedure may be required according to the conveyancing rules of the two countries, so that the pursuer Edward Fairfax Studd shall hold and shall be required to hold the estate of Banchor and others in Inverness-shire on substantially the same terms, and in substance under the same limitations and conditions as he holds the English estates in Devonshire, in Staffordshire, and elsewhere, consisting of “freehold of inheritance,” all which estates, both

in Scotland and in England, are devised to him in the same words, and by the same breath, and with the same intention under his father's will. No. 57.

I have therefore come to be of opinion, and latterly without very much difficulty, that the Lord Ordinary's judgment should be recalled so far as it gives the pursuer an absolute and unlimited fee in the lands of Banchor and others, "without any restriction or limitation whatsoever," and that instead thereof it should be declared that the pursuer has only right to the said estate for his own life and use only, and after his death the same to descend to the other parties called in General Studd's will, and in the manner therein mentioned. There may be, and there is some nicety in expressing in the language of Scottish conveyancing the precise legal effect which is attained in England by the words of General Studd's will, but I have no doubt it can be done so as to place the Scotch estates in substantially the same position as the English ones. This will carry out the true intention of the testator, and as there is no illegality in that intention—nothing contrary either to law or to statute, and nothing unreasonable or even unusual—I think this is what must be done.

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The steps by which I reach the conclusion now indicated may be stated in a very few words.

Prior to the passing of "The Titles to Land Consolidation Act, 1868," the last will of General Studd, now before us, would not have carried heritable estate in Scotland, and General Studd would have been held, so far as his Scottish real estates were concerned, to have died intestate. The Act of 1868, however, in accordance with the clearest principles of equity and expediency, altered this, and provided (section 20) that no *de presenti* words, or words of conveyancing style, shall be necessary in *mortis causa* deeds of settlement, and that every testamentary writing purporting to convey or bequeath lands in Scotland shall be effectual, provided that it is executed and expressed in a manner sufficient to convey or bequeath moveables. I am expressing the clause shortly, instead of quoting its somewhat anxious provisions. I think in reference to wills it puts heritage on precisely the same footing as moveables, it being always shewn that this was the intention of the testator. Now, in virtue of this enactment, and without the aid of the broader and more comprehensive provisions of "The Conveyancing Scotland Act, 1874," I am of opinion that the last will of General Studd is amply sufficient validly to settle the testator's estate of Banchor in Inverness-shire, Scotland, quite as effectually as it validly settles his other estates in England, which are devised to his eldest son and the heirs and others substituted to him in manner therein mentioned. I think this is the very meaning of the enactment of 1868. It expressly provides that "it shall be competent to any owner of lands" (that is of land and real estate in Scotland) "to settle the succession to the same in the event of his death, not only by conveyances *de presenti* according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings," and then it proceeds to describe what wills shall be sufficient to carry heritage, the substance being, as I have already said, that provided only intention be clear, a deed that would settle moveables in Scotland may settle heritage also. I hold it clear, therefore, that General Studd's will effectually settles his heritable estate in Scotland.

The next question is, how, and in what manner, to what effect, and with what legal consequences, does General Studd's will settle his Scotch estates? Now, here I think the only difficulty is that General Studd in his will has used only English technical terms, having, as I understand it to be admitted, a precise and

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definite technical meaning and effect in England, but which words are not technically used and have not a known and definite technical meaning in Scotland, and as applicable to Scottish real estate. There seems to be no doubt whatever that General Studd in his will used these technical and legal words in their strict and technical legal sense according to the law of England, and read in that country as such they have a perfectly definite and legal meaning and effect. So read, and read with the effect which the law of England would give to them, they convey with definiteness, and with accuracy, General Studd's true intention and meaning, and it appears to me that if this be so, all that the law of Scotland has to do in reference to the Inverness-shire estate is to carry that meaning and intention into effect so far as it can possibly be done, unless it can be shewn to be contrary to law or statute, or opposed to the policy of the law of Scotland.

In other words, all that the Courts of Scotland need in order to enable them to carry out General Studd's will, in reference to his Inverness-shire estates, is a translation of the technical words of the will, so that the Court may be informed of their true meaning and effect. When this is obtained the Court will then consider, first, whether there is anything illegal in the will so translated, and second, if not, how it is to be expressed in Scotch conveyancing language so as to complete the title to the lands and enter the records of real rights.

We might have obtained a translation of the technical words of General Studd's will from English counsel or from English Courts under statutory provisions made for that purpose, but in the present case the parties themselves, by the joint minute No. 13 of process, have given us the translation required. They have agreed as to what the technical meaning, according to the law of England, is of the technical words used in the will, and also as to the legal effect which such words have according to the law of England, and I am of opinion that this joint minute is enough to enable us to effectuate the will in Scotland according to its true intent and meaning. For according to the law of Scotland there is nothing illegal or incompetent in the wishes and intentions of General Studd so reached and so explained. He merely wished to settle his estates in Scotland according to the same tailzied settlement and destination which he applied to his estates in England. The joint minute makes it clear what sort of settlement he has effectually made of his English estate. There is nothing illegal in making a similar settlement in Scotland if only it can be done by appropriate words. I think the appropriate words may be found by the exercise of reasonable care and discrimination, and possibly by the use of certain declarations and conditions which may be expressed with greater or with less detail, but when so expressed I think it is impossible to say that they will be illegal or incompetent, or in any degree contrary to the spirit and policy of the law of Scotland. It is impossible to say that a proprietor of lands in Scotland cannot legally settle his estate in the same way and with substantially the same effect as he might settle an estate tail in England. In truth there is not very great difference in substance and in effect between the law of England and the law of Scotland in regard to the powers of entailing lands. The difference is very wide as to the modes in which entails must be made, and how and according to what forms lands are to be entailed or disentailed, but when we consider not form, but substance, the differences are by no means great, and I should be very sorry indeed to be compelled to hold that a proprietor who

wished his Scotch estate to descend under the same tailzied destination with his English one, and distinctly expressed his wishes in his will made in England, could not possibly accomplish his purpose.

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In the present case I read the last will of General Studd simply as his last will, that is, simply as the last expression of his wishes and desires in reference to his estates both in England and in Scotland. I am of opinion that such expression of desire or of will is effectual to settle his Scotch heritage, and I think that there is nothing to prevent this expression of will or of desire from receiving effect. I think that we can give the will effect, and that we should do so. I should regard it as a misfortune if we found ourselves compelled to defeat and disappoint the will instead of carrying it out.

The present declarator raises sharply in its first conclusion the main question in which the pursuer is chiefly interested, namely, whether under his father's will the pursuer is absolute fiar of the Scotch estate of Banchor, that is, out and out proprietor, without any restriction or limitation whatsoever, and whether as such he may dispose of it at pleasure, either onerously or gratuitously by himself alone, and without the consent of any other party whatever. The other conclusions are alternative, and I think do not apply. Now, I decline to give the pursuer decree in terms of his first conclusion, because I think that that is and would be directly contrary to the father's will, under which alone the pursuer can claim the lands. I think the defenders are entitled to absolvitor from this conclusion, and from the other conclusions of the action.

As to the terms of the formal title to the estate of Banchor, the Court is not required to adjust these terms. That is a matter for the private conveyancer who may be consulted or employed by the parties.

LORD YOUNG.—It is clear and undisputed that the testament in question contains a declaration of the testator's will with respect to the disposal of his lands of Banchor in Scotland. It was, indeed, suggested that the word "devise" is, according to English law, a word of conveyance. I believe that it is a testamentary word which is used only in wills to declare testamentary intention, and although by construction of law it vests on the testator's death an actual freehold in the devisee, yet this is not from any technical virtue in the word devise, but from respect to the will, the same result following from any words expressive of the testator's will and intention. Indeed, the testator's will when only collected by necessary or highly probable implication, is given effect to in like manner. If the point were material we should require further information as to the law of England. But I think it is clearly immaterial, for, whatever the law of England, a devise in an English will cannot, with respect to land in Scotland, operate as a conveyance, or otherwise than as a declaration of testamentary intention. Prior to the Conveyancing Act of 1868, a declaration of testamentary intention was, as to Scotch heritage, altogether inoperative, the common law requiring absolutely a *de presenti* conveyance even in a *mortis causa* deed intended to take effect on the maker's death. The rule of the common law was altered by the statute, and the law now is that a will has effect upon land as fully and completely as upon moveables. This is the meaning and effect, in my opinion, of section 20 of the statute, the language of which I think it unnecessary to consume time by commenting on. It would have been against the general scheme and policy of our system of titles and registers to take the will as a deed of conveyance, and accordingly a method is provided of making a

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I do not dwell on this topic, for the parties were agreed, and the Lord Ordinary has decided, that the will must have effect upon the lands in Scotland "according to the sound construction" of it. The pursuer's leading plea is to this effect, and the Lord Ordinary has "no hesitation in holding that it (the Scotch land) passed under the 'devise.'" The only question, then, is what is the meaning of the will, and the Lord Ordinary has decided that "according to the sound construction of the will" the Scotch lands were destined to the testator's eldest son, and the heirs-male of his body, in fee. But the parties are agreed that this is not the meaning of the language of the instrument according to the law and practice of England, where it was made, and that the law of England imputes a quite different meaning to any testator using that language in an English testament, which this is. Now, it is, at first sight at least, a paradoxical proposition that Scotch heritage shall pass under the devise of an English testament, only quite otherwise than the testator confessedly intended, or, in other words, that the will shall have effect, but not according to the admitted meaning of its language and intention of the testator. The language here is indeed such that we require to be furnished with an authoritative translation. But such translation has been furnished, and I cannot say that I have any difficulty in understanding it. If I had, I should require farther assistance, assuming, as I should, that any given devise or declaration of will in an English testament respecting Scotch heritage admits of being made intelligible to us, so that we shall know what the testator meant to be done with it. The language here is apparently technical, and, at all events, is admitted to be quite familiar to English conveyancers and lawyers, and the meaning is stated to us without a suggestion that there is any doubt about it. There is, indeed, in the minute of the parties a variety of superfluous (as I think) information, with which we have no occasion to concern ourselves, at least in this action. The material thing is that the language according to its admitted meaning declares it to be the testator's desire that his eldest son (the pursuer) shall have the lands for life, and that his (the son's) male issue, or the heirs-male of his body, shall have the fee. According to my view of the case, and having regard to the conclusions of the summons, this is enough to entitle the defenders to absolvitor, provided the will is to have effect according to the admitted meaning of it.

But the Lord Ordinary has declared that "the sound construction" of the will differs from the admitted meaning of its language, and gives the fee of the lands to the pursuer with only a spes successionis to his heirs-male. His Lordship arrives at this conclusion by applying to this English testament, made in England by an Englishman, a very special and peculiar Scotch rule of construction applicable to Scotch deeds of conveyance. That rule is that a conveyance to a parent in liferent and his unborn issue in fee confers a fee on the parent, unless a contrary intention appears. The rule has been condemned as unreasonable by Lord Corehouse and other eminent Judges, and it owes its continuance only to the consideration that it has been so long fixed and known that Scotch testators, and certainly Scotch conveyancers, may and ought to be presumed to use the language to which it applies in the sense or with the meaning which the rule attaches to it. In accordance with this view, the word "alienably" or "only," or anything whatever in the deed satisfactorily shewing

that a liferent and no more was intended, excludes the rule. This has not been doubted for a long while. To apply this rule of construction to an English testament, and so defeat the testator's intention according to the sense and meaning of his words as admitted by the parties, or expounded to us by those versed in the language used, is to misapply it, I think, grievously. An English testator must, on clear and familiar principle, be held to have used the words of his English will, prepared by an English conveyancer, in the sense and meaning which the law of England attaches to them, and this in the present case is distinctly negative of an intention to give the fee to the pursuer, to whom he devised the estate for life. I have already pointed out that even in a Scotch conveyance any satisfactory indication of intention to give a liferent only is conclusive, and excludes the rule on which the Lord Ordinary has here acted.

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The Lord Ordinary observes "that an entail of lands in Scotland cannot be constituted according to the law of this country, except with strict compliance with the statutory rules which regulate entails." But a liferent and fee with a destination to heirs-male of the fiar's body, and as long a destination beyond as you please to think of, although it is indeed an entail, is not a statutory entail, or anything but a simple destination standing on the common law. It is not suggested that this will is a statutory entail of the Scotch lands, or that the testator has expressed any desire that such an entail should be made, although if he had I really see no reason why his will should not have effect, the statutory rules of course being complied with in the conveyances made in pursuance of it. But that is not the question. The question is whether a testament which distinctly expresses the testator's will and desire that his Scotch lands shall go to his eldest son in liferent, and to the heirs-male of his body in fee, is to have effect or not, and the Scotch Entail Acts have, as I think, no bearing on this question. "Tail male" is not the language of Scotch conveyancing, but as interpreted to us by agreement it is precisely, or almost precisely, equivalent to what we call a fee with a simple destination to heirs-male of the fiar's body. A tail male in immediate succession to an estate for life vests in possession, we are told, on the termination of the life estate, when the fiar taking, if of lawful age, or as soon as he attains it, may dispose of the estate as he pleases. The only peculiarity, as distinguished from our law in the corresponding case, seems to be that the fiar cannot alienate or burden during the continuance of the life estate. Whether in giving effect to the will the fiar ought to be disabled from affecting the estate during the subsistence of the liferent by postponing to that time the vesting of the fee in the fiar, and leaving it to stand in the liferenter as a fiduciary or otherwise, we are not called on to decide. It may be that the testament will be sufficiently and satisfactorily fulfilled by constituting the estates of liferent and fee as therein desired, leaving the law of Scotland to determine the quality and incidents of these estates respectively in Scotch land without reference to the rules of the law of England applicable to similar estates in English land. On this question, which may never arise, I give no opinion now.

In this action we can only give or refuse, in whole or in part, one or other of three declarators alternatively concluded for, and are not required to settle, and I should think could not competently settle, the terms of the conveyances by which the testament is to be carried into execution with respect to the Scotch estate. The proper judgment, in my opinion, is to repel the pursuer's pleas, sustain the second and third pleas for the defenders, and assoilzie them from the action.

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In my opinion the fundamental error in the Lord Ordinary's judgment consists in this, that he has regarded the instrument in question not as an English will, which it is, but as a Scotch conveyance, which it is not. The notion seems to have been that the Act of 1868 substituted "devise" for "dispone," and with that change left the instrument to be construed and stand or fall as a deed of conveyance of Scotch heritage. In that view, which, I have already said, I think is erroneous, I must own that I do not see how the instrument could stand at all. It would certainly be a unique title in the Register of Sasines. Taken as an English will, we have only to find the meaning of it in the usual and familiar way, and give it effect accordingly with respect to both real and personal estate within our jurisdiction, requiring, as the Act of 1868 enjoins, that in so doing with respect to land our conveyancing forms shall be observed and a registrable title made. Another error which I have, I think, sufficiently pointed out, consists in the idea that there is here any question about a strict entail, i.e., an entail with fetters. It is generally known even in Scotland that an English estate "tail" is just a fee with a simple destination to heirs of the body, and that an estate in "tail male" is just a fee with a simple destination to heirs-male of the body, although, if there had been any question about it, we should, according to our practice, have required it to be cleared by a reference to English lawyers. Such an estate in "tail" or "tail male" to take effect on the termination of a life estate created by the same instrument is the familiar strict settlement of English conveyancing. The destination may be made as extensive as the settler pleases, but however extensive it is a simple destination in the sense familiar to us, viz., that any fiar taking may alter or terminate the destination, and deal with the property at his pleasure. I cannot accept the suggestion that we have no sufficiently exact equivalent in Scotland to enable us to give effect to an English will, using the English terms when these are interpreted to us, for a liferent and fee with a simple destination to heirs-male of the body is exactly equivalent except in the single particular I have already mentioned, viz., that with us a fiar may dispose of his fee while the liferent subsists, which it appears is not the case in an English settlement. I see no difficulty in making the assimilation altogether exact if necessary by postponing the vesting of the beneficial fee till the termination of the liferent, and meanwhile giving a fiduciary fee to the liferenter. But no question arises now or may ever arise, and meanwhile the property is quite safe, inasmuch as the pursuer having by our judgment a liferent only, cannot affect the fee or prejudice the party who may eventually be entitled to it.

LORD JUSTICE-CLERK.—The Lord Ordinary has decided this case in favour of the pursuer, and your Lordships are both agreed that that judgment should be recalled, and the action dismissed. I find myself in the position of agreeing in the result, though not in the grounds, of the Lord Ordinary's judgment. If the case had only rested upon its specialties I should not have thought it necessary to allude to the result of the Court's deliberations. It is always unfortunate to differ, but the present condition of the Court, which is not its statutory condition, renders a difference more unfortunate. The Lord Ordinary has decided one way, and two Judges in the Inner-House out of three have decided another way. That is not a satisfactory result, and I would very gladly have avoided it if I could. But this case gives rise to some very important questions, and will necessarily be a precedent, and, when cases like the present arise, will be

similarly applied. Therefore I think it only right, all the more that the Act of 1868 is now to receive a construction with which I do not agree, to state shortly the grounds on which I differ from your Lordships.

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The instrument, the effect of which we are to determine in this case, professes to devise or convey certain real estates in Inverness-shire to persons therein designed, to be held under the restrictions and qualifications expressed in the settlement. We are told that this devise, and the conditions annexed to it, constitute a settlement in tail male according to the law of England, and that if it had related to real estate in that country the rights thereby conferred would have been those described in a statement on which the parties have agreed. The question raised in this case is whether the law of Scotland will recognise and give effect to a conveyance of landed estate in Scotland to which these conditions are attached.

I need not stop to establish, for the proposition is too elementary to be disputed, that this is a question which can only be determined by the law of Scotland. The domicile of the granter of the conveyance is in this question of no moment. The conveyance, wherever executed, and whatever the domicile of the granter, must be effectual according to our own law, or it is not effectual at all. If the granter had been domiciled in Scotland the question would have been precisely the same.

Before the statute of 1868 the conveyance would have been wholly ineffectual for want of sufficient words of disposition. But no question of that kind is involved in the present case. If the substance of the right conveyed be according to our own law, the words used in the settlement are by that law quite sufficient to operate a valid conveyance. "Devise," as a term applicable to personal estate, is, under the 20th section of the Act of 1868, an effectual term of disposition in a testamentary settlement. But the provisions of the statutes, as I shall shew immediately, reach no farther, and cannot possibly authorise land in Scotland to be held under a tenure which the law of Scotland does not recognise.

It has been said that we are bound to discover the intention of the granter, and, having done so, to give effect to it, whether that can or can not be done by the actual devise. It is of more importance to ascertain what the granter has done. There is no doubt about his intention. He meant his lands in Inverness-shire to be held under an English settlement in tail male, and had no other intention; and that which he intended he has embodied not in informal instructions but in a formal instrument. The question is, whether this deed can receive effect. There is no other question.

The following are the provisions of this instrument—(reads clause of will recited *supra*, p. 250).

The parties to this action have agreed on a glossary or interpretation of these terms, the material clauses of which are the following—(reads clauses recited *supra*, p. 252).

It will, however, be kept in mind that the results of the legal relations thus constituted, which are here enumerated, are but a fraction of the numberless legal incidents of the estates of tenant for life, tenant in tail, and remainder man by the law of England. If I mistake not, this is one of the most technical chapters in the English law of real property. In the course of succession contemplated under this will, are the rights of the tenant for life, the tenant in tail, and the remainder men to continue to be regulated by the law of England,

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or are the persons called intended to be Scottish proprietors holding their estate under the law of Scotland? Is the entail—if entail it is to be considered—to be terminated according to English rules or according to Scotch? Are questions regarding the rights to cut timber, or impeachment of waste, to be settled by our law or that of England? I only point out these things which lie on the surface, to shew on how wide a sea of difficulties it is proposed to embark. To my mind it is entirely impossible to carry out the only intention which the testator has expressed.

Excepting in their relation to general jurisprudence we know nothing of the rules of the law of England beyond what the parties have agreed to tell us. But we see enough from the statement of parties to make it certain that a devise to a tenant for life, and after his death to the use of another in tail male with remainders over, is not equivalent to, but is entirely discrepant from, a Scotch disposition to A in liferent, and to B in fee. The difference is vital. A disposition to A in liferent and B in fee makes B the immediate proprietor, under burden of the liferent; and unless he is limited by the fetters of a strict entail he may sell, or charge the lands as he will, or his creditors may attach them for his debts, although only under burden of the liferent. The law will recognise no restrictions which are not in conformity with the entail statutes of 1685, and the right of fee cannot be held in abeyance. But a devise of real estate in England to A as tenant for life and then to B as tenant in tail male, is, as we know, a gift, in which the interest of the tenant in tail commences only when that of the tenant for life terminates, and in which the validity of the grant for life is essential to support the grant in remainder. There is no fee in existence, in the sense in which we use that term, other than the right for life, while the tenant for life lives; although the interest in expectancy vests, and must vest, from the date of the grant. These distinctions affect the whole nature of the gift—its immediate enjoyment, and its ultimate effect. In my opinion it is hopeless, and idle, to attempt to weld into one two incompatible and inconsistent rights.

I conclude therefore that as under this settlement no present right of fee is vested in any one during the life of the tenant for life, the right of fee remains undisposed of by the law of Scotland, and the heir-at-law may complete a title to it. I come to the same result as regards the life interest. As the right conferred is, as every liferent is in England, not a burden on a present fee, but a right on which the remainder depends, a doctrine unknown to the law of Scotland, I think the whole settlement must fail, and the pursuer, as heir-at-law, must prevail.

There is no injustice in this result. Scotch conveyancers are as accessible as English conveyancers, and we are not to make a crude and unscientific jumble of our land rights because people will not take the trouble to use reasonable precautions. The case is precisely analogous to one which the Courts in England would have to decide, if it were attempted to entail English real estate in the terms of the statute 1685, either by conveyance *de presenti*, or by *mortis causa* settlement. I cannot believe they would listen for a moment to such an attempt, for the English law of real estate will not permit a series of limited fees, and the Courts are not likely to alter their settled law because of a similar blunder by a Scotch conveyancer.

It seems to be thought that the 20th section of the Act of 1868 enables an English testator to attach to a bequest of real estate in Scotland conditions

which are ineffectual by the law of Scotland—and that it abrogates the *lex rei sitæ* in such a case. Whether this view extends to a Scotch testament I have been unable to gather from your Lordships' opinions. But I apprehend that the clause in question not only gives no sanction to this result, but is wholly inconsistent with it. The clause in question deals exclusively with the solemnities or formalities requisite in conveyances of lands, and with the mode of completing a feudal title under them. No. 57.
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Clause 19 of this statute provides a short method of making up a title under a general disposition of real estate. It provides that this may be done by recording a notarial instrument in the form of schedule L of the Act, and that schedule must contain any conditions or qualifications attached to the right by the general disposition. Clause 20 then provides that it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyances *de presenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings. It then provides that it shall not be necessary to use the technical word “dispone,” but that it shall be sufficient to use any words which, if used in a will or testament, would entitle the grantee to claim moveables; and that if such deeds are executed according to the law of Scotland regulating testaments they shall be equivalent to a general disposition of the lands within the meaning of the 19th section thereof. It then provides that the title may be made up either by a conveyance from the heir-at-law or by a notarial instrument as provided in section 19.

It is thus manifest that the title so made up must contain the conditions and qualifications contained in the general disposition, and no other. As to the effect to be given to these conditions and qualifications the statute of course is wholly silent. It dealt with no such matter. But it shews that the conditions and qualifications must enter the title precisely as they are contained in the general disposition, and if these are such as the law of Scotland will not recognise, there is not a word in this clause which can give them validity.

It is said that this 20th section places bequests of land on the same footing with bequests of moveables, and on this assumption the opposite argument is wholly built. But this is not what the clause does. It puts bequests of land in testaments which contain words which would be sufficient to convey moveables on the same footing with a general disposition of land *inter vivos*, and if this were a general disposition of land *inter vivos* it seems to be conceded that it could not be supported. If so, the foundation of the hypothesis is destroyed, because by the very words of the section this settlement is equivalent to a general disposition of land *inter vivos*.

I am therefore of opinion that there is here no valid disposition of this estate, because it is qualified by conditions repugnant to the law, and that the pursuer, as heir-at-law, is entitled to the property in fee-simple.

THIS interlocutor was pronounced:—“Recall the said interlocutor; repel the pleas in law for the respondent (pursuer); sustain the second and third pleas in law for the defenders, Edward Arthur Studd and Gladys Studd: Assoilzie the said defenders from the conclusions of the libel, and decern.”

No. 58.

Dec. 10, 1880.
Stewart v. Gibson's Trustee.

WILLIAM STEWART, Pursuer.—*Mackintosh—Wallace.*

ROBERT B. RITCHIE (Gibson's Trustee), Defender.—*Kinnear—McKie.*

Poinding of Ground in security for current interest—Poinding of the ground in security for interest current but not yet due is *competent*, but payment cannot be demanded till the stipulated term arrives.

A petition in a Sheriff Court craved warrant of poinding of the ground for payment of a principal sum of £2000 (which had been constituted a real burden over certain lands bearing interest, but the payment of principal being deferred till the occurrence of an event which had not yet taken place), and of the interest current but not due till the term of Whitsunday next following the date of the petition. The trustee in the debtor's sequestration appeared. Warrant was granted in terms of the prayer, "with this variation, that instead of making payment as craved, the officer who carries out the warrants shall consign the free proceeds with the Clerk of Court to abide the orders of Court." A sale followed, and the proceeds were consigned as ordered. When the first term for payment of interest arrived warrant was granted for payment out of the consigned fund. Like warrants were granted on two subsequent occasions when interest became due. *Held* that the poinding in security for the interest was competent, and that the irregularity in that part of the prayer of the petition which craved warrant of poinding for the principal sum had been cured by the mode of proceeding subsequently adopted by the Sheriff.

Superior and Vassal—Composition—Debitum fundi.—*Held* that a composition due to a superior on the death of a vassal, where the entry is taxed by the feu-contract, is a debitum fundi, and not merely a personal debt of the succeeding vassal.

1ST DIVISION.
Sheriff of
Forfarshire.
M.

By minute of agreement, dated 11th March 1876, between Henry Gibson, solicitor, Dundee, and William Stewart, nurseryman, Dundee and Broughty Ferry, the former agreed to purchase from the latter certain subjects at Broughty-Ferry,—“The price to be £2600, whereof £2000 shall be created a real burden on the property and allowed to remain so long as the said Henry Gibson, his heirs and assignees, shall desire, and at all events until his title shall be made unchallengeable—said sum of £2000 to bear interest at the rate of $4\frac{1}{2}$ per cent per annum, . . . and the remainder of said price, being £600, shall be paid at Whitsunday next (old style).”

On 26th May 1876 Stewart executed a disposition of the subjects in favour of Gibson in consideration of the sum of £673, 6s. 8d. paid to him, and “of the further sum of £2000 herein declared to be a real burden upon and affecting the lands” “in terms of and upon the conditions specified in the minute of agreement,” which was “referred to and held to form part of these presents,”—the said sum of £2000 to bear interest from Whitsunday 1876.

On the same date a personal bond was executed by Gibson for that £2000, which he bound himself to pay to Stewart, “subject to the stipulations in the minute of agreement, at Whitsunday 1881, declaring that notwithstanding the said term of payment the principal sum shall be allowed to remain unpaid until the said Henry Gibson's title shall be made unchallengeable.”

The disposition was recorded on 29th May 1876, but the minute of agreement referred to was not recorded.

On 15th February 1879 the whole estates of Henry Gibson were sequestrated under the Bankruptcy (Scotland) Act, 1856, and Mr R. B. Ritchie, accountant, Dundee, was confirmed trustee thereon.

On 4th March 1879 Stewart presented a petition in the Sheriff Court of Forfarshire at Dundee, praying the Court to grant warrant to officers of the Court to “pound and distrain All and Sundry the readiest moveable goods, gear,” &c. “of the said defender Henry Gibson, proprietor or

lately proprietor, and also occupant, of the lands, subjects, and others known as Mount Rosa, Broughty-Ferry, and grounds thereof, and particularly described in the condescendence hereto annexed, or forming part of his estates or of his sequestrated estates, and make payment thereof to account of or to the avail and quantity of the principal sum of £2000, being the amount of the real burden created and constituted in favour of the pursuer on and over the said lands, subjects, and others by disposition granted by the pursuer in favour of the defender, and specified in the said condescendence, penalty specified in the said disposition, and the interest of the said principal sum at the rate of £4, 10s. per centum per annum from and after the term of Martinmas last, the terms of payment thereof being always first come and bye-gone."

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Ritchie, the trustee on the sequestrated estate, entered appearance to defend the said action.

The pursuer averred ;—(Cond. 3) "The foresaid sum of £2000 sterling, and the interest thereof at the rate of £4, 10s. per cent per annum from and since the term of Martinmas last, are unpaid and due by the defender to the pursuer. The counter statements, in so far as inconsistent with the said disposition by the pursuer to the said Henry Gibson, and the said bond by the said Henry Gibson to the pursuer, and with the pursuer's statements, are denied. In consequence of the sequestration, the whole sums of principal and interest are now presently exigible, or at least the whole subject of the pursuer's security is attachable by him to provide for the due payment of the obligations before mentioned in his favour." (Ans. 3) "Admitted, with this explanation, that the interest here averred for the half year up to Whitsunday next will not be payable till that term, and that under arrangements between the pursuer and the said Henry Gibson the sum of £2000 was not payable when the petition in this action was presented to the Court by the pursuer."

Article 4 of the statement of facts lodged for the defender was as follows :—(Stat. 4) "That the interests of the pursuer may be fully protected, and that there may be no pretext for asking decree in this action, the defender is prepared, and now offers on his being allowed to sell the whole effects which belonged to the said Henry Gibson, situated within or upon the said heritable subjects, for behoof of whom it may concern, and that at the sight and to the satisfaction of any person to be named by the Court, to hold the proceeds subject to any claim which the pursuer may lodge in the sequestration, to be adjudicated upon by the defender, or under appeal from his judgment, all in terms of the bankrupt statute."

The pursuer pleaded, *inter alia* ;—(1) The sums condescended on, and in any event the interest of the real burden mentioned in the petition, being in the circumstances presently exigible, or at least not being a contingent but a certain debt, the pursuer is entitled to the warrant and decree craved. (2) In any event, pursuer having the rights condescended on, is entitled to have the goods and others sought to be poinded, or the proceeds thereof, applied or set apart in payment or security *pro tanto* of the sums due and to become due to him.

The defender pleaded, *inter alia* ;—(2) The pursuer has not averred, or at least has not produced, any title warranting him to ask a decree of poinding the ground as prayed for. (4) The term of payment of the £2000 claimed by the pursuer not having yet arrived, he, notwithstanding the sequestration of the bankrupt's estates, is not entitled to payment, but only to such reasonable security as can be given that his claims will be met when due, and such security will be afforded under the tender now made by the defender.

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On April 7, 1879, the Sheriff-substitute (Cheyne) repelled the defender's plea on the competency of the action.* On appeal, the Sheriff (Maitland Heriot) adhered, and remitted the case to the Sheriff-substitute to proceed.

On 22d May 1879, the Sheriff-substitute issued the following interlocutor:—"Grants warrant as craved in the prayer of the petition, with this variation—that instead of making payment as craved, the officer who carries out the warrant shall consign the free proceeds with the Clerk of Court to abide the orders of Court, and decerns *ad interim* to this effect, reserving to dispose of the money that may be consigned, and to pronounce further as may be just."

On appeal, the Sheriff issued an interlocutor adhering.†

Following on this interlocutor, the warrant to poind the ground was executed.

The execution bore that the decree had been obtained against the defender "for not making payment of the principal sum of £2000, being the amount of the real burden created and constituted in favour of the pursuer in and over the lands" conveyed by the said disposition, "penalties therein specified, and the interest of the said principal sum at the rate of £4, 10s. per centum per annum from and after the term of Martinmas last," &c.

Warrant for sale having been granted, the poinded goods were thereafter sold, and the price consigned "in terms of the order of Court" by the pursuer.

On 1st October 1879 the defender Ritchie lodged the following minute:—"The compeerer submits to the Court that the poinding and the sale following thereon were irregular and illegal, in respect the officer in many instances appraised in one sum various articles which were of different kinds and values, thus leading to the effects being exposed in corresponding lots, to the loss and injury of the compeerer and others concerned—see *Macknight v. Green*, 27th January 1835, 13 S. 342, and *Menzies' Conveyancing*, 3d ed. p. 309. The compeerer therefore craves that the officer at whose sight the poinding was executed be not allowed the expenses of the poinding and sale, and that in the meantime, and pending the consideration of this question, he be ordained to consign in the hands of the Clerk of Court the full amount of the roup-roll, including £13, being the value of effects adjudged over to the poinding creditor, except in so far as consignment has already been made."

On 13th October the Sheriff-substitute pronounced this interlocutor:—

* "NOTE.—The competency of the action seems to me to be conclusively established by the old cases of *Lady Ednam*, 26th June 1828, M. 8128, and *Douglas of Morton v. Tenants of Kinglassie*, February 1662, M. 1282 and 8130 (in the latter of which the term of payment was, as here, uncertain). . . ."

† "NOTE.—Looking to the law as established by the case of *Royal Bank v. Bain*, 6th July 1877, 4 R. 985, there seems to the Sheriff to be no doubt that the pursuer is preferable in competition with the trustee. The peculiarity of the case is that by the minute of agreement and by the bond, both dated 26th May 1876 (Nos. 13 and 15 of process), it is declared that the £2000 shall be allowed to remain until the said Henry Gibson's title to the subjects 'shall be made unchallengeable.' Now, this does not seem to have been yet done, and until it be done it is a question whether the pursuer can demand payment of his £2000. But it seems to the Sheriff that this position of matters will not prevent the pursuer selling in payment of the interest on the sum borrowed, which is heritably secured. In fact, both parties seek the same thing. The pursuer, on the one hand, seeks to be allowed to sell and consign the price with the Clerk of Court; Mr Ritchie, on the other, seeks to be allowed to sell and consign the price with the Clerk of Court."

" Finds that the proceeds of the sale amounted to £163, 10s., whereof the sum of £13 is still in the pursuer's hands, being the value of articles knocked down to him as the pointing creditor at the appraised values : . . . Finds that there is now in the hands of the Court the sum of £128, 7s. 8d., and that this sum may be taken as representing the free proceeds of the sale exclusive of the £13 above mentioned, less the dues of the consignment : . . . Grants warrant to the clerk of Court to pay out of the consigned fund— . . . (2) To the pursuer the sum of £31, 1s. 3d., being the balance of the half year's interest due at Whitsunday last on the bond mentioned in the proceedings after deducting income-tax, and also the above-mentioned sum of £13; and decerns *ad interim*, and *quoad ultra* continues the cause."* No. 58.
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On 12th November 1879 the pursuer lodged a minute, in which he craved the Court to grant decree for payment to him out of the balance of the consigned fund of the interest due to him on his bond for £2000 for half year ending at Martinmas 1879, amounting, less income-tax, &c., to £40, 8s. 3d.

Of the same date the Sheriff-substitute granted decree in terms of the minute.

On 10th March 1880 the pursuer lodged another minute, stating (1) that the heritable subjects had been sold by the liquidators of the City of Glasgow Bank in virtue of an absolute disposition to them by the bankrupt for £2050, "*i.e.*, for £50 under the burden of pursuer's debt of £2000 and consequents from the date of entry;" (2) that the interest on the said £2000 from Martinmas 1879 to Candlemas 1880, amounting to £20, 9s. 3d., was still unpaid, and that that sum, less 8s. 6d. of income-tax, was payable to him out of the consigned fund; (3) that he, the pursuer, had had to pay certain sums to the superior of the said heritable subjects to prevent declarator of irritancy of the feu *ob non solutum canonem*, viz., feu-duties amounting to £32, 16s. 10d., and a composition of £8, payable on the death of Mrs Anderson, the last vassal of said subjects.

To this minute the following answers were lodged by the defender:—Answers 1 and 2. "Believed to be true." 3. After denying the liability of the pursuer to pay the said sums to the superior, the answer set forth,— "Explained that as regards the composition of £8 the superior had no right to full or preferable payment of that sum, the same being simply a personal claim."

On 30th March 1880 the Sheriff-substitute issued the following interlocutor:—"The Sheriff-substitute having resumed consideration of the process, finds that the heritable subjects to which the action relates were recently exposed to sale by the liquidators of City of Glasgow Bank in virtue of an absolute disposition by the bankrupt in favour of the said bank, and were purchased under burden of the pursuer's debt of £2000 and consequents from the date of the purchaser's entry (which was at Candlemas last) for the sum of £50, which sum did not cover the expenses of the sale and the conveyance to the purchaser: Finds that the interest due to the pursuer for the period from Martinmas 1879 to 2d

* "NOTE.—While disposed to think that there have been some irregularities in the way in which this pointing has been carried out, which would have entitled the trustee or any one interested to interdict the sale, I do not see how, when matters have been allowed to go so far, I can possibly treat the sale as null and void, nor do I feel justified in entertaining the trustee's motion that in respect of these irregularities all the expenses incurred in connection with the sale should be disallowed. It seems to me that the trustee's remedy, if he has one, must be sought by an action of damages against the officer. . . ."

No. 58. February 1880 is unpaid, and that said interest amounts, after deducting income-tax, to £20, 0s. 9d.: . . . Finds the pursuer has recently made the following payments to the superior of the subjects, viz., the sum of £29, 5s. 10d., being the amount of the feu-duties payable therefrom for the period from Whitsunday 1876 to Martinmas 1879 with progressive interest, and the sum of £8, being the composition payable on the death of the last entered vassal, and that in virtue of the assignation by the superior in his favour, No. 62 of process, he is entitled to have these sums repaid to him out of the proceeds of the moveables sold under his poiding, now *in manibus curiæ*, under deduction, however, of the following sums (amounting together to £3, 9s. 11d.) of which under the feu-contract the superior was bound to relieve the vassal, viz., . . . ; and as the result of these findings, finds that the pursuer is now entitled to an order to uplift from the consigned fund the sum of £48, 15s. 11d. (forty-eight pounds, fifteen shillings, and elevenpence sterling); and grants warrant to the clerk of Court to make payment to him of that sum accordingly: Finds the compeerer, Robert Bower Ritchie, trustee on the defender Henry Gibson's sequestrated estate, liable in the pursuer's expenses, subject to some modification."*

On appeal, the Sheriff adhered.

Ritchie appealed to the Court of Session.

Argued for appellant;—The minute of agreement not having been put on record, the principal sum of £2000 had not been effectually constituted a real burden on the land.¹ Poiding of the ground for a contingent debt was incompetent. At the date of the petition no interest was due, and the poiding, so far as the principal sum was concerned (the execution and warrant of sale proceeded on that), was clearly incompetent.²

The payment of £8 composition to the superior out of the consigned money was incompetent, not being a *debitum fundi*, but merely a personal debt of the vassal.³

The manner in which the sale, following on the poiding, was carried out was illegal, and invalidated the whole proceedings.⁴

Argued for the respondent;—The appellant was barred from insisting in his objections by his actings in the Sheriff Court. The principal sum

* "NOTE.—It is quite true that the feu-contract in the case of *Morrison's Trustees v. Webster* (16th May 1878, 5 R. 800), contained a declaration which does not occur in the one before me, that the entry-moneys stipulated for on the entry of heirs or singular successors should be real burdens on the subjects, and recoverable as *debita fundi*; but a perusal of the opinions delivered by the Lord Justice-Clerk and Lord Gifford, who formed the majority in that case, has satisfied me that the judgment would have been the same though the specialty to which I have referred had been absent, for both these learned Judges were, as I read their opinions, prepared to hold that where in an old feu-contract the vassal undertakes as one of his obligations to pay, say, a duplicand of the feu-duty as composition on the entry of each heir or singular successor, the composition so agreed to be paid forms an integral condition of the grant, just as much as the feu-duty itself does, and is *ex sua natura* a real burden without any clause declaring it to be such. The case in question is, therefore, in my opinion, a direct authority for negativing the defender's contention that the composition of £8 which the pursuer paid, and *quoad* which he is now in the superior's place, is not a *debitum fundi*, but merely a personal debt of the vassal. . . ."

¹ Bell's Com. (7th ed.), 727-728; Act 37 and 38 Vict. c. 94 (Conveyancing (Scotland) Act), sec. 30.

² Lady Ednam, 1628, M. 8128 and 10,545; Erskine, Inst. iv. 1, 11, and ii. 8, 32; Stair, v. 7, 8, and iv. 23, 18; Raplock v. Tenants, 1625, M. 1277.

³ *Morrison's Trustees v. Webster*, May 16, 1878, *ante*, vol. v. 800.

⁴ Macknight v. Green, Jan. 27, 1835, 13 S. 342.

had been effectually constituted a real burden on the lands by the registration of the disposition. The respondent had never insisted on the poiding for the principal sum. A creditor on a heritable estate could legally ask for poiding on a debt to become due if he did not ask for payment till it was due.¹ He was obliged to take the course he did to preserve his preference over the trustee.² The payment of the composition from the consigned fund was competent, it being a condition of the tenure—(*Morrison's Trustees v. Webster, supra*). The appellant's proper course, if he objected to the mode in which the proceedings were carried out, was to have interdicted the sale.

At advising,—

LORD PRESIDENT.—The pursuer of this action in the Sheriff Court is a party who is in right of a real burden to the extent of £2000, which is secured over certain subjects in Forfarshire under a disposition by himself in favour of Henry Gibson, and it is not necessary to refer to that deed further than to say that the £2000 was by it effectually secured as a real burden over the subjects conveyed. At the same time the pursuer was restrained from demanding payment of it till a certain event occurred, for in a relative agreement and a relative personal bond it was provided that notwithstanding the foresaid term of payment the principal sum should remain unpaid till Gibson's title was made unchallengeable; till all difficulty as to the title was cleared up the real burden was to continue. Now, that difficulty had not been removed before this poiding of the ground was used, nor has it yet for aught we know, and so the pursuer is not entitled to be paid the principal sum. But the prayer of the petition does conclude that the proceeds of the poiding should be applied "to account of or to the avail and quantity of the principal sum of £2000, being the amount of the real burden created and constituted in favour of the pursuer on and over the said lands, subjects, and others, . . . and the interest of the said principal sum at the rate of £4, 10s. per centum per annum from and after the term of Martinmas last, the terms of payment thereof being always first come and bygone." Now, the Sheriff-substitute, on 22d May 1879, granted warrant as craved in the prayer of the petition. He added, however, "with this variation, that instead of making payment as craved, the officer who carries out the warrants shall consign the free proceeds with the clerk of Court, to abide the orders of Court, and decerns *ad interim*, . . . reserving to dispose of the money that may be consigned, and to pronounce further as may be just." This warrant was granted after Gibson's trustee—for he had become bankrupt in the meantime—was sisted as defender in the action. The warrant was executed, and the poiding was laid on so as to secure payment of principal as well as interest, but the Sheriff's reservation is of considerable importance, especially as to what follows, for the money was not paid to the poiding creditor and allowed to be applied by him in terms of the warrant, but was consigned, and so we can now see what was done with the proceeds of the poiding. The warrant of sale, which is dated 25th July, is in the same terms as the warrant of 22d May 1879. But the sale

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¹ Lady Ednam, *supra*; Douglas of Morton v. Tenants of Kinglassie, 1662, M. 1282 and 8130; Lady Pitfoddels, 1674, M. 10,548.

² Royal Bank v. Bain, July 6, 1877, *ante*, vol. iv. 985; Campbell's Trustees v. Paul, Jan. 13, 1835, 13 S. 237; Neish v. Marshall, July 7, 1824, 3 S. 223, *aff.* 2 W. and S. 71; Barstow v. Mowbray, March 11, 1856, 18 D. 846, 28 Scot. Jur. 341.

No. 58. having been effected, we have on 13th October an interlocutor which is very important as shewing what the Sheriff-substitute intended by his reservation in the interlocutor of 22d May. He "finds that the proceeds of the sale amounted to £163, 10s., whereof the sum of £13 is still in the pursuer's hands, being the value of articles knocked down to him as the pouncing creditor at the appraised values," that is, there having been no competitors for the goods so sold, they were knocked down to the pouncing creditor; then follow findings as to expenses, and then the Sheriff-substitute "finds that there is now in the hands of the Court the sum of £128, 7s. 8d., and that this sum may be taken as representing the free proceeds of the sale, exclusive of the £13 above mentioned, less the dues of the consignment;" then he deals with some claims for poor-rates, &c., and awards a sum on that account; and then he awards to the pursuer "the sum of £31, 1s. 3d., being the balance of the half year's interest due at Whitsunday last on the bond mentioned in the proceedings, after deducting income-tax, and also the above-mentioned sum of £13, and decerns *ad interim*, and *quoad ultra* continues the cause." This interlocutor was issued on 13th October. The first half year's interest which became due after the petition was presented was at Whitsunday preceding, and this explains the terms used. Then on 12th November 1879 the Sheriff-substitute "grants warrant to the clerk of Court to pay to the pursuer out of the consigned fund the further sum of £40, 8s. 3d. sterling, being the balance of the half year's interest due at this term on the bond mentioned in the proceedings, after deducting income-tax."

Now, what was the effect of these proceedings? The proceeds of the sale of the pounced goods were applied, first, in payment of the half year's interest due at Whitsunday 1879, being the half year's interest current at the date when the petition was presented, and then part of the balance was paid for the second half year's interest, which had fallen due at 12th November 1879. I have no doubt, as regards this application of the proceeds, that it was quite regular and proper. No part of the proceeds was applied in discharge of the principal sum, and no effect was given to the part of the prayer which asked that. The course taken by the Sheriff-substitute in making the reservation on 22d May, and the way in which he carried it out, had the effect of removing the objection, which there would otherwise have been, to the terms of the prayer and of the warrant, for nothing was done but to apply the price in payment of interest, not only of the current interest, but also of the second term's interest, with regard to which there seems to be no practical objection. The whole matter was wound up by an interlocutor of 30th March 1880, in which the Sheriff-substitute "finds that the heritable subjects to which the action relates were recently exposed to sale by the liquidators of the City of Glasgow Bank in virtue of an absolute disposition by the bankrupt in favour of the said bank, and were purchased, under burden of the pursuer's debt of £2000 and consequents from the date of the purchaser's entry (which was at Candlemas last), for the sum of £50, which sum did not cover the expenses of the sale and the conveyance to the purchaser: Finds that the interest due to the pursuer for the period from Martinmas 1879 to 2d February 1880 is unpaid, and that said interest amounts, after deducting income-tax, to £20, 0s. 9d."—and the Sheriff-substitute then proceeds to make certain deductions, and brings out a balance, for which he gives the pursuer credit, and finds him "now entitled to an order to uplift from the consigned fund the sum of £48, 15s. 11d., and grants warrant to the clerk of Court to make payment of that sum to him accordingly." Now, the interest for that period was

also well secured by the poiding, and payment of it regularly ordered by the Sheriff-substitute, for the same reason as that of the interest which became due at Martinmas 1879.

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But the interlocutor contains a number of items on both sides of the account, to none of which any objection is made save one, viz., a payment made by the pursuer, as poiding creditor, of £8, being a composition to the superior of the subjects payable on the death of the last entered vassal. I think the poiding creditor was bound to pay this sum. If it had been a case of an untaxed entry it might have been a very different matter; but this is a composition the amount of which is fixed by the feu-contract, and it is therefore a real burden on the feu just as much as the feu-duty is. I concur with the Sheriff-substitute's view of the law on this matter, and I think this was just as much a real burden as any other stipulation in favour of the superior in the feu-contract.

On the whole matter, though there was certainly an inherent vice in the original prayer for warrant of poiding as craved, I think that was covered by the Sheriff-substitute's subsequent course of dealing; and I am for adhering to the interlocutors appealed against.

LORD DEAS.—The only point, in the opinion of your Lordship, on which I entertain any doubt is whether this poiding of the ground was not equally well and competently executed for the principal sum as for the other items included in it. The principal sum was well constituted as a real burden. It is not necessary to decide the question precisely, but I am disposed to think that there is nothing to prevent a poiding of the ground being executed for a principal sum to await the event of its becoming payable, on the same principle as terms of interest current and not yet come may be rightly included in the poiding to await the event of their becoming due. At the same time it is a matter of little moment in the present case whether this is so or not. In all other particulars I entirely agree with your Lordship's observations, and, having come to the same conclusion, it is unnecessary for me to enter into detail.

LORD MURE.—I have come to the same conclusion. The main question argued was the competency of having a poiding of the ground for interest not payable at the date of the poiding. As regards the first objection, that there cannot be a poiding for a contingent debt, it is plain from your Lordship's explanation of the proceedings that though the terms of the warrant might be held to cover the principal sum of £2000, that matter was, in point of fact, restricted by the terms of the Sheriff-substitute's interlocutor. We are therefore relieved from the necessity of deciding that question, because no step was taken to carry out the poiding as regards that principal sum. The other point was strongly pressed, and authority cited to shew that a poiding could not be brought for interest current but not yet due; but I think the cases cited by the Sheriff-substitute go plainly to shew that such a poiding may be brought. In the Juridical Styles, moreover (vol. iii., pp. 461 and 462), I find that the usual form of the summons of poiding and of letters of poiding of the ground is this, "to make payment thereof to the complainer to the amount of the said principal sum of £ , and interest of the said principal sum from the said term of , and to become due in time coming, during the non-redemption, the terms of payment thereof being always first come and bygone." These are the usual words of style in a summons of poiding, and the letters run in

No. 58. having been effected, we have on 13th October an interlocutor which is very important as shewing what the Sheriff-substitute intended by his reservation in the interlocutor of 22d May. He "finds that the proceeds of the sale amounted to £163, 10s., whereof the sum of £13 is still in the pursuer's hands, being the value of articles knocked down to him as the pouncing creditor at the appraised values," that is, there having been no competitors for the goods so sold, they were knocked down to the pouncing creditor; then follow findings as to expenses, and then the Sheriff-substitute "finds that there is now in the hands of the Court the sum of £128, 7s. 8d., and that this sum may be taken as representing the free proceeds of the sale, exclusive of the £13 above mentioned, less the dues of the consignment;" then he deals with some claims for poor-rates, &c., and awards a sum on that account; and then he awards to the pursuer "the sum of £31, 1s. 3d., being the balance of the half year's interest due at Whitsunday last on the bond mentioned in the proceedings, after deducting income-tax, and also the above-mentioned sum of £13, and decerns *ad interim*, and *quoad ultra* continues the cause." This interlocutor was issued on 13th October. The first half year's interest which became due after the petition was presented was at Whitsunday preceding, and this explains the terms used. Then on 12th November 1879 the Sheriff-substitute "grants warrant to the clerk of Court to pay to the pursuer out of the consigned fund the further sum of £40, 8s. 3d. sterling, being the balance of the half year's interest due at this term on the bond mentioned in the proceedings, after deducting income-tax."

Now, what was the effect of these proceedings? The proceeds of the sale of the poinded goods were applied, first, in payment of the half year's interest due at Whitsunday 1879, being the half year's interest current at the date when the petition was presented, and then part of the balance was paid for the second half year's interest, which had fallen due at 12th November 1879. I have no doubt, as regards this application of the proceeds, that it was quite regular and proper. No part of the proceeds was applied in discharge of the principal sum, and no effect was given to the part of the prayer which asked that. The course taken by the Sheriff-substitute in making the reservation on 22d May, and the way in which he carried it out, had the effect of removing the objection, which there would otherwise have been, to the terms of the prayer and of the warrant, for nothing was done but to apply the price in payment of interest, not only of the current interest, but also of the second term's interest, with regard to which there seems to be no practical objection. The whole matter was wound up by an interlocutor of 30th March 1880, in which the Sheriff-substitute "finds that the heritable subjects to which the action relates were recently exposed to sale by the liquidators of the City of Glasgow Bank in virtue of an absolute disposition by the bankrupt in favour of the said bank, and were purchased, under burden of the pursuer's debt of £2000 and consequents from the date of the purchaser's entry (which was at Candlemas last), for the sum of £50, which sum did not cover the expenses of the sale and the conveyance to the purchaser: Finds that the interest due to the pursuer for the period from Martinmas 1879 to 2d February 1880 is unpaid, and that said interest amounts, after deducting income-tax, to £20, 0s. 9d."—and the Sheriff-substitute then proceeds to make certain deductions, and brings out a balance, for which he gives the pursuer credit, and finds him "now entitled to an order to uplift from the consigned fund the sum of £48, 15s. 11d., and grants warrant to the clerk of Court to make payment of that sum to him accordingly." Now, the interest for that period was

also well secured by the poinding, and payment of it regularly ordered by the Sheriff-substitute, for the same reason as that of the interest which became due at Martinmas 1879.

But the interlocutor contains a number of items on both sides of the account, to none of which any objection is made save one, viz., a payment made by the pursuer, as poinding creditor, of £8, being a composition to the superior of the subjects payable on the death of the last entered vassal. I think the poinding creditor was bound to pay this sum. If it had been a case of an untaxed entry it might have been a very different matter; but this is a composition the amount of which is fixed by the feu-contract, and it is therefore a real burden on the feu just as much as the feu-duty is. I concur with the Sheriff-substitute's view of the law on this matter, and I think this was just as much a real burden as any other stipulation in favour of the superior in the feu-contract.

On the whole matter, though there was certainly an inherent vice in the original prayer for warrant of poinding as craved, I think that was covered by the Sheriff-substitute's subsequent course of dealing; and I am for adhering to the interlocutors appealed against.

LORD DEAS.—The only point, in the opinion of your Lordship, on which I entertain any doubt is whether this poinding of the ground was not equally well and competently executed for the principal sum as for the other items included in it. The principal sum was well constituted as a real burden. It is not necessary to decide the question precisely, but I am disposed to think that there is nothing to prevent a poinding of the ground being executed for a principal sum to await the event of its becoming payable, on the same principle as terms of interest current and not yet come may be rightly included in the poinding to await the event of their becoming due. At the same time it is a matter of little moment in the present case whether this is so or not. In all other particulars I entirely agree with your Lordship's observations, and, having come to the same conclusion, it is unnecessary for me to enter into detail.

LORD MURE.—I have come to the same conclusion. The main question argued was the competency of having a poinding of the ground for interest not payable at the date of the poinding. As regards the first objection, that there cannot be a poinding for a contingent debt, it is plain from your Lordship's explanation of the proceedings that though the terms of the warrant might be held to cover the principal sum of £2000, that matter was, in point of fact, restricted by the terms of the Sheriff-substitute's interlocutor. We are therefore relieved from the necessity of deciding that question, because no step was taken to carry out the poinding as regards that principal sum. The other point was strongly pressed, and authority cited to shew that a poinding could not be brought for interest current but not yet due; but I think the cases cited by the Sheriff-substitute go plainly to shew that such a poinding may be brought. In the Juridical Styles, moreover (vol. iii., pp. 461 and 462), I find that the usual form of the summons of poinding and of letters of poinding of the ground is this, "to make payment thereof to the complainer to the amount of the said principal sum of £ , and interest of the said principal sum from the said term of , and to become due in time coming, during the non-redemption, the terms of payment thereof being always first come and byegone." These are the usual words of style in a summons of poinding, and the letters run in

No. 58. similar terms. It is therefore clear that at the time these styles were published that was the recognised form in practice. On looking into M'Glashan's "Sheriff Court Practice" (p. 136) I find it laid down that such is the practice, and reference is there made to the case of *Kennedy v. Ramsay's Trustees*, 17th Feb. 1852, 14 D. 513. On examining that case, in which there were originally nine conclusions of reduction, which were either repelled or not insisted on, I find that the form of summons there contained the very words I have read from the Styles. I am therefore of opinion that the proceedings here have been conform to the usual practice, and ought to be sustained. On the other point of the case, viz., as to the composition, I concur with your Lordship.

Dec. 10, 1880.
Stewart v. Gib-
son's Trustee.

LORD SHAND.—I have also come to the conclusion that there are no sufficient grounds for disturbing the judgments of the Sheriff-substitute and the Sheriff. If the case had been insisted in as one of diligence for the principal sum in the bond, or had not been practically treated in the Sheriff Court as a diligence for securing interest only, I think the judgment could not have been sustained, for it appears to me to be clear that a poiding of the ground for a real burden of which the term of payment is indefinite,—a term which may not arrive perhaps for many years, or possibly never,—is not a proper diligence. Such a case is different from one in which, as here, interest is payable in any event, and stipulated to be paid at definite terms. I think that in this case the petitioner from the first made it clear that he restricted the diligence to interest alone, and on that footing the case was treated by the Sheriffs. That being so, the interlocutor of the Sheriff-substitute, authorising payment, certainly, of the first and second half year's interest, are unobjectionable, the diligence having been used for the interest past due at the date of the sale, and for the half year then current, and payment of which was obtained only after the term of Martinmas was past. Neither of these payments of interest was really resisted or objected to by the appellant; and even as to the warrant of sale the question raised before the Sheriff seems really to have been not one as to the propriety or necessity for a sale, but as to which of the parties should have the carriage of it.

Speaking generally of the objections argued I am not disposed to receive them with favour, for I think there was a considerable amount of acquiescence on the part of the defender in the proceedings, and that the petitioner acted and was entitled to act in reliance on this. It would be extremely hard in a litigation of this sort, and after parties have taken up a certain attitude before the Sheriff, that one of them should be permitted in this Court to turn round and take exception to all that has occurred, stating new objections to each stage of the proceedings, it might be with the consequence of opening claims of damages against his opponent. The same thing runs through the whole of the proceedings. I cannot better illustrate this than by adverting to what occurred when the third payment of interest was asked. When that demand was made there might have been a grave objection to it, but the way in which it was treated was this. A minute was lodged for the petitioner stating that interest for a certain period was due, and the amount of it was stated. The respondent admitted that it was so due, for in his answers to the minute he says, "Believed to be true." In addition to this, in the same pleading, he does not object to the proceedings *in toto* or to the claim for interest, but merely says that a less sum was due than was demanded. I hold that in respect of the conduct of the party the appellant is not entitled now to raise the objection. So far as

the demand for the third payment of interest is concerned, I wish to rest my judgment on that ground, and on that ground alone. No. 58.

An objection was taken to the mode of poinding, and if it had been maintained and pressed before the Sheriff I think that the poinding would have been open to grave objection. I should be sorry to sanction any such extensive slumping of articles together as was here done, but the objection taken in the Court below was merely that the officer should not get his fees, and not that the poinding was bad, and might, or should be cut down entirely. I think there was a blot on the proceedings, but I do not think the objection can be insisted in now, after a sale took place without objection. On the point of the composition to the superior I only say that the sum is very trifling, and as to so small an amount left as the only question in the appeal, I would not disturb the Sheriffs' judgments. On the whole question, I can see no good reason for interfering with the interlocutors appealed from. Dec. 10, 1880. Stewart v. Gibson's Trustee.

THE COURT dismissed the appeal.

REIND, LINDSAY, & WALLACE, W.S.—DRUMMOND & REID, W.S.—Agents.

MRS GRACE CRAWFORD HARRIS OR BAILLIE OR M'GAAN, Pursuer.—
Macdonald—Thorburn.

No. 59.

WILLIAM M'GAAN, Defender.—*J. C. Smith—Millie.*

Dec. 14, 1880.
M'Gaan v.
M'Gaan.

Husband and Wife—Separation and Aliment—Habitual intoxication and reasonable fear of violence.—In an action of separation at the instance of a wife against her husband, held that to entitle the pursuer to decree of separation *a mensa et thoro* it was not necessary for her to instruct personal injury to herself, but that proof of the husband's habitual intoxication and violent conduct, inducing a reasonable fear of violence to the pursuer, was enough.

THIS was an action of separation on the ground of cruelty at the instance of Mrs G. C. Harris or Baillie or M'Gaan against her husband, William M'Gaan. 2D DIVISION. Lord Adam. M.

The pursuer and defender were married in 1876, and lived together as husband and wife, with certain brief interruptions, till February 1880, when the pursuer was obliged, as she alleged, to leave the defender by reason of the treatment which she received at his hands.

The grounds of action were stated to be the intemperate habits of the pursuer, which led to riotous and violent scenes, in the course of which the defender so maltreated, abused, and threatened his wife as to put her in fear of serious personal injury.

The evidence led was to the following effect:—

The pursuer had considerable means, acquired from her first husband, and these, on her marriage with M'Gaan, were, by antenuptial marriage-contract, placed beyond the defender's control. The pursuer's means were sufficient comfortably to maintain the spouses. Except to the extent of one half year's rent and taxes the pursuer supported herself and the defender out of her means during the whole of their married life. The defender had no means of his own, and though he had employment for about a year as traveller for a firm of wine and spirit merchants he was dismissed in April 1878 owing to his intemperate habits, and did not again obtain or even seek employment. Except as above mentioned, he contributed nothing to the support of the pursuer and himself. His habits, which were intemperate from the beginning of his married life, grew worse, and after being dismissed from his employment he lived in an almost continuous state of intoxica-

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tion, never coming home in the evening sober, and often bringing drink with him. When excited by drink he was violent and abusive in his language to his wife, and riotous in his conduct, breaking and throwing about furniture and domestic articles. Without actually striking her, he frequently roughly seized her, pushed her about, tore her clothes, and put her in fear that he would do her some serious personal injury. He also threatened her in such terms as that he "would throw her over the window," "would kill her," "would shoot her," &c. In consequence of such conduct, the pursuer on two or three occasions took refuge in the houses of her neighbours, and obtained their intervention between herself and her husband; at other times she got a nephew of her own to sleep in the house for her protection; and on three or four occasions she left the house intending to separate from the defender, but was induced to return by his promises of amendment. At the same time it was proved that there were frequent quarrels between the pursuer and defender, which she often provoked, and in course of which she used very abusive and irritating language to him. These were, however, always occasions on which he had returned home under the influence of drink.

The Lord Ordinary, on 14th July 1880, assolizied the defender from the conclusions of the action.

The pursuer reclaimed.¹

The pursuer had, prior to the action being raised, offered to pay to the defender an annuity of £25 out of the income of her marriage trust-funds, on condition of his agreeing to an extrajudicial separation, and at the conclusion of the debate her counsel judicially repeated this offer, contingently upon decree being pronounced in her favour.

The Court intimated that they would give the defender time to consider this offer before they gave judgment.

The defender agreeing to accept the pursuer's offer, she executed a bond of annuity in his favour for £25 per annum, to be delivered in the event of decree in her favour being pronounced, and a minute for the parties was lodged informing the Court of this arrangement.

At advising,—

LORD JUSTICE-CLERK.—I do not think it necessary in this case to go at length into our grounds for granting decree of separation. I shall content myself with giving the impression which a careful perusal of the evidence has made upon my mind.

The agreement which has been come to between the parties is, in the circumstances, a very proper one, but it cannot affect our view of the evidence or enter in any way into our judgment.

I am quite at one with the Judges who decided the case of *Fulton v. Fulton*, 12 D. 1104, in thinking that mere habits of intoxication will not afford grounds for separation. I keep in mind also that it was decided by the House of Lords in *Paterson v. Paterson*, 7 Bell's App., 337, that mere moral torture will not be sufficient to afford ground for granting a demand of this kind. And though the Judges in *Fulton's* case did express regret that the law did not permit them to give relief to a woman united to a husband whose life was spent in habitual intoxication and riot, I should have followed them in holding that the habitual intoxication and riotous conduct of the husband in this case were not sufficient in themselves to warrant our granting the decree craved.

¹ *Fulton v. Fulton*, June 28, 1850, 12 D. 1104, 22 Scot. Jur. 509; *Paterson v. Paterson*, August 9, 1850, 7 Bell's App. 337.

But when habitual intoxication on the part of the husband is coupled with such conduct as puts the wife in reasonable fear of personal injury to herself, I think the law does allow the Court to intervene. And I am of opinion that we have such a case here.

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Of the defender's conduct it is impossible to speak too severely. He has not done a hand's turn of work for two years. During that time he has been entirely dependant on his wife—this has indeed been, more or less, the case during his whole married life—and during the whole of his married life, but more particularly during the last two years, he has been living in a condition of habitual, I might almost say continuous, intoxication. Four times at least during that period has his wife retreated from his house and society from fear of personal violence. On the whole, I think she was warranted in so doing.

I find farther this fact in the case, and it is not without materiality, that the defender has not ventured to come forward to contradict his wife's testimony.

I cannot think that a woman is bound to wait until some grievous injury is inflicted on her person before she is entitled to separation, and, therefore, though the defender's violence has not been carried that length, I think there is enough in the evidence to warrant our granting the decree craved. In its legal aspect, the case is a narrow one. In its moral aspect, it is not.

LORD GIFFORD and LORD YOUNG concurred.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find that the defender has been guilty of cruelly abusing and maltreating the pursuer, and that, therefore, the pursuer has full liberty and freedom to live separate from the defender her husband, and decern and ordain the defender to separate himself from the pursuer *a mensa et thoro* in all time coming."

ANDREW WALLACE, L.A.—WILLIAM PATERSON, L.A.—Agents.

WILLIAM LINDSAY AND OTHERS (Thomas Lindsay's Trustees), First Parties.—*Pearson.*

No. 60.

WILLIAM BRUCE LINDSAY, Second Party.—*Kinnear—Mackintosh.*
THOMAS JAMES LINDSAY AND OTHERS, Third Parties.—*Pearson.*

Dec. 14, 1880.
Lindsay's
Trustees v.
Lindsay, &c.

Succession—Fee and Liferent—Fee with protected Succession—Repugnancy.—

A testator, on the narrative that he had acquired considerable means by his first wife, and that it was his wish to make an additional provision for his two children by her, directed his trustees to convey certain heritable property to his son by his first marriage, W B L, and, "to make my said daughter C B L equal thereto, I leave and bequeath to her the sum of £1000 sterling, which legacy shall be payable at the first term" that should happen six months after his decease.

The residue of his estate the testator directed to be liferented by his second wife, and on her death to be divided among his whole children, the shares to vest at his death, and, subject to a condition of survivorship, to be payable to sons at the age of twenty-five, but in the case of daughters to be settled on themselves in liferent allenerly and on the issue of their bodies in fee. In this provision as to residue there was inserted a direction that the special legacy of £1000 to C B L, the daughter of his first marriage, should "be held by the trustees for her sole behoof during her minority," and should, upon her attaining majority, "be settled or placed so as validly and effectually to provide to herself a liferent only thereof, and to the lawful issue of her body, equally among them, the fee thereof."

No. 60. C B L survived her father, attaining majority, but died shortly after unmarried.

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In a competition for the special legacy of £1000 bequeathed to her, *held* (by the Second Division after consultation with the Judges of the First Division) that it had vested in her in fee absolutely and was transmitted to her executor, the restriction to a liferent alienably only taking effect in the event of her being married and dying leaving issue surviving her.

2d Division,
after consul-
tation with
Judges of
1st Division.
R.

THOMAS LINDSAY, shipowner, Leith, who died on 8th April 1877, left a trust-disposition whereby he conveyed to his brother, William Lindsay of Hermitage Hill House, Leith, and others, as trustees, his whole means and estate, for the purpose, *inter alia*, "Secondly, I direct my said trustees to implement and fulfil the obligation undertaken by me in antenuptial contract of marriage entered into betwixt me and my spouse, Mrs Agnes Cossar or Lindsay (his second wife), bearing date 2d April 1859 : Thirdly, In respect that I acquired considerable means by my deceased wife, Catherine Bruce or Lindsay, it is my wish that the following provisions to my children by the said Catherine Bruce or Lindsay (his first wife), viz., William Bruce Lindsay and Catherine Bruce Lindsay, should be preserved or made for them over and above the other provisions herein contained in their favour, viz.—I direct my said trustees to execute and deliver" to his son, William Bruce Lindsay, a conveyance of a certain heritable property in Leith, which the truster had acquired from his first wife, Catherine Bruce or Lindsay; "and as I consider the said subjects to be of the value of £1000 or thereby, to make my said daughter, the said Catherine Bruce Lindsay, equal thereto, I leave and bequeath to her the sum of £1300 sterling" (restricted by codicil to £1000 according to original intention, £1300 having been inserted at this place by clerical error instead of £1000), "which legacy shall be payable at the first term of Whitsunday or Martinmas that shall happen six months after my decease: Fourthly, I direct my trustees to give effect to the following specific legacies, viz." (here followed a list of special legacies): "Sixthly, I appoint my said trustees, after fulfilling the before-written purposes, to pay over to my said spouse, in case she shall survive me, and so long as she shall remain my widow, the nett income which shall accrue from the residue of my means and estate: Ninthly, Upon the death of my said spouse, or in the event of her entering into a second marriage, upon that event, my whole estate, heritable and moveable, not already otherwise appropriated by these presents or by the foresaid antenuptial contract of marriage with my said spouse, shall be divided into as many parts as may be necessary to give each of my children, William Bruce Lindsay and Catherine Bruce Lindsay (children of the marriage betwixt me and the said deceased Catherine Bruce or Lindsay), and Thomas James Lindsay, John Allan Lindsay, Charles Cossar Lindsay, and Agnes Veitch Lindsay, surviving children already born of the marriage betwixt me and the said Agnes Cossar or Lindsay, and any other child or children who may yet be born of the marriage, an equal share, so that the same may be divided equally among them, the lawful issue of those predeceasing taking their parent's share; and in regard to the application of my means so divided for the benefit of my children I hereby direct as follows, viz.:—I direct that the legacy of £1000 sterling to the said Catherine Bruce Lindsay shall be held by the trustees for her sole behoof during her minority, and shall, upon her attaining majority (with any savings of interest that may have resulted therefrom), be settled or placed so as validly and effectually to provide to herself a liferent only thereof, and to the lawful issue of her body, equally among them, the fee thereof: And as regards the respective

shares of my said estate, heritable and moveable, both under these presents and under the antenuptial contract of marriage aforesaid (exclusive of the £1000 legacy to the said Catherine Bruce Lindsay), I hereby provide that the same shall vest in each of my children on my death, and in the case of a posthumous child, on the birth thereof, but the said respective shares shall be held by my trustees for the sole behoof of my said children respectively during their respective minorities, and the annual produce, or such part thereof as may be necessary, applied for their use, and the respective shares, with any savings of interest that may result therefrom, shall then be settled as follows, viz., in the case of daughters, on themselves in liferent for their respective liferent uses alienably, and on the lawful issue of their separate bodies, equally among them, in fee, and in the case of sons, it shall be settled on them, so as the share of each shall be paid when they respectively attain twenty-five years of age."

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There followed a survivorship clause applicable to the period of payment as well as vesting, and to the shares of residue, both original and accreting, provided to the truster's whole children.

Catherine Bruce Lindsay survived her father, and died, after attaining majority but unmarried, on 24th January 1879. She left no settlement, and her brother William Bruce Lindsay was decerned her executor-dative *qua* next of kin.

In consequence of the death of Catherine Bruce Lindsay, in these circumstances, a question arose as to the destination of the legacy of £1300 (restricted by codicil to £1000) bequeathed to her by the third purpose of the truster's settlement.

It was contended by her brother William Bruce Lindsay that the said legacy of £1000 had vested in his sister, and was carried to him as her next of kin.

It was maintained, on the other hand, by the children of the truster's second marriage, that the right of the said Catherine Bruce Lindsay in the said legacy was a right of liferent only, and that upon her death without lawful issue the fee of the said legacy lapsed and fell into residue, or was otherwise undisposed of.

A special case was presented to the Court by Mr Lindsay's trustees, the first parties, William Bruce Lindsay, the second party, and Thomas James Lindsay and others, the children of the truster's second marriage, the third parties, in which judgment was asked on the following questions:—“(1) Does the legacy of £1300, mentioned in the third purpose of the said trust-settlement, and restricted to £1000 by said codicil, fall to the party of the second part, as the executor of the said Catherine Bruce Lindsay? or (2) Has the said legacy lapsed so as to fall into residue? or (3) Is the fee of the said legacy undisposed of, so as to pass to the heirs *in mobilibus* of the truster?”

After hearing counsel the Second Division appointed the case to be argued before seven Judges.

Argued for the second party;—The question at issue arose upon the conjunction of two clauses of a settlement, and, if possible, both must be read together. If one clause occurred in the will and another in a codicil it might then be said the former was cancelled by the latter. But not if they occurred in the same writing. In that case you must endeavour to reconcile them. Except in so far as the latter clause qualified the original gift, the original gift stood. In the present case the first clause provided for all events;¹ the second clause provided for a contingency which had not occurred, viz., the daughter leaving issue. Therefore, the

¹ Balderston v. Fulton, Jan. 23, 1857, 19 D. 293, 29 Scot. Jur. 143.

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previous gift, which was not otherwise qualified, must receive effect. The only persons to take the benefit of this legacy, other than the daughter, were her issue, and the object of the ninth clause was simply the protection of the latter, should they exist, and it did not qualify the right of the former if they did not exist. There were several cases, of which *Gibson v. Boss*¹ was an example, in which the words "liferent allenary" or "liferent only" were held, because of other expressions in the deed, not incompatible with a fee.

Argued for the third parties ;—The terms used in the ninth purpose of the settlement clearly limited the right to a bare liferent, and there were no other words in the deed to take off that effect.² If it were said that the expressions found in the third purpose indicated that a right of fee was given, then, the two clauses being repugnant, the latter, the ninth, must govern in accordance with the maxim, *cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est*.³ Cases such as *Wilson v. Reid*⁴ could not be pleaded against this view, for it was impossible to sever two parts of a testamentary settlement. A direct authority in the present case was *Fulton v. Fulton's Trustees*.⁵

At advising,—

LORD PRESIDENT.—The question in this case arises on the construction of the settlement of the late Thomas Lindsay, who died on 8th April 1877. It is substantially this, whether a special legacy to his daughter by his first marriage vested in her during her lifetime and has transmitted to her executor.

The general scheme of Mr Lindsay's settlement is simple, and may be shortly stated. There is first a direction to implement a certain obligation undertaken by the truster in his marriage-contract with his second wife. There are then some special legacies given. And lastly, the whole residue is to be liferented by the truster's widow, and on her death to be divided in equal shares among his seven children. These shares are to vest in the children at the testator's death, the income to be applied towards their maintenance during minority, and on majority the capital, with any savings of interest, is to be settled as follows :—On the sons, "so as the share of each shall be paid when they respectively attain twenty-five years of age;" in the case of daughters, "on themselves in liferent for their respective liferent uses allenary, and on the lawful issue of their separate bodies, equally among them, in fee." There is farther a survivorship clause, applicable to accruing as well as original shares.

The scheme of the settlement is thus simple enough. The difficulty arises in connection with a special legacy to Catherine Bruce Lindsay the truster's daughter by his first marriage, which is given by the third purpose of the deed. The motive for this special legacy is there set out to be that the truster had acquired considerable means through his first wife, and that he therefore wished to make certain provisions for his children by her over and above the provisions in favour of his children generally in which they were to share. Accordingly he declares his purpose to be that his son William Bruce Lindsay should receive a conveyance of certain heritable property, and that his daughter Catherine Bruce Lindsay should receive, as an equivalent, a sum which he erroneously

¹ July 12, 1877, *ante*, vol. iv., p. 1038.

² *Cumstie v. Cumstie's Trustees*, June 30, 1876, *ante*, vol. iii., p. 921.

³ *Broom's Legal Maxims*, 5th ed., p. 583, and *Stair*, iv., 46, 21.

⁴ Dec. 4, 1827, 6 Sh. 198.

⁵ Feb. 6, 1880, *ante*, vol. vii., p. 566.

states at £1300, but which was intended to be and was by codicil restricted to £1000. The words of the latter provision are these:—"And as I consider the said subjects to be of the value of £1000 or thereby, to make my said daughter, the said Catherine Bruce Lindsay, equal thereto, I leave and bequeath to her the sum of £1300 sterling, which legacy shall be payable at the first term of Whitsunday or Martinmas that shall happen six months after my decease."

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So far as these words are concerned, there is no doubt as to the meaning of the bequest. But there is a farther provision or declaration as to this legacy in the afterpart of the deed, which creates the difficulty. After making the equal division of residue, the testator says:—"And in regard to the application of my means so divided for the benefit of my children, I hereby direct as follows, viz:—I direct that the legacy of £1000 sterling to the said Catherine Bruce Lindsay shall be held by the trustees for her sole behoof during her minority, and shall upon her attaining majority be settled or placed so as validly and effectually to provide to herself a liferent only thereof, and to the lawful issue of her body, equally among them, the fee thereof."

Now, it is contended that the effect of this declaration is to alter the previous bequest from a bequest of fee to one of liferent merely, and that, Catherine Bruce Lindsay having deceased after majority, but without issue, the fee of this bequest is undisposed of.

It is certainly strange that there should be two clauses in the same deed so apparently contradictory, but if we read them in accordance with the construction to which I have just referred, we should not, in my opinion, be giving effect to the desire of the testator. I think he intended, for the reason stated by him, that his two elder children should receive an equivalent for their mother's fortune in the shape of the heritable property and this sum of £1000 respectively. That was the leading idea, but it naturally occurred to the testator, that as he was settling the shares of residue which his daughters were to take in the way I have already mentioned, it might also be quite proper that in the event of Catherine Bruce Lindsay being married, this £1000, as well as her share of the general residue, should also be settled so that the fee might be secured to her children. Therefore the testator says that while his trustees are to hold the provision during his daughter Catherine's minority, they are on her majority to settle it so as validly and effectually to give her a liferent only, and the lawful issue of her body the fee. But that is plainly on the condition that she marries and has children. Excepting in that event the bequest takes effect according to its terms in the earlier part of the deed. Even if there are children, theirs is only a contingent right, and if they predecease their mother the bequest takes effect, as I have said, according to its own absolute terms. The result is that until Catherine Bruce Lindsay's death it cannot be seen whether the bequest which had vested in her had so vested absolutely in fee, or only in liferent allenary. Now that she has died unmarried and without issue, it becomes apparent that what vested in her was an absolute fee, and that absolute fee passes to her executor.

If I had thought it necessary to construe the term "liferent allenary" in a different way, from technical reasons, I should not have been prepared to come to this result. But I give the fullest effect to the term, on that event occurring in which alone it was the intention of the testator to create such a right, and that is all I am called on to do.

No. 60. The LORD JUSTICE-CLERK, LORD DEAS, LORD MURE, and LORD SHAND concurred.

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LORD GIFFORD.—The question in this case really is, what was the true intention of the testator, the late Thomas Lindsay, in reference to the special legacy of £1000 bequeathed by him to his daughter, the late Catherine Bruce Lindsay? Of course, that intention must be gathered solely from the terms of the late Mr Lindsay's trust-settlement and codicil, and from the words which he has used in these deeds. But if, upon a sound construction of these testamentary deeds, and of the whole expressions contained therein, it can be made to appear what was the true wish and intention of the testator, then that wish and intention must receive effect, and the testamentary trustees must do whatever is necessary for this purpose. There is no technical rule forbidding this, for we are not construing a deed of conveyance or other deed by which anything is professed to be done, and the terms of which must receive only their legal and their fixed meaning. We are construing a deed of settlement which effectually conveys the testator's whole estate to his trustees, who are fully vested therewith, and the only question is, how are these trustees to carry into full effect the real intentions of the testator? Whatever can be shewn from the deeds to have been the real will of the testator, that will the trustees are bound to make effectual.

Now, it appears from the deed itself that the testator was twice married, and he informs us, in the third purpose, "that I acquired considerable means by my deceased wife, Catherine Bruce or Lindsay," who conveyed her whole estate to him by a certain mutual disposition, dated in 1852. Upon this narrative the testator proceeds to say,—“It is my wish that the following provisions to my children by the said Catherine Bruce or Lindsay, viz., William Bruce Lindsay and Catherine Bruce Lindsay, should be preserved or made for them over and above the other provisions herein contained in their favour.” He then directs his trustees to convey his dwelling-house and pertinents in Charlotte Street, Leith, which he values at £1000, to his son William, one of his two children by the first marriage, and in order “to make my said daughter, the said Catherine Bruce Lindsay” (his other child by the first marriage) “equal thereto, I leave and bequeath to her the sum of £1300 sterling, which legacy shall be payable at the first term of Whitsunday or Martinmas that shall happen six months after my decease.” This sum of £1300 is plainly an accidental error for £1000, which was the proper sum required to produce equality, and to which sum it was accordingly restricted by the codicil.

If there had been nothing else in the deed, the case would have been perfectly clear. The testator was survived by all his children of both marriages, and his daughter Catherine by the first marriage took upon her father's death this legacy of £1000 over and above her other provisions, just in the same way as the son by the first marriage got the Charlotte Street house over and above his other provisions, and thus the intention of the testator would have been effectuated.

But a difficulty is created by the subsequent parts of the deed, and in particular by the ninth purpose thereof. By this purpose the testator directs that upon the death of his wife, or upon her entering into a second marriage, the whole residue of his estate shall be divided into as many parts as may be necessary to give each of his whole children, by both marriages, the whole number being seven, an equal share of said residue, the lawful issue of those predeceasing taking their parent's share, and he then proceeds, “and in regard to the applica-

tion of my means so divided for the benefit of my children, I hereby direct as follows, viz. :—I direct that the legacy of £1000 sterling to the said Catherine Bruce Lindsay shall be held by the trustees for her sole behoof during her minority, and shall, upon her attaining majority (with any savings of interest that may have resulted therefrom) be settled or placed so as validly and effectually to provide to herself a liferent only thereof, and to the lawful issue of her body, equally among them, the fee thereof; and as regards the respective shares of my said estate, heritable and moveable, both under these presents and under the antenuptial contract of marriage aforesaid (exclusive of the £1000 legacy to the said Catherine Bruce Lindsay), I hereby provide that the same shall vest in each of my children on my death, and, in the case of a posthumous child, on the birth thereof," and he then provides that in the case of his daughters their shares should be settled on them for their liferent use alienably, and on their lawful issue in fee. There is a subsequent clause which provides that in case any of the testator's children, born or to be born, including his two children by his first marriage, should die without leaving lawful issue before their respective shares shall have vested in them or become payable, then their shares shall accresce to the surviving children. I think there are no other clauses in the deeds bearing upon the present question.

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Catherine Bruce Lindsay, the daughter by the first marriage, survived her father and attained majority, but she died unmarried and intestate on 24th January 1879, and the question now is, what becomes of her special legacy of £1000?

I am of opinion that that legacy vested in Catherine Bruce Lindsay in fee, and now belongs to her only surviving full brother, William Bruce Lindsay, as her only executor and nearest of kin.

The direct bequest in the first part of the deed is in express terms, and absolutely unqualified—to Catherine Bruce Lindsay £1000 sterling, payable at the first Whitsunday or Martinmas six months after the testator's death. Under this bequest Catherine Bruce Lindsay, who survived the testator and outlived the term of payment, took the legacy absolutely to herself. It vested in her at her father's death. I do not think that the subsequent provisions of the deed in any way cancel or destroy the original bequest. Their intention is not to diminish Catherine's share, but only to secure it for her children, in case she should have any, and accordingly I read the provision directing the legacy to be held so as to provide her a liferent only thereof, and the fee to her children as a conditional provision only in the event of her having and leaving children. The legacy was to be hers by being secured to herself in liferent, and her children, if any, in fee, and it never could have been the intention of the testator, in the event of her dying unmarried, and dying early as she did, to deprive her of the legacy altogether and of all power of testing thereon, and to send it to his whole other children, including his five children by his second marriage. It is here that the specialty seems to me so important that the testator intended this legacy, and the house corresponding thereto, given to his son by the first marriage, to be in substance estates left to them by their own mother, the testator's first wife, and it would utterly defeat this intention if either William's house or Catherine's legacy of £1000 should accrue equally among the children of the second marriage. This would be to deprive the house and the legacy of £1000 of their character of succession by the first family to their own mother, the testator's first wife.

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But apart from this, I am of opinion that the legacy of £1000 absolutely vested in Catherine Bruce Lindsay notwithstanding the direction given to the trustees to secure the sum to herself in liferent only, and to the lawful issue of her body in fee. There is no repugnancy between the direct bequest of the sum to the lady herself and the direction to secure the fee to her children. Both must be read together, and the effect is that if she have no children the fee remains in herself. Suppose the trustees had actually settled the sum in terms of the trust-deed, as indeed they were bound to do on the death of the testator, and while the said Catherine Bruce Lindsay was still alive and unmarried, or suppose that she were alive still and that the question now was, in what terms should the sum be settled, she being still unmarried? I think the answer must be that the sum should be settled by a trust or otherwise to Catherine Bruce Lindsay in liferent, for her liferent use only, and to the issue of her body in fee, whom failing, to Catherine Bruce Lindsay herself, and her nearest heirs and assignees whomsoever. I think that this, and nothing but this, was the true intention of the testator as gathered from his deed, and I should so have decided the question had Catherine been still alive and unmarried. This would have given Catherine the full fee in the event of her dying without issue. Of course the result must be the same whether the sum was formally settled by the trustees during Catherine's life or not.

The alternatives put in the case are, I think, both excluded by the sound construction of the trust-disposition and settlement. It was not the intention of the testator that Catherine's legacy of £1000 should, in the circumstances which have emerged, fall into residue, and still less that it should, as estate undisposed of, fall into intestacy, and pass to the heirs *in mobilibus* of the testator.

I am therefore of opinion that the first question should be answered in the affirmative, and the two alternative questions in the negative.

LORD YOUNG.—The will in question first bequeaths a legacy of £1000 to the testator's daughter Catherine, so that it should vest *a morte testatoris*, and then declares a trust with respect to it which, having regard to the terms of the trust, might exhaust it or not according to an uncertain future event, which being the death of the legatee with or without issue was incapable of being ascertained before the legatee's death. According to the trust, the trustees were to pay the income of the legacy to the legatee during her life, and on her death, leaving issue, they were to pay the capital to them, whereby, of course, the legacy would be exhausted and the trust ended. If she died without issue, as in fact she did, the trust was ended, there being no longer any trust-purpose to fulfil; but the trustees having the capital of the legacy in their hands the question is, what are they to do with it? and that is the question which we have to decide.

It depends, I think, on the consideration whether the trust I have referred to, subsequently declared with respect to the legacy previously bequeathed, operated as a revocation of the bequest, leaving the rights of parties to depend entirely on the declaration of trust; or whether the bequest remained subject only to the trust subsequently created, and I am of opinion that the latter is the right view. I think the testator put the legacy, which he had bequeathed so as to vest *a morte testatoris*, in trust for a specified purpose, and that, subject to this trust, the legacy subsisted as originally constituted in the same way exactly as if the trust had been created by the legatee, whether voluntarily or pursuant to a direction in the will. I am accordingly of opinion that on the termination

of the trust by the legatee's death without issue, the legacy was set free of the only burden that was ever upon it, and became payable to her legal representative, just as it would have become payable to herself had the trust been such as might have been fulfilled and ended in her lifetime without exhausting the legacy. Had the trust been for a purpose that disappeared before the testator's death or was fulfilled thereafter, living the legatee, I think it not doubtful that the legacy must have been paid in terms of the unrevoked bequest. The fulfilment of the trust on the legatee's death (the legacy being extant) no otherwise varies the case, in my opinion, than that the legatee being dead, her representative takes her place.

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THIS interlocutor was pronounced:—"The Lords of the Second Division having, along with the Judges of the First Division, heard counsel for the parties on the special case, Find in terms of the unanimous opinion of the Judges of both Divisions, and in answer to the first question, that the legacy of £1300 mentioned in the third purpose of the trust-settlement of Thomas Lindsay, the testator, and restricted to £1000 by the codicil thereto, falls to the party of the second part as the executor of Catherine Bruce Lindsay: Find it unnecessary to answer the second and third questions, and decern," &c.

JAMES W. LINDSAY, W.S.—JOHN T. MOWBRAY, W.S.—Agents.

WILLIAM LANDLESS, Pursuer.—*Asher*—*George Burnet*.

No. 61.

WILLIAM WILSON, Defender.—*Kinnear*—*Rhind*.

Dec. 15, 1880.
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Recompense—Implied Contract—Architect's remuneration for preparation of plans.—An architect prepared detailed plans for covering a piece of ground with buildings to be erected by the proprietor. The buildings were not proceeded with, but the proprietor used the plans to his advantage in dealing with a purchaser of the ground. In an action by the architect for payment of his account the proprietor denied liability on the ground that the plans had been furnished upon the footing of there being a competition. *Held* that, assuming the fact as stated by the defender, it lay upon the employer to prove that the employment was gratuitous, which he had failed to do, and decree given accordingly.

THIS was an action by William Landless, architect in Glasgow, for payment of £98, 0s. 6d., the principal item in which was a sum of £87, the fee charged by him for certain building plans and a report prepared on the defender's employment in connection with certain subjects belonging to the latter in Wood Lane, Glasgow. The buildings were not erected. The pursuer's charge was at the rate of 1 per cent on the estimated cost of executing the buildings. It was averred that the defender had made extensive use of the plans and report in securing a purchaser for the subjects, and that owing to them the price obtained was much larger than it would otherwise have been.

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The defender stated that he had not employed the pursuer, and had authorised no one to do so, but that, his agent having introduced him to the pursuer, who was just beginning business, the pursuer had offered to compete for the plans, upon the understanding that he was to have no claim unless his plans were adopted. A Mr Gordon had also furnished plans.

After proof, the result of which sufficiently appears from the following findings and from the opinions of the Court, the Sheriff-substitute (Lees), on 11th December 1879, found "(1) That the pursuer, on the employment of the defender, prepared the plans to enable the defender to carry out the project, which he stated to the pursuer he entertained, of

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building on the ground belonging to him specified on said plans : (2) That the pursuer gave these professional services on the express footing that the defender intended to build on said ground, and that if his plans were adopted he would be paid in usual form : (3) That the defender having obtained possession of said plans and other documents, instead of using them on the footing on which they had been prepared, submitted them to a purchaser, and in a considerable measure in consequence of the inducements offered by the plans succeeded in selling the property at a large profit : And (4) that the pursuer is in these circumstances entitled to claim payment from the defender for his professional services." And he further made a remit to ascertain the proper remuneration for the preparation of the reports and plans.

The Sheriff (Clark), on 6th February 1880, adhered.*

The reporter subsequently stated that the percentage charged for the plans was reasonable, and decree was given for £94, 17s. 6d.

The defender appealed to the Court of Session, and argued ;—There was no legal category under which he could be made liable. The plans were got merely upon approbation. Payment was to be made only if they were used. Even if the buildings had been erected it did not follow that Mr Landless' plans would have been used. It was only if the pursuer could qualify loss that he was entitled to succeed. The English cases quoted all rested upon a wrong done to the plaintiff. To establish a case of recompense there must be an actual advantage and specific gain shewn.¹

Answered for the pursuer ;—Employment was proved. The *onus* was upon the defender to shew that it was gratuitous. Failing his doing so there was an implied contract to pay. At any rate, as the defender had benefited by the pursuer's services, there was a good claim on the principle of recompense or *quantum meruit*.²

LORD PRESIDENT.—This action was raised by Mr William Landless, an architect in Glasgow, to recover payment of an account from his employer, Mr Wilson, who was the proprietor of building-ground in various parts of Glasgow. The sum sued for is £98, 0s. 6d., but the defence is now confined to one item of the account amounting to £87, for the preparation of plans for buildings to be erected on subjects situated at Wood Lane, Broomielaw, and relative attendances, &c. The amount of this charge, if the employment be held to be on the usual terms, is not a matter of dispute ; it was settled by a remit to a person of skill, who decided that it was fairly charged at the ordinary rates. But the defence is that the pursuer undertook to prepare the plans gratuitously. Now, I need not say that that defence throws the whole *onus probandi* on the defender, to shew that the pursuer did undertake to make them for nothing.

In estimating the proof of that defence the first thing is to look at the plans themselves ; they are of a very elaborate nature, and are measured plans in this

* The Sheriff referred to the following cases :—Pricket v. Badger, 1856, 1 C. B., N. S., 96, 26 L. J., C. P., 33 ; Inchbald v. The Western Neilgherry Coffee Co., 1864, 34 L. J., C. P., 15, 17 C. B., N. S., 733 ; Moon v. Witney Union, 13 Bingham's Reports, p. 815, a case very similar to the present ; 2 Smith's Leading Cases, pp. 25 and 41.

¹ Fraser v. Vans Agnew, April 2, 1831, 5 W. and S. 249 ; Innes v. Hepburn, May 18, 1859, 21 D. 832.

² Besides the cases quoted by the Sheriff—Stair, i. 3, 8 ; Erskine, iii. 3, 85 ; Pinkerton v. Addie, June 22, 1864, 2 Macph. 1270 ; Moffatt v. Laurie, 1854, 24 L. J., C. P., 56, 15 C. B. 583.

sense, not only that the whole space of ground belonging to the defender at Wood Lane is disposed of in the plans and covered with buildings, but every separate tenement and room and passage and staircase is laid down with mathematical accuracy. In addition, there was an elevation of the building, and the whole were carefully prepared, and accompanied, first, by one report, and then by another, in reference to the probable rents likely to be obtained by the defender from tenants. Now, *prima facie*, an undertaking to prepare such plans gratuitously is an exceedingly unlikely thing, and if it is to be proved, it must be by very distinct evidence as matter of contract.

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Now, what is the evidence in support of the averment here? The defender himself, and his agent Mr Buchan, say that the defender resolved to take plans from two architects in competition, the other architect being a Mr Gordon, and the arrangement made with him is distinctly enough proved. Mr Gordon himself, as well as the defender and his agent, says that he undertook to make his plans gratuitously, and such an undertaking was perhaps not surprising, as we see from the evidence that Mr Gordon's plans were rather in the nature of sketches, and not plans according to measurement. Now, an architect may very naturally offer to supply sketches gratuitously, especially to a former employer, even without any particular stipulation, but it was apparently stipulated that Mr Gordon's plan should be so furnished. The question is, was this also the case with the pursuer's plans? Neither the defender nor his agent venture to say distinctly that it was proposed or assumed that Mr Landless was not to be paid for his work. There is not a word to that effect. They do say that he was told there was to be a competition of plans, and though Mr Landless denies that, I am willing to take it for granted that he was mistaken in this respect. There was room for a mistake, looking to the evidence of the defender and his agent, and I am willing to take it that he made the mistake, and ought to have understood that there was to be a competition. But is it implied in the so-called competition that the competitors were not to be paid? If so, we must know what kind of contract it is in which that condition is said to exist. Conditions may be easily implied in well-known and nominate contracts, but in unusual and innominate contracts I have always clearly understood that nothing can be left to implication. It is here alleged by the defender that there was to be a competition of plans for these buildings, which were to be private buildings, and not public edifices such as a church or a town-hall, and that we are told by the pursuer and Mr Gordon (and they are uncontradicted) is quite unknown in practice. Mr Gordon says, in his experience of nineteen years he never heard of such a thing,* and the pursuer's evidence is to the same effect. It would then have

* Mr Gordon, who was called for the defender, stated,—“I have been nineteen years in business. I remember of defender speaking to me about a property he had acquired at Wood Lane, Broomielaw. . . . He told me if I chose to prepare a sketch, shewing what could be done with the ground, and that sketch satisfied him, that he might build, but I must do so on my own responsibility, as he would be under no obligation to pay any fee, and he asked if I would undertake on these terms to prepare a sketch. I prepared a sketch, and sent it on to defender. The sketch I made was just plans of a proposed building. There was no elevation plan. I did not think the elevation plan was necessary. I prepared ground plans and a report shewing the rental. They were not the ordinary plans I send in when competing. Usually, if asked to compete, it depends on the conditions of the competition what you send in. Usually an almost complete set of plans is submitted; but the plans I submitted to defender were

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been an unusual, in fact an unprecedented, proposal to have competing plans for these private buildings, and there is no room for implication of such an arrangement. In the case of competing plans for public buildings, so far as my experience goes, it is usual to issue in writing the terms and conditions of the competition, and the competitors are generally paid in one way or the other, for besides the prospect of being the successful candidate there is often a provision for a prize to the second and even the third, but it is always a matter of stipulation in each case. It would be an extraordinary result in the case of plans for private buildings to hold that a competitor was not to be paid. On that ground I think the defender has failed to establish his defence.

But the other aspects and circumstances of the case go to confirm that view. The defender, it seems, made up his mind that he could get the best and most available plans from the pursuer. There were none of those constant interviews between the defender and Mr Gordon which passed between him and the pursuer. These latter took place once a-week or oftener, for the purpose of arranging, first, as to the ground plans, then as to the elevation, and then as to the terms of the report for the purpose of bringing out the rental to be derived from the scheme. In fact both parties endeavoured to make the plans and expected rental as attractive as possible, and having done that, Mr Wilson seems to have made up his mind to sell the property and not build upon it at all, provided he could get the price he desired. With this view he wished to impress intending purchasers with the idea that the ground was very available notwithstanding its apparently irregular form. That irregularity was got over in what I think was a most ingenious manner by the pursuer's plan; and he so influenced very strongly the minds of the intending purchasers. Mr Carrick, the purchaser, himself says it was so. Now, all that seems to confirm the pursuer's case—that he prepared the plans on the same footing as any other architect, and for the usual rate of remuneration. It is not possible to suppose, if he believed he was to get nothing for his plans, that all these repeated meetings with the view of bringing them to the greatest possible perfection would have taken place. The plans themselves speak loudly in that direction—they must have cost a great deal of money as well as labour.

On the whole matter, I have no doubt that the defender has entirely failed to prove that this work was intended to be done gratuitously, and I think the pursuer is entitled to receive the usual remuneration.

LORD DEAS and LORD MURE concurred.

LORD SHAND.—There is a conflict of evidence in this case as to the terms of

quite sufficient for his purpose. I shewed how the ground could be laid out, and the return, and from that he could know whether it would be worth his while to go on with the buildings. . . . It is not very usual to ask for competition plans for that class of property at all, but when they are made it is usual to give a report of the anticipated rental. I should say that with competition plans in a case of this kind, it would be necessary to send in a report. . . . I made no charge for the plans I made.

"Cross.—I do not think it is usual for owners of private property to ask architects to send in competitive plans. In my experience of nineteen years this is the first instance of it. And I know pretty well the custom among other architects. I do not recollect at this moment of having heard of a competition in such a case as this. Competitive plans for churches, municipal buildings, and the like, are well known in the profession."

the contract between the parties. But, having in view the fact that the defender alleges a contract of a very extraordinary nature, I agree in thinking that he has entirely failed to discharge the *onus* of proving it.

But I think it right to say that if I had been of opinion that the case was one of a competition of plans between the two architects, and the defender had afterwards thought fit not to build at all, I should have had great difficulty in holding that he would have been entitled to say to the competitors, "You shall be paid nothing for the plans and labour you have bestowed upon me." My impression is that each of them would have been entitled to receive a *quantum meruit*.

But there is a clearer ground upon which we can proceed. The defender undoubtedly had these plans prepared (let us assume, upon the footing that there was a competition which was frustrated by the defender's change of mind), and he made use of them to obtain an advantageous bargain with a purchaser. I am of opinion that, in these circumstances, he was bound to pay for them. Suppose that after getting the plans he had used them for other subjects for which they might be suitable, can there be a doubt that he would have been obliged to meet the claim? It seems to me to make no difference that the plans should have been used for the purpose of enhancing the value of the ground in the eyes of a purchaser, and not, as intended, for the erection of Mr Wilson's buildings.

I should not be very careful to enquire whether the legal principle underlying this case is that of recompense, or of implied contract or obligation. The law of recompense is stated thus in Bell's Principles, sec. 538—"Where one has gained by the lawful act of another, done without any intention of donation, he is bound to recompense or indemnify that other to the extent of the gain." The services of the pursuer were taken advantage of, and I think there ought to be a fair return for them.

On the whole I agree with your Lordships that the pursuer is entitled to succeed.

THE COURT, on 16th December, pronounced this interlocutor:—"Find that the pursuer was employed by the defender to make plans for covering with buildings a certain property belonging to the defender at Wood Lane, in the Broomielaw of Glasgow: Find that the pursuer, on the said employment, prepared the plans No. 9/6 of process, and delivered them to the defender accompanied by his reports respecting the amount of rental which might be expected to be obtained from the proposed buildings when completed: Find that the defender did not proceed to build on the said ground, but sold the same as it stood at a large advance in the price which he had recently paid for it: Find that in negotiating for said sale the defender exhibited the said plans and reports to the purchasers, and that the purchasers were greatly influenced by the exhibition of the said plans and reports, as proving the capabilities of the said ground in purchasing the said ground at the price they paid for it: Find that the defender has failed to prove that the pursuer undertook to prepare the said plans gratuitously or otherwise than on receiving remuneration at the usual rate: Find that the sum of £87 claimed by the pursuer for the said plans is charged at the usual rate: Therefore refuse the appeal, and decern," &c.

No. 62. PETER HASTIE (John Aim's Trustee) AND OTHERS, First, Second, Third, Fourth, and Fifth Parties.—*Mackintosh.*

Dec. 15, 1880.
Aim's Trustee
v. Aim, &c.

JANE AIM OR HASTIE AND OTHERS (Mr John Aim's Next of Kin), Sixth Party.—*Dickson.*

JAMES BARRIE AIM, Seventh Party.—*Dickson.*

Succession—Testamentary writing—Deed purporting to convey or bequeath land—Titles to Land Act, 1868 (31 and 32 Vict.), c. 101, sec. 20.—There was found in the repositories of a deceased an informal holograph document in these terms:—"All furniture, books, and personal effects to A absolutely, and the free liferent use of all my other means and estate. After A's decease, the whole of the estate to turned into cash at the time my trustees deem most suitable for best realising, and proceeds safely invested for disbursing as under." There then followed certain pecuniary legacies and a bequest of residue, and a nomination of trustees "for carrying out the foregoing." Held that this document being conceived in terms applicable to the deceased's whole estate, heritable as well as moveable, and being a clear expression of his last will, and therefore sufficient to confer on the trustees named "a right to claim and receive" his moveable estate, was also by virtue of the 20th section of the Titles to Land Act, 1868, equivalent to a general disposition in their favour of his heritable estate.

2D DIVISION.
I.

JOHN AIM died on 24th February 1880 at Bournemouth in England. After his death there was found in his repositories the following document written upon two sides of half a sheet of note-paper, and addressed to his mother, "Mrs John Aim":—"All furniture, books, and personal effects to Mrs Jno. Aim, absolutely, and the free liferent use of all my other means and estate. After Mrs A.'s decease, the whole of the estate to turned into cash at the time my trustees deem most suitable for best realising, and proceeds* safely invested for disbursing as under, viz., to John Aim, son of W. L. Aim, Pollokshields, on his attaining the age of twenty-one years, £300. In event of his predeceasing, the same to be equally divided between his two sisters, Catherine and Mary Jane, or the survivor of them (on their attaining their majority)." After two similar bequests, and a bequest of residue, the writing continued—"Trustees for carrying out the foregoing, I wish to name my two brothers and brother-in-law, and Mr Richard Lennie. JOHN AIM, 8 March 1877."

The deceased left a cottage at Kilbride, Dunoon, worth about £500, containing furniture and other personal effects to the value of £35. He also left moveable property consisting of shares in the Dunoon Gas Light Company, and of money in bank to the value of about £1700.

Peter Hastie, the deceased's brother-in-law, was the sole accepting and acting trustee.

James Barrie Aim, his immediate younger brother, was his heir-at-law.

The estate having become divisible by the death of Mrs John Aim, the testator's mother, a special case was presented to the Court for the various parties interested under the will on the following questions in law:—"1. Whether the document referred to is a valid testamentary settlement and conveyance of deceased's heritable and moveable estates in favour of the parties therein named as trustees, and whether the succession of the deceased is regulated thereby; or whether the deceased must be held to have died intestate as regards his heritable and moveable estate, or either of them? 2. Whether the party of the first part, as sole acting trustee foresaid, is entitled to complete titles for effectually vesting him in the right and estate of the deceased; and whether the said James Barrie Aim, as heir-at-law of the said deceased is bound to make up a title to

* The word "proceeds" interlined in pencil.

the heritable estate and convey it to the trustee acting under the said will? 3. To what portion of the moveable estate, in the event of the will being sustained, did the testator's mother, Mrs Aim, succeed under the clause, 'All furniture, books, and personal effects to Mrs John Aim, absolutely'?"

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Argued for the trustee, and for the beneficiaries under the will;—1. The document in question was a valid testament, informal no doubt, but distinctly expressing the last will of the deceased. It was, therefore, sufficient to confer upon the trustee a right to claim and receive the moveable estate of the grantor. Prior to 1868, admittedly, it would not have in any way affected heritable estate, but the 20th section* of the Titles to Land Act of that year rendered it effectual to confer the same right to claim and receive heritage which formerly it would have conferred to claim and receive moveables only, provided its words of bequest or expression of will bore reference to heritage. Now, here the testator gave his mother the life interest use of "all my other means and estate," that is, other than his furniture and personal effects, and after her death he directed "the whole of the estate to be turned into cash." These expressions were wide enough to shew that he was dealing with his whole estate, and did not mean to except therefrom the cottage in which he had lived, which was his only heritable property. The 20th section of the Act of 1868 therefore made this document sufficient to carry this heritage to the trustee to the same effect as the moveable property. 2. Under the 20th section of the Act of 1868 the trustee might either make up his title by notarial instrument, using the will as a general disposition, or he might call upon the heir-at-law to make up a title and grant a conveyance in his favour. The former course was facilitated by the 46th section of the Act of 1874. 3. Mrs John Aim was only entitled

* 31 and 32 Vict. c. 101, sec. 20.—"From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same in the event of his death, not only by conveyance *de præsenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies, on the ground that the grantor has not used with reference to such lands the word 'dispose,' or other word or words importing a conveyance *de præsenti*; and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands, within the meaning of the 19th section hereof, by the grantor of such deed or writing in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create and shall create in favour of such grantee or legatee an obligation upon the successors of the grantor of such deed or writing to make up titles in their own persons to such lands, and to convey the same to such grantee or legatee; and it shall be competent to such grantee or legatee to complete his title to such lands in the same manner and to the same effect as if such deed or writing had been such a general disposition of such lands in favour of such grantee or legatee, and that either by notarial instrument, or in any other manner competent to a general dispositive."

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Argued for the heir-at-law, and for the next of kin, both of the testator, and of his mother, Mrs John Aim ;—1. The document in question was a mere jotting of particulars, evidently intended as instructions for an agent, and could not reasonably be regarded as the deliberate and completed expression of the testator's last will.¹ 2. But even if it was a proper testament it only carried moveables. It did not meet the requirements of the 20th section of the Act of 1868. That section validated deeds purporting to be settlements of lands, but not expressed in the terms required by the then existing law or practice for the conveyance of lands; but it applied solely to deeds the bequeathing words of which bore reference to lands. But here there were no words having reference to lands at all. There was nothing either express or implied to shew that the testator was making any attempt, however informal, to convey his heritable property. To such a case the enactment was not intended to apply.² 3. Mrs John Aim, the testator's mother, was entitled under the term "personal effects" to the whole personal or moveable property of the deceased.

LORD JUSTICE-CLERK.—I see no reason for entertaining doubt here. This document was found in the repositories of the deceased enclosed in an envelope addressed to Mrs Aim. It is a carefully written and distinct document. Whether it was intended or not as a memorandum of instructions to a law-agent for the preparation of a formal settlement is of no moment.

The first question we are asked to decide is, whether it carries heritage under the 20th section of the Act of 1868? Now, some questions may arise no doubt under that enactment, but I am of opinion that the construction of the section is clear enough. It provides (1) in reference to heritage that it may be conveyed by *mortis causa* deeds or writings. (2) It provides that the word "dispone," which was formerly essential, shall be so no more. (3) It provides that heritage may be conveyed by testament provided words are used in regard to the heritage which if used in regard to moveables would have been sufficient to carry them. And then (4) that such testamentary deed or writing shall be equivalent to a general disposition under the 19th section of the Act, and shall create an obligation on the heir-at-law to make up a title and convey to the granter accordingly, or the granter may make up his title as on a general disposition. That, I take it, is the meaning of the clause.

But then it is objected that in the present case heritage is neither conveyed, nor bequeathed, nor even referred to, there being merely a direction that the whole of the truster's estate is to be turned into cash and the proceeds safely invested for disbursing in manner directed. This, however, I cannot think to be a sound objection, and I am of opinion that this document will effectually carry heritage under the 20th section of the Act of 1868; and looking to its whole language I am of opinion that it is perfectly clear the deceased meant to convey his heritage, and under the above section of the Act competently did so.

The cases which have been quoted to us are not on all-fours with the present. The case of *Lowson v. Ford*, 4 Macph. 631, was a very remarkable one, but far

¹ *Lowson, &c. v. Ford*, March 20, 1866, 4 Macph. 631, 38 Scot. Jur. 325; *Forsyth's Trustees v. Forsyth*, March 13, 1872, 10 Macph. 616, 44 Scot. Jur. 353.

² *Urquhart v. Dewar*, June 13, 1879, *ante*, vol. vi., p. 1026.

narrower than this. There was no testament nor words of bequest, but simply a list of names with sums of money appended. It was certainly signed, but the Court refused to give effect to so bare an expression of the intention of the person who framed it.

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I think, then, it is clear (1) that the first question must be answered in the affirmative. The conveyance is a good one, because words have been used in it with regard to heritage sufficient in regard to moveables to carry them. (2) It follows that the heir-at-law is under obligation to make up a title under the 20th section of the Act of 1868, and besides section 46 of the Act of 1874 also applies, and will enable the trustee to make up a title notwithstanding that there is no direct conveyance to him. (3) This question is chiefly a matter for common sense. The collocation of words, however, seems clearly to infer that Mrs Aim was to get the personal effects as contained in the inventory only.

LORD GIFFORD concurred.

LORD YOUNG.—I am of the same opinion, and I have no doubt whatever about the case. It is true, I think, that the document before us is a proper will and no more. That which is commonly called a testament is not a conveyance of either heritable or moveable estate. It contains no words of conveyance. It has operation given to it, but that is in deference to the will of the deceased proprietor therein expressed. A will may contain a conveyance, and often does ; but it is not necessary that it should do so. I speak of it without reference now to the changes in the law made by the 20th section of the Act of 1868. Before it was passed the proper purpose of a will or testament was to express the will and intention of the deceased with respect to the disposal of his personal estate, and the written instrument under his hand doing so was given effect to as the last will or rather as the emphatic expression which disclosed the will in his mind at the last moments of his rational existence. If he himself named a person to carry his express wishes into effect, the law, by confirming him executor, armed that person with a title to the deceased's moveable property, and his duty was to execute the will of the deceased proprietor with respect to it ; and even where he named no executor, but simply stated what his will was, the law appointed an executor to carry out that will, and confirmed him, and vested him with a title to the property, his duty being to do with respect to it according to the mere wish of the testator.

That was the law of the land with respect to last wills and testaments before the Act of 1868. The only exceptional case was where the will contained an express conveyance of some specific subject. It then operated as a conveyance, and the party in whose favour it was made took independently of the executor altogether. This distinction will be found explained by the text writers and illustrated by decisions. But now, since 1868, according to my own view of clause 20 of the Act of that year, heritage is placed in the same position as moveables, not with respect to the conveyance, but with respect to the settlement of succession thereto. Formerly a proprietor, if he wished to settle his heritage, could not do so by simply declaring his will ; the only mode of effecting his purpose was by making a *de præsenti* conveyance, and I think it has been expressly held that a conveyance in words to operate as a conveyance on death or six months after death was bad, because it was not a conveyance *de præsenti*. A conveyance *de præsenti*, though not published, was requisite. But

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under the Act of 1868 wills were made applicable to heritage just as to moveables, and the words used in the Act are material, for not only may you now convey heritage in the same manner as moveables, but you may affect heritage by the use of any words which, without directly conveying, will give right to moveables. Now, what words would confer on executors a right to claim and receive moveables? Why, any words expressing distinctly the deceased owner's will. Suppose he said, "I wish £1000 to be divided amongst my three children," would the words be enough to confer on them a right to claim their share of the £1000? There can be only one answer. Well, the same words which would confer a right to moveables are under the Act of 1868 to confer a right to heritage if used with reference to heritage. Well, then, I use them with reference to heritage. "I wish my lands of A to be divided amongst my three children." I apprehend the effect of that is as clear as anything can be. Let me give another illustration. A list of legatees or persons intended to take the moveable estate of the deceased is quite good. If a proprietor say that he wishes his estate to be divided so that A shall get £500, B a house, C a bit of land, and so on; in short, if he places opposite the names of some sums of money, and of others houses or land, shall we say that the words which are sufficient to entitle the legatees to claim and receive the moveables are not sufficient to entitle them to claim and receive the houses or lands? To do so would be to contradict the language of the 20th section of the Act of 1868. Therefore, regarding this document as a will, as distinguished from a conveyance, and being of opinion that it was intended to settle the testator's heritable as well as his moveable estate, I am compelled to give it the same effect with reference to heritage as with reference to moveables. Parties being named for carrying that will into effect, they are bound to give it effect according to the testator's intention with reference to heritage as well as to moveables.

A question is put to us about the mode of making up a title, as the will does not contain a conveyance. No doubt to satisfy our system of titles to land a registrable conveyance is necessary. But that is hardly a matter on which to consult the Court. If we decide that the will is to have effect with respect to heritage the parties can have no difficulty in making up titles. The same thing came up the other day in the case of *Studd, supra*, p. 249.

THIS interlocutor was pronounced:—"Find (1) that the document referred to in this question is a valid testamentary settlement and conveyance of the deceased John Aim's heritable and moveable estate in favour of the parties therein named as trustees, and that the succession of the deceased is regulated thereby; (2) find it unnecessary to answer the second question; and (3) find that the portion of the moveable estate of the testator to which Mrs Aim, his mother, succeeded absolutely under his will, comprised all furniture, books, and personal effects in the testator's house at his death, and no other personal estate."

ALEXANDER MORISON, S.S.C.—J. & A. HASTIE, S.S.C.—Agents.

STRAITON ESTATE COMPANY (LIMITED), Pursuers.—*Kinnear—Jameson.*
 WILLIAM WALKER STEPHENS (Brash's Trustee), Defender.—
Sol.-Gen. Balfour—J. P. B. Robertson.

No. 63.

Dec. 16, 1880.
 Straiton Estate
 Co. (Limited)
 v. Stephens.

Superior and Vassal—Relief—Claim of relief for composition by purchaser against seller—Conveyancing Act, 1874 (Stat. 37 and 38 Vict.) cap. 94, sec. 4—Titles to Land Consolidation Act, 1868 (Stat. 31 and 32 Vict.) cap. 101, sec. 8.—A proprietor of lands entered with the superior in virtue of the Conveyancing Act of 1874, and liable to the superior for a casualty of composition, sold the subjects, and executed a disposition binding himself to relieve the purchaser of all casualties payable to the superior prior to the date of entry. The purchaser took infestment on the disposition, and the superior obtained decree against him for payment of the composition.

In an action brought by the purchaser against the seller for relief, *held* by the Second Division and four consulted Judges, *rev.* judgment of Lord Curriehill, (1) that at the date of the sale the ~~seller was bound to clear the subjects of liability for the casualty then exigible~~; and (2) that the purchaser, by accepting the disposition and recording the same, had not barred himself from enforcing the obligation of relief.

Question, whether, apart from the obligation in the disposition, the seller would have been bound to relieve the purchaser.

Relief—Expenses.—A superior obtained decree for payment of composition due by a vassal against the latter's singular successor, who, after notice, had defended the action. The singular successor, having been found entitled to relief from the vassal of the casualty, was *held* to be entitled also to the expense of his unsuccessful defence.

(*Vide Sivright v. Straiton Estate Co. (Limited)*, June 12, 1878, *ante*, vol. 2d Division, v., p. 922, and July 8, 1879, *ante*, vol. vi., p. 1208.)

The following narrative of the circumstances under which this action of relief was raised is taken from the Lord Ordinary's note:—

"The late Peter Brash, merchant in Leith, died on 8th November 1872, duly infest and entered with the superior in the Straiton estate, described in the summons. He left a trust-disposition and settlement, dated 6th February 1869, with relative codicil, dated 2d November 1872, by which he conveyed his heritable property, and, *inter alia*, the Straiton estate, to trustees, of whom the defender, William Walker Stephens, was the only acceptor. He made up his title to the said estate by notarial instrument, recorded in the Register of Sasines 9th July 1873, but his title was never confirmed by the superior, and the lands which had fallen into non-entry continued in that condition until the Conveyancing (Scotland) Act, 1874, came into operation on 1st October of that year. By that statute the defender, in virtue of his infestment, became the duly entered vassal of the superior. Thereafter, by disposition dated 10th November 1876, he sold the lands to the pursuers, who expedite infestment therein by recording the disposition on the 15th of that month, and by the operation of the statute became the duly entered vassals of the superior.*

* The portions of the Conveyancing Act, 1874, referred to in the case, were thus summarised and quoted by the Lord Ordinary:—

"The present question depends upon the construction of section 4 of the statute, and its sub-sections. Sub-section (1) declares the granting of writs by progress to be unnecessary for the completion of the title to land, and to be incompetent, and has thus rendered it no longer necessary for the heir or singular successor of a vassal to resort to the superior for an entry or renewal of the investiture as a necessary step in the completion of the title.

"In order, however, to maintain the feudal relation between the superior and vassal, it is enacted in sub-section (2) that every proprietor duly infest in the

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WILLIAM WALKER STEPHENS (Brash's Trustee), Defender.—

Sol.-Gen. Balfour—J. P. B. Robertson.

No. 63.

Dec. 18, 1880.
Straiton Estate
Co. (Limited)
v. Stephens.

Superior and Vassal—Relief—Claim of relief for composition by purchaser against seller—Conveyancing Act, 1874 (Stat. 37 and 38 Vict.) cap. 94, sec. 4—Titles to Land Consolidation Act, 1868 (Stat. 31 and 32 Vict.) cap. 101, sec. 8.—A proprietor of lands entered with the superior in virtue of the Conveyancing Act of 1874, and liable to the superior for a casualty of composition, sold the subjects, and executed a disposition binding himself to relieve the purchaser of all casualties payable to the superior prior to the date of entry. The purchaser took infestment on the disposition, and the superior obtained decree against him for payment of the composition.

In an action brought by the purchaser against the seller for relief, *held* by the Second Division and four consulted Judges, *rev.* judgment of Lord Curriehill, (1) that at the date of the sale the ~~seller was bound to clear the subjects of liability for the casualty then exigible~~; and (2) that the purchaser, by accepting the disposition and recording the same, had not barred himself from enforcing the obligation of relief.

Question, whether, apart from the obligation in the disposition, the seller would have been bound to relieve the purchaser.

Relief—Expenses.—A superior obtained decree for payment of composition due by a vassal against the latter's singular successor, who, after notice, had defended the action. The singular successor, having been found entitled to relief from the vassal of the casualty, was *held* to be entitled also to the expense of his unsuccessful defence.

(*Vide Sivright v. Straiton Estate Co. (Limited)*, June 12, 1878, *ante*, vol. 2d Division, v., p. 922, and July 8, 1879, *ante*, vol. vi., p. 1208.)

The following narrative of the circumstances under which this action of relief was raised is taken from the Lord Ordinary's note:—

"The late Peter Brash, merchant in Leith, died on 8th November 1872, duly infeft and entered with the superior in the Straiton estate, described in the summons. He left a trust-disposition and settlement, dated 6th February 1869, with relative codicil, dated 2d November 1872, by which he conveyed his heritable property, and, *inter alia*, the Straiton estate, to trustees, of whom the defender, William Walker Stephens, was the only acceptor. He made up his title to the said estate by notarial instrument, recorded in the Register of Sasines 9th July 1873, but his title was never confirmed by the superior, and the lands which had fallen into non-entry continued in that condition until the Conveyancing (Scotland) Act, 1874, came into operation on 1st October of that year. By that statute the defender, in virtue of his infestment, became the duly entered vassal of the superior. Thereafter, by disposition dated 10th November 1876, he sold the lands to the pursuers, who expedite infestment therein by recording the disposition on the 15th of that month, and by the operation of the statute became the duly entered vassals of the superior.*

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"The present question depends upon the construction of section 4 of the statute, and its sub-sections. Sub-section (1) declares the granting of writs by progress to be unnecessary for the completion of the title to land, and to be incompetent, and has thus rendered it no longer necessary for the heir or singular successor of a vassal to resort to the superior for an entry or renewal of the investiture as a necessary step in the completion of the title.

"In order, however, to maintain the feudal relation between the superior and vassal, it is enacted in sub-section (2) that every proprietor duly infeft in the

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"On 8th May 1877 William Henry Revell Bedell Sivright, the superior, raised a summons against the pursuers in the form prescribed by the Conveyancing (Scotland) Act, 1874, concluding that it should be found and declared that, in consequence of the death of the said Peter Brash, the vassal last vest and seized in the subjects, a casualty, being a year's rent of the lands, became due to the superior on 15th November 1876, being the date of the infestment of the pursuers, and concluding for payment of £1930, 19s. 2d. as the value thereof. After sundry procedure the Second Division pronounced an interlocutor on 8th July 1879¹ fixing the amount of the casualty at £824, 6s. 1d., with interest thereon at the rate of five per cent from the date thereof till payment. The pursuers paid the amount to the superior, with the expenses of process, and they have raised the present action against the defender to recover from him the amount so paid by them, and the expenses incurred by them to their own agents in defending the superior's action.

"The grounds of this claim of relief are thus stated in condescendence 7:—The defender was at the period when the Conveyancing Act, 1874, came into operation liable in payment of a casualty or composition, being a year's rent of the subjects in question. This was a burden affecting the

lands shall be deemed and held to be, as at the date of the registration of his infestment in the Register of Sasines, duly entered with his immediate lawful superior, to the same effect as if such superior had granted a writ of confirmation according to the previously existing law, and that whether the superior's own title had been completed or not.

"But as the granting and delivery of a writ of confirmation in the absence of any reservation of the claim for composition operated under the old law as a discharge of the composition, whether the same was paid at the time or not, sub-section 3 provides that 'such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu-right, for recovering, securing, and making effectual such casualties, feu-duties, and arrears, . . . shall continue to be available to such superior in time coming; but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could, by the law prior to this Act or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering.' The term 'casualty,' I may mention, is declared by the interpretation clause of the Act to include the composition payable by a singular successor.

"Sub-section 4 is as follows:—'No lands shall, after the commencement of this Act, be deemed to be in non-entry, but a superior who would, but for this Act, be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infest or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action; and any decree for payment in such action shall have the effect of, and operate as, a decree of declarator of non-entry according to the now existing law, but shall cease to have such effect upon the payment of such casualty, and of the expenses (if any) contained in such decree; but such payment shall not prejudice the right or title of the superior to the rents due for the period while he is in possession of the lands under such decree, nor to any feu-duties or arrears thereof which may be due or exigible at or prior to the date of such payment, or the rights and remedies competent to him under the existing law and practice for recovering and securing the same, and the summons in such action may be in, or as nearly as may be in, the form of schedule B hereto annexed.'

¹ Sivright v. Straiton Estate Co. (Limited), July 8, 1879, *ante*, vol. vi., p. 1208.

estate in the defender's hands, and for which decree might have been obtained against him by the superior. It was an implied condition of the contract of sale between the pursuers and defender that the pursuers should, upon payment of the agreed-on price, which was a full price, acquire the subjects free of all incumbrances; and this implied condition was, so far as regards casualties, made matter of express stipulation in the disposition of the subjects to the pursuers.' The express stipulation here referred to is the short clause usually inserted in all onerous conveyances of land, and is as follows:—'I bind myself, as trustee foresaid, and the trust-estate under my charge, to free and relieve the said disponees and their foresaids of all feu-duties, casualties, and public burdens.' By the 'Titles to Land Consolidation (Scotland) Act, 1868,' section 8, it is declared that a clause so expressed 'shall, unless specially qualified, import an obligation to relieve of all feu-duties or other duties, or services or casualties, payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry.' "

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The pursuers pleaded;—(1) The defender having sold the estate of Straiton to the pursuers for a full price, and as an unencumbered subject, is bound to relieve them of the casualty which ought to have been paid by the defender on his entry to the lands. (2) In respect of the obligation of relief in the disposition by the defender to the pursuers, the defender is bound to relieve the pursuers, as concluded for. (3) The pursuers, having incurred expenses in consequence of the defender having refused to relieve them when the claim was made, are entitled to recover the amount thereof, and, *separatim*, are entitled to the expenses beneficially incurred on the defender's behalf in reducing the amount of the said casualty.

The defender pleaded;—(2) The casualty sued for not having been due and payable at the date of the pursuers' entry, and not being a burden of which the pursuers are entitled to be relieved by the defender under their disposition, the defender should be assoilzied, with expenses. (4) On a sound construction of the disposition, and of the Conveyancing (Scotland) Act, 1874, the defender is not, in the circumstances, bound to relieve the pursuers of the sums sued for, or any part thereof.

On 19th July 1880 the Lord Ordinary assoilzied the defender.*

* "NOTE.—This action raises an important question as to the operation of section 4 of the Conveyancing (Scotland) Act, 1874, in reference to the clause usually inserted in onerous conveyances of land binding the seller to relieve the purchaser 'of all feu-duties, casualties, and public burdens.' I had occasion to consider a similar question in the case of *The Leith Heritages Company v. The Edinburgh and Leith Glass Company*, my judgment (which was acquiesced in) being reported in the Scottish Law Reporter, vol. xiii, p. 731, under date 8th June 1876. The question, which is undoubtedly one of great and general importance, having been again very ably and anxiously argued in the present case, I deemed it right to reconsider with all possible care the views expressed in *The Leith Heritages Company's* case, but the result has been to confirm me in my former opinion.

"The circumstances of the present case are as follows:—(given in narrative).

"Now, it is important to keep in view that, by the law as it stood prior to the commencement of the Conveyancing Act of 1874, although lands fell into non-entry immediately upon the death of the last-entered vassal, entitling the superior to the casualty of non-entry—i.e., to take and retain possession of the lands until the entry of a new vassal as heir or singular successor of the last vassal, and the payment by him of the relief or composition prestable in respect of such entry—the superior's right to the casualty consisted, to use the words of

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Erskine (Inst. II. v., sec. 29), merely of a 'claim which must be made effectual by an action for declaring that the lands have fallen into non-entry.' It must be observed, however, that this action was merely an indirect means of compelling the vassal's successor to enter and pay the composition, as the superior had no direct action to compel the successor either to enter or to pay the composition, the latter being only one of the conditions of entry. The lands, therefore, remained in non-entry, and in the hands of the superior, in virtue of his decree of declarator of non-entry, until the successor voluntarily came forward and asked to be received on payment of the composition.

"In short, neither the casualty of non-entry nor the composition (and the two things are entirely different) would ever be said to be 'payable or prestable' to the superior, until after his action was raised, and, in the case of the composition, until the successor had shewn his submission by asking to be received as vassal.

"It is thus quite clear that, had the Conveyancing Act of 1874 not passed, the present pursuers, after paying the price and accepting the disposition from the defender, and taking infestment thereon without reserving right to call upon the defender to complete any further title in his person, or to enter with the superior, would not, in the event of the superior raising against them an action of declarator of non-entry, have been entitled to insist upon the defender entering and paying the composition. It was no doubt not uncommon in practice for the purchaser, before accepting the disposition, to insist upon the seller entering with the superior and paying the composition.

"But where the disposition was accepted without reservation, the lands remaining in non-entry, no casualty was regarded as payable and prestable to the superior until an entry was demanded, or an action of declarator of non-entry was raised; and it was never heard of in practice that, on such an action being raised, the purchaser was entitled to call upon the seller to relieve him of the action and pay the composition. In short, by the law and practice prior to 1874, this was not one of the casualties falling within the clause of obligation to relieve of casualties, &c., contained in an ordinary disposition by a seller to a purchaser; indeed such a claim of relief would have been clearly untenable, because the defender, having been divested by the infestment of the pursuers before any judicial demand for an entry had been made by the superior, the casualty of non-entry, and the payment of the composition of a singular successor, would not have been a casualty 'payable or prestable' by the seller to the superior prior to the pursuers' term of entry. The pursuers, however, maintained that the effect of the Conveyancing Act of 1874 was to make the casualty of the year's rent actually 'payable or prestable' by the defender to the superior as at the passing of the Act on 1st October 1874, and, therefore, before the term of entry in the disposition, although no judicial demand was made by the pursuers until after that date; and they further maintained, that so soon as the judicial demand was made by the superior, the defender's obligation to relieve them of casualties took effect, and entitled them to call upon him to relieve them of the casualty in question. On the other hand, the defender maintains that the statute did not, according to its sound construction, impose any such liability upon him as seller."—(His Lordship here summarised and quoted the sub-sections of section 4 of the Conveyancing Act, 1874, as above, p. 299, note.)

"According to the construction which the pursuers place upon these enactments, the sum of £824, 6s. 1d., being the casualty of a year's rent of the subjects in question, became, on 1st October 1874, 'payable or prestable' to Mr Sivright, as superior, by the defender, as the proprietor then duly infest in these subjects, although the superior had not demanded payment thereof, and the same continued to be 'payable or prestable' by the defender to the superior even after the pursuers had purchased the property, and, by the implied statutory confirmation of their own infestment in 1876, had become themselves the

The hearing was taken on 15th and 16th November 1880.

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Argued for the pursuers;—(1) The effect of the Act of 1874 had been

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duly entered vassals of the superior. I am of opinion that this is not the sound construction of the statute. It appears to me that what has been done by the various sub-sections of section 4 is to substitute for an actual entry by confirmation, given to the superior under the old form, and as equivalent thereto, an implied entry by force of the statute taking effect on the completion of every infestment; and further to declare that, notwithstanding the death of the last entered vassal and the non-infestment of his successor, the lands should not be held to be in non-entry. But in order to protect the right of the superior to his casualty of composition which might have been held as extinguished by the statutory confirmation, and to take possession of the lands until payment of the composition, the statute substitutes for the old action of declarator of non-entry, in which the superior might have obtained decree of Court authorising him to enter into possession of the lands and appropriate the rents while the vassal lay out unentered, an equivalent action against the actual proprietor of the lands for the time, concluding for declarator that a casualty of a year's rent has become due, either by the death of the last entered vassal or by the infestment of a new proprietor, and until the casualty is paid he is entitled to the rents of the property, and for decree against the proprietor for payment of the casualty personally.

"Now, as I read these provisions of the statute, it is left in the option of the superior to determine whether he shall raise such an action against the immediate successor of his last entered vassal, or against some remoter successor, just as it was optional to him under the old law to allow one or more successors of the last vassal to lie out unentered without claiming composition or without raising a declarator of non-entry. Under the old law, as already explained, the casualty of non-entry did not become 'payable or prestable' until the claim was enforced by the superior in an action of declarator of non-entry. That action operated indirectly as a compulsator upon the successor of the vassal to enter and pay the composition, because until he did so the superior was entitled to enter into possession of the lands and appropriate the rents; but until the action was raised the vassal was not regarded as contumacious, and was entitled to lie out unentered, to retain possession of the lands, and to withhold payment of the composition; and if he sold the lands to a purchaser who was infest and took possession of the lands, the superior could not, with any effect, call upon the seller to enter or pay composition, and could make his right to composition effectual only by a declarator of non-entry against the purchaser, who, on the other hand, had no claim of relief against the seller. Now, I think there is no material change in this respect introduced by the statute of 1874. It appears to me that the vassal is not to be regarded as contumacious, and is not bound to pay the composition unless and until the superior demands it in an action in the statutory form.—See *Ferrier's Trustees v. Baillie*, 4 Ret., 738. But against whom is that action to be raised? It is not necessarily against the immediate successor of the last vassal, but against the successor, whether infest or not, against whom the superior would have been entitled to raise an action of declarator of non-entry under the old law; but, as we have seen, it was against the party in possession of the lands for the time, that the declarator of non-entry was directed, although there might have been many intermediate proprietors between him and the last entered vassal; and I am clearly of opinion that, under the Act of 1874, the defender in the action of declarator and for payment of the casualty is to be the party in possession of the lands at the time as successor, whether immediate or more remote, of the last entered vassal, and especially is this the case where the several successors in their order have been infest in the lands. Each successive infestment makes the person infest the entered vassal of the superior, and dissolves the feudal relation which has subsisted between the superior and the proprietor previously infest. It follows, therefore, that the new proprietor, if a singular successor of the last entered vassal, or his heir, becomes by virtue of his infestment the party against whom

No. 63. to change the nature of the superior's right from one of merely taking possession of the lands to a right of action for payment of composition.

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the superior may raise his action to constitute the casualty of composition as a debt 'payable or prestatable' to the superior.

"It is true that the statute provides that the superior is not to demand a casualty sooner than he could 'by the law prior to the Act, or by the conditions of the feu-right, have required the vassal to enter, or to pay such casualty irrespective of his entry.' But in the present case the superior did not demand the casualty sooner than under the old law he could have required the pursuers to enter. On the contrary, under the old law, he might have required an entry from the defender long before the date of his action against the pursuers, but he did not so enforce his claim. Had he chosen to constitute his claim against the defender before he sold the lands to the pursuers he would not have been entitled to demand the casualty from the pursuers during the defender's lifetime, because the defender would on that supposition have been in the position which under the old law would have been held by one duly entered by the superior as his vassal on payment of composition, during whose lifetime the superior could not have called upon a successor to enter. But though the defender had obtained implied entry by the operation of the statute, the superior did not, although entitled to do so, demand a casualty from him, and the statute expressly provides 'that no implied entry shall be pleadable' against the new action for the casualty. The meaning of that provision clearly is, that the proprietor infert against whom the statutory action was raised is not only not to be entitled to plead his own implied entry by confirmation as a discharge of the composition, but is not to be entitled to plead that by the implied entry of any of his predecessors the action is excluded, unless some one of such predecessors still in life has paid the composition.

"It appears to me, therefore, according to the sound construction of the Act of 1874, and of the obligation of the defender to relieve the pursuers of casualties contained in his disposition of Straiton—(1st) That the casualty for which the pursuers were sued, and which they paid to the superior in 1879, was the casualty exigible from themselves in respect of their own implied entry; (2) that the demand for that casualty was not made by the superior sooner than he was entitled to do so; and (3) that the said casualty is not a casualty 'payable or prestatable' to the superior by the defender prior to the term of entry of the pursuers under their disposition from the defender within the sense and meaning of the obligation to relieve of casualties contained in that disposition.

"In addition to what I have already stated, it may be well to point out that, if the pursuers' argument is sound, the defender, and not themselves, was the party against whom the superior should have raised the statutory action. But that plea was stated by the pursuers in defence against that action, and was over-ruled by the Lord Ordinary (Adam) and the Second Division.—See *Sirright v. Straiton Estate Company*, 5 Ret. 922, and 6 Ret. 1208. And I must assume that the judgment would not have been pronounced unless the Judges who decided the case had been satisfied that the casualty for payment of which they decerned against the pursuers was payable or prestatable in respect of their own implied entry, and not in respect of the defender's previous implied entry. But further, if the superior had raised his action against the defender instead of the pursuers, I think the defence of the defender would have been conclusive, viz., that he was not the successor of the last vassal who would have been called as defender in a declarator of non-entry under the old law, and that therefore he was not the proper defender in the new statutory action of declarator and for payment of the casualty.

"Before concluding, it is necessary to refer to the defender's averments to the effect that, during the treaty for the sale, and before the disposition was executed, the question of the casualty was expressly raised between the parties, and that although the pursuers urged the defender to pay the casualty he declined to do so, and that the pursuers assented to this declinature and agreed to pay the casualties themselves. These averments are denied by the pursuers, who

That alteration took the question out of the old law to which the Lord Ordinary had given effect. (2) The clause of relief here, when read in the light of the 8th section of the Titles to Land Consolidation Act of 1868, and the interpretation clause of the Conveyancing Act of 1874 clearly covered the composition sought to be repaid. It had been laid down and always acted upon before the passing of the 1874 Act that a seller who had not entered with the superior could not compel the purchaser to pay the price until he had entered and paid the composition.¹ This had been held to be law still in a recent Outer-House case, the judgment in which had been acquiesced in.* The mere fact that the company

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allege that the defender concealed from them the fact that he had not paid a casualty. If the clause in the disposition truly bears the meaning which I have now put upon it, then it is unnecessary to consider the relevancy of these averments on either side. On the other hand, if my construction is wrong, then it may become necessary to do so. But I may say that, as at present advised, I should not be inclined to admit these averments to probation. The alleged communings during the treaty of sale were prior to the date of the disposition, and if it had been intended to exclude the casualty in question from the seller's obligation to relieve the purchaser of casualties, the clause in the disposition should have been 'specially qualified' to that effect; and parole proof of such qualification would be clearly incompetent. On the other hand, the pursuers have not relevantly alleged on record any duty of disclosure which the defender failed to discharge. The result of the whole case is that the defender is assoltized with expenses."

¹ *Gardiner v. Henderson*, March 7, 1799, M. 15,037.

* Judgment of Lord Rutherford Clark in *Lawrie and Scott v. Scott*, 15th November 1876:—"NOTE.—In June 1876 the pursuers sold the estate to the defender, and by the action they seek to recover the price. The defence is that the last entered vassal died in 1868, and that though the pursuers have under the Act of 1874 an implied entry, they cannot enforce the contract of sale until they pay the composition which is now due to the superior.

"It is plain that under the former law the pursuers could not enforce the contract unless they had entered with the superior, and that they would have been bound to pay the composition which became due on their entry. But they contend that by force of the statute they are entered with the superiors, and that in consequence the defender is bound to accept the title which is tendered to him. On the other hand, the defender maintains that the composition has become due to the superior, and that the incumbrance thus created must be cleared off before he is bound to pay the price.

"The rule under the former law was settled by the case of *Gardiner v. Henderson*, M. 15,037. Looking to the report, the ground of judgment seems to be that, by reason of the lands being in non-entry, the title offered by the sellers was incomplete. Consequently the pursuers urge that, as they are entered, they tender a complete title. The Lord Ordinary is not satisfied with this view. It is true that the pursuers have the benefit of the statutory entry; but the lands are exposed to the claim which the superior has for the composition exigible on the death of the vassal last entered by him. They are thus liable to eviction from a cause antecedent to the sale. But the defender is entitled to the full enjoyment of the lands which he has bought, and to this end the sellers must, it is thought, clear them of all incumbrances existing prior to the sale. The right of the superior to claim the composition, if not paid, seems to the Lord Ordinary to be an incumbrance of this nature, for it owes its origin to an event which occurred before the lands were bought. This appears to be in conformity with the views which the profession have taken of the case of *Gardiner*, though it is perhaps wider than the special grounds of judgment assigned by the Court. See 2 Bell on Conveyancing, p. 645.

"The decision of Lord Curriehill in *The Leith Heritages Company v. The Edinburgh and Leith Glass Company*, 8th June 1876, was brought under the

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here had paid the price and recorded their disposition could not alter their position so as to deprive them of their right to be relieved of a debt truly due by the disponent. (3) Even had there been no clause of relief the company was entitled to recover their payment, which had been truly for a debt of the disponent; and the disponent having refused to pay before had caused the expense which had been incurred, and was therefore liable for that also.

Argued for the defender;—The company, by recording their disposition, became the entered vassal with the superior, and the composition due became their own proper debt. Their entry superseded the seller's entry, and what had been formerly his debt then became theirs. Composition was a debt resulting from the relation of superior and vassal, and the superior was only entitled to go against the vassal at the time in possession and entered with him. Whatever might have been the effect of the clause of relief before the disposition was taken and recorded the moment the disposition was put upon record the debt became the proper debt of the disponentes, and the disponent had then no debt of which to relieve them.

At advising on 14th December 1880,—

LORD JUSTICE-CLERK.—Lord Deas has been kind enough to communicate to me the substance of his opinion. I concur in the result at which he arrives, and I shall explain in a few sentences some difficulties which have led to this hearing.

The difficulty which I have felt in giving effect to this clause of relief in this conveyance has arisen from doubts how far the debt now sued for was truly due prior to the pursuers' entry to the lands. I imagine it to be unquestionable that without this clause of relief the purchaser would have had no claim, because, having accepted his title, taken infeftment, and entered with the superior, the price paid by him must then have been held to represent the value of the subject as it stood. Under the former law a purchaser was entitled to refuse to complete a contract for the sale of lands unless the sellers were entered with the superior; but if he accepted the title, and entered with the superior himself, he could have had no claim on his author to relieve him of the casualty. I am inclined to think that even under the statute of 1874 the same rule would hold good in both events, for although it could not be seen from the title whether the composition was paid or not, it was as much within the power of the purchaser to ascertain that fact as whether the feu-duty was in arrear, or what was the amount of the public burdens, or of the rental of the lands. The case therefore turns on the clause of relief. Now, although composition under the old law was not a casualty proper, but in truth a voluntary payment for an entry, which never became a debt due to the superior, the Act of 1874 has expressly declared it to be a casualty, and to be a debt due by the vassal infeft or by the possessor of the lands. Thus the only question remaining is, whether the composition in this case was due and prestable from the lands prior to the purchasers' entry? That there was a casualty due to the superior by the seller of the lands is certain, but whether that debt subsisted after the purchasers' entry I have found to be a question of difficulty. It was admitted at the

notice of the Lord Ordinary; but he does not think that this judgment runs counter to that case. There the purchaser agreed to take the title as it stood, and the decision turned on the meaning of a clause of relief occurring in a disposition granted and accepted in conformity with that agreement."

debate that the composition now sued for was the proper debt of the pursuers ; and that could hardly be said to be due and prestable by them before their own term of entry. But if the seller still remained liable to the superior, which might be questioned, or if in settling with the superior the pursuers were only bound to pay the amount due by the seller, which is not quite consistent with the principle on which the argument was placed, these difficulties would disappear. But as we are dealing with a statute from which we must discover a rule not very clearly indicated, I am content to acquiesce in Lord Deas' opinion, and to give effect to the pursuers' demand. Any judgment we may pronounce will leave some unsettled questions behind it ; but the object of this consultation will be attained if conveyancers are instructed as to the rule they are to follow for the future.

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LORD DEAS.—By missives of sale dated 12th July 1876, Stephens, the defender, as trust-dispensee under the *mortis causa* deed of settlement of the late Peter Brash, sold to the Straiton Estate Company, incorporated by Act of Parliament, the estate of Straiton, in the county of Edinburgh, at the price of £58,000, payable £43,000 at Martinmas 1876, and the balance on 2d February 1877. This is the whole import of the missives. Nothing whatever is said on the subject of the title to be accepted by or given to the purchasers.

Peter Brash had been entered with the superior, but at his death on 8th November 1872 the subjects fell into non-entry ; Stephens, his trust-dispensee, obtained himself infest by expeding and recording a notarial instrument on 9th July 1873. He did not, however, enter with the superior. Thus stood the title of Stephens, the seller, at the passing of the Act 37 and 38 Vict. cap. 94, which Act had the effect (section 4, sub-section 2) of entering Stephens with the superior as at the date when the Act came into operation, viz., 1st October 1874. Stephens consequently became liable at that date to pay the entry-money which then became due to the superior. He did not, however, pay that entry-money, but from that time forward he was liable to be sued for it as his own proper debt at the instance of the superior. In this state of matters Stephens sold the lands to the pursuers, the Straiton Estate Company, by the missives referred to of 12th July 1876.

It is very clear that while as yet nothing had followed on these missives, the purchasers could have declined to pay the price and to accept a disposition so long as the seller was not entered with the superior. Long prior to the statute of 1874 it was settled (*Gardiner*, M. 15,037) that a purchaser under missives or minute of sale, silent, as the present missives are, upon the subject of entry with the superior, was not bound to accept the title as complete if the subjects were in non-entry till the seller had paid the entry-money and entered with the superior. There is nothing in the statute of 1874 to change the relative position in that respect in which the seller stands towards the purchaser under such missives as the present. The seller at the date of the sale was thus under an obligation to the superior to enter. He was under a similar obligation to the purchasers in order to complete his title. That obligation the statute implemented for him, so far as the entry itself was concerned, by enacting (section 4, sub-section 2) that "every proprietor who is at the commencement of this Act, or thereafter shall be duly infest in the lands, shall be deemed and held to be as at the date of the registration of such infestment in the appropriate register of sasines duly entered with the nearest superior." But the statute did not

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relieve the proprietor of the relative obligation to pay the entry-money. On the contrary, it enacted (section 4, sub-section 3) that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, &c., which may be due or exigible in respect of the lands at or prior to the date of such entry." In case of non-payment of these casualties, sub-section 4 gives the remedy—"A superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not" (that is, in this case, against Stephens, who was infeft), "an action of declarator, and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action; and any decree for payment in such action shall have the effect of and operate as a decree of declarator of non-entry according to the now existing law, but shall cease to have such effect upon the payment of such casualty and of the expenses, if any, contained in said decree." The effect of an action and decree of this kind against Stephens would have been to bring him back from the position of an entered vassal to the position of an unentered vassal, so long as he did not pay the casualty—that is, the entry-money—which had become due by him, and expenses, and consequently would have entitled the purchasers to refuse to pay the price and accept a disposition till he had reinstated himself in the position of an entered vassal who had paid the relative casualty,—that is, the entry-money,—the consequence of which payment would have been that an entry by the purchasers or any subsequent proprietor would neither have been necessary nor competent, as the lands would not again have been in non-entry.

That what is called in the statute "the casualty" includes the entry-money payable by Stephens, the seller, is clear from the interpretation clause, which bears, "'Casualties,' shall include the relief-duty payable on the entry or succession of an heir, the composition or other duty payable on the entry of a singular successor, whether by law or under the conditions of the feu, and all payments exigible in lieu of such duties and compositions, and all periodical fixed sums or quantities which may be stipulated for under this Act."

Now, it is true that the purchasers,—in place of taking their stand upon the missives, as they might have done, till the seller, who was entered by force of the statute, had paid the relative casualty due to the superior,—paid the price of the lands and accepted a disposition; but then that disposition expressly bore—"I bind myself as trustee foresaid, and the trust-estate under my charge, to free and relieve the said disponees and their foresaids of all feu-duties, casualties, and public burdens." Whether without any such clause the purchasers, who had accepted the title and taken infeftment, could have demanded relief, I do not inquire; I shall only say that would have been a different question. It is true that the clause is applicable only to feu-duties, casualties, and public burdens which were then past-due. But that was undoubtedly the case with the entry-money, or, in other words, the casualty in question. The statutory entry made the casualty a debt due by Stephens as at the date of the registration of his infeftment, and that is quite consistent with the enactment (in sub-section 3) that "such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering," for by the law prior to the Act the superior could

have required Stephens, the seller, to enter and pay the casualty so soon as No. 63.
Brash, the last entered vassal, died, viz., in November 1872.

As the output of minerals, and consequently the amount of lordships, varied at different dates, there may be, or might have been, some little puzzle, looking to the decision of the Second Division that minerals are to some extent to be taken into account as to how the entry-money fell to be calculated in this case; but I do not enter into that subject further than to say that I am very clearly of opinion that the casualty in dispute, whatever its amount, is not a casualty which became payable in respect of any statutory entry of the purchasers. There was no longer any room for such an entry. Stephens, the seller, stood entered at the date of the sale, and the only casualty payable was a casualty in respect of his entry. At the date of the disposition the casualty was past-due by him, and consequently it falls under the very words of the obligation in that deed by which the seller binds himself to free and relieve his disponees of all casualties. This short view appears to me to be conclusive.

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LORD MURE.—The question here raised is one of general importance, but, in the view I take of it, it lies within a narrow compass; and it is this—What is to be the effect of a clause in a disposition by which the seller undertakes to relieve the purchaser of “all feu-duties, casualties, and public burdens” due on account of the lands conveyed, in a case where, under the operation of the 4th section of the Conveyancing (Scotland) Act, 1874, both the seller and purchaser have been entered with the superior, by neither of whom any composition had been paid at the time of entry?

The facts on which this question mainly depends are not, as it appears to me, in dispute between the parties, and are shortly these:—

After the death of the vassal last infeft in 1872, the title to his property was made up by the defender as his sole accepting trustee by notarial instrument, which was recorded in July 1873, but this title was never confirmed by the superior. So standing the title, the Conveyancing Act of 1874 was passed, which had the effect of entering the defender with the superior, and making him liable for a composition for which no demand appears to have been made. In this state of matters the property was purchased by the pursuers in 1876, and the disposition in their favour, by which the disponer was taken bound to “free and relieve the disponees of all feu-duties, casualties, and public burdens,” was recorded in November of that year. By so recording the disposition the pursuers were themselves duly entered with the superior, and in May 1877 an action was raised against them by the superior to have it declared that in consequence of the death of the vassal last vest and seized in the property a casualty had become due, and concluding for payment of that casualty. In that action, after a variety of procedure, the pursuers were found liable in payment of the casualty, and it is for relief from the sum decerned for against the pursuers in that action that the present action has been brought.

If the action at the instance of the superior had been brought against the present pursuers, after their acquisition of the property, but before they were infeft, as it might have been under sub-sec. 4 of the 4th section of the Act of 1874, and they had then called upon the defender to relieve them of that action and its consequences in respect of the obligation of relief undertaken by him, I am unable to see on what grounds the defender could have successfully maintained a defence against that demand. He had himself become the entered

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vassal of the superior by the operation of the 2d sub-section of the 4th section of the Act of 1874. Having been so entered he was liable in the casualties, to use the words of the 3d sub-section, "due or exigible in respect of the lands at or prior to the date of such entry;" and by the clause of relief in the disposition granted by him to the pursuers in 1876 he had become bound to free and relieve them "of all feu-duties, casualties, and public burdens." Now, these words are, by the 8th section of the Titles to Land Consolidation Act of 1868, expressly declared "to import an obligation to relieve of all feu-duties or other duties and services or casualties payable or prestable to the superior, from or on account of the lands conveyed prior to the date of entry," and when so interpreted appear to me to be conclusive of the question I am now dealing with. For it cannot, I think, admit of doubt that at the date of the sale to the pursuers a composition for an entry was "payable" to and "exigible" by the superior, according to the ordinary meaning of these expressions; and all difficulty as to the question which might a few years ago have been raised as to whether a composition was truly a casualty is removed by the interpretation clause of the Act of 1874, which declares that the word "casualty" shall include the "composition or other duty payable on the entry of a singular successor, whether by law or under the conditions of the feu."

But the circumstances under which the question has been here raised are somewhat different from those in the case I have just put, inasmuch as the pursuers were themselves entered with the superior by force of the statute before any demand was made against them by the superior, and it was strongly contended, on the part of the defender, that the composition claimed from the pursuers by the superior was a composition for their own entry in 1876, and not one due in respect of the defender's entry in 1874. I was at one time disposed to think that there might be grounds on which this contention might be supported—more especially if, as appears to have been at one time supposed, a larger composition was in those circumstances due and exigible than there would have been had the composition been fixed at the date of entry of the defender. But on further consideration I have come to the conclusion that this difficulty does not arise in the circumstances of the present case; for on looking into the report of the case between the superior and the present pursuers in July 1879 (6 R., 1208), I find that the question was there raised as to the period at which the composition was to be struck, and that the Court rejected the claim of the superior to have it fixed at the rental as it stood at the date of his action in 1879, and adopted the period of an average of the three years prior to Whitsunday 1874, two years before the date of the sale to the pursuers. That seems to me to be clear from the passage in the opinion of the Lord Justice-Clerk, as reported at p. 1214 of the case, where his Lordship says,—“I think what I have already suggested in the course of the debate is a reasonable course, viz., that we should take the average of the three years ending at Whitsunday 1874.”

What, then, the defender will, in this view, be now called on to relieve the pursuers of will be the composition due by himself to the superior at the date of the sale to the pursuers, and of this it appears to me, on a fair construction of the statutes, that the defender is bound under the clause of relief to relieve the pursuers.

LORD GIFFORD.—I am of opinion that the pursuers are entitled to relief from the defender of the composition which the pursuers have been obliged to pay

to the superior of the lands of Straiton and others, which the pursuers purchased from the defender under a disposition dated 10th November 1876, and therefore I think the Lord Ordinary's interlocutor must be recalled. I abstain, however, from giving any opinion as to how far the claim of relief will warrant decree for the full sums concluded for in the summons, because on this question of the extent of relief there has been no completed argument, indeed, no argument at all, either before the Second Division or before the seven Judges. There is also a question as to the defender's liability for the expenses found due to the superior. These questions I leave open, and confine myself to the single point whether the defender is bound under his obligation of relief or otherwise to free the pursuers of the composition of a year's rent payable on the entry of a singular successor. I think the defender is so bound.

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The subjects sold fell into non-entry on 8th November 1872, when Peter Brash, who was fully entered vassal, died. He left a trust-deed under which the present defender, as his sole trustee, took up the subjects, and completed a title thereto by notarial instrument, registered 9th July 1873, but he took out no entry with the superior. On 1st October 1874 the Conveyancing (Scotland) Act, 1874, came into force, and by virtue of that Act the defender became by implication under the statute entered with the superior, the non-entry ceasing by the operation of the Act. The same Act provided that although the lands should not be deemed to be in non-entry the superior should have the same pecuniary rights as he would have had under the former state of the law, and I take it to be clear that if the superior had chosen to sue the present defender any time after 1st October 1874, and before the defender sold the estate to the pursuers, he could have compelled the defender to pay to him one year's rent of the estate. I think this is plain. The defender would have had no defence if the superior had demanded from him the casualty of a year's rent.

In November 1876 the defender sold the estate to the present pursuers, and we have now been furnished with copies of the missives of sale. Neither in the missives of sale nor in any other writing was any special agreement made regarding the composition then exigible by the superior. The formal disposition by the defender to the pursuers was granted on 10th November 1876, and was registered 15th November 1876.

The next point, which also I take to be clear, is that the pursuers at any time before accepting the disposition in their favour by the defender might have required the defender to pay the composition of a year's rent which was then demandable by the superior. Under the old law a seller who had sold lands in non-entry might have been compelled to complete his title by entering with the superior before the purchaser was bound to accept of a disposition, and I think that it follows that under the existing law, although an entry is no longer required, that being implied by the seller's infestment, still the seller must pay any non-entry duties or duplicands or compositions which have become due to the superior, and are payable under the statute in the same way as if the seller had taken out an entry.

Now, in the present case this was not done. Although the superior was undoubtedly entitled to exact from the seller at the date of the sale a year's rent of the subjects he did not do so, and the seller, without making any payment to the superior, proceeded to grant a disposition to the purchasers in common form. The disposition, however, contains the following clause of relief and obligation upon the seller:—"I bind myself, as trustee foresaid, and the trust-estate

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under my charge, to free and relieve the said disponees and their foresaids of all feu-duties, casualties, and public burdens." Now, I am of opinion that this clause of relief and obligation undertaken by the seller, which, in terms of the statutes, is interpreted as meaning all feu-duties, casualties, and others due prior to the date of the purchaser's entry, entitles the pursuers to insist in the present action. The word "casualties" certainly includes the present claim, and indeed can refer and be applied to nothing else but the present claim. It seems to me to be quite as effectual as if the clause had been more fully expressed, and had borne that the seller was to relieve the purchasers of the casualty of one year's rent which became due to the superior and was exigible by him in consequence of the death of Peter Brash, and of the implied entry in virtue of the statute of 1874 of Mr Stephens, as his trustee. Of course if the clause had been so expressed this would have removed every doubt, but as there is no other possible casualty to which the obligation of relief can apply I think the clause is quite as effectual as if it had been expressed in the fullest detail. I am aware that this short form of the obligation of relief was introduced by a statute passed long prior to the Conveyancing Act of 1874, and that the word "casualties" occurs in it when it could not have the same meaning as that contended for in the present action. But I am not moved by this consideration. When I find the clause occurring in a deed executed in November 1876 I must hold that it refers to the state of the law at that time, and that the parties had the statute of 1874 in view. The use of all these clauses and of the shortened forms of conveyancing are optional, and the clauses or the words given as examples therein may be adopted in whole or in part, so far as applicable, and they may be varied so as to make them applicable to each particular case. Although the word "casualties" occurs in the earlier statute, no conveyancer is bound or entitled to insert that word if it has no application to the case with which he is dealing. But if that word is adopted by the parties, and if there is a casualty to which it is directly and strictly applicable,—as fully applicable as if it had been devised on purpose to meet the present case,—then I cannot refuse to give effect to the clause according to express and unambiguous terms. To deny effect to the clause in the present deed, and in the circumstances in which that deed was granted, would, I think, be to deny effect to the explicit and most natural agreement of the parties.

It is worth notice that the decree pronounced in the action at the superior's instance for payment of the casualty expressly bears (differing in this respect from the conclusions of the superior's summons) that the casualty found due to the superior became due to him upon the death of the said Peter Brash. Apart from this, however, I think it is quite clear that under the statute the casualty of one year's rent became due and exigible, or, in the words of the statute, "payable, or prestable," to the superior by the seller prior to the date of his sale to the present pursuers, and this is enough for the purpose of the present action.

I am therefore for altering the interlocutor of the Lord Ordinary, but reserving in the meantime the exact amount for which the pursuers will obtain decree.

LORD SHAND.—It cannot, I think, be doubted that after the pursuers purchased the lands of Straiton, in terms of the missives of sale of 12th July 1876, the defender was bound to pay the composition then due to the superior so as to free the purchasers from liability for the amount. This view is in accordance with the law as it was understood long prior to the statute of 1874, and as settled

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by the case of *Gardiner* in 1799, and universal practice, and it is, I think, plain that the law continued to be the same after the statute, as was, indeed, found by Lord Rutherford Clark in the recent case of *Laurie v. Scott*, *supra*, p. 305, n. The legal principle on which the law rests appears to me to be simply this, that the seller of a heritable property is bound to free the subjects of all burdens and incumbrances affecting it which are not like feu-duty of a permanent and annual continuing nature, unless in so far as the purchaser has specially contracted to take upon himself such liability. The liability of the property to the superior's claim for composition in lieu of non-entry duties is in truth as much a burden or incumbrance as any heritable debt affecting the property. It was so, as I think, prior to 1874, for the superior's claim might lead to eviction of the proprietor in an action of non-entry unless the composition were paid; and it became even more clear after the statute of 1874 in a case like the present, in which the seller, the successor of the last entered vassal deceased, was infeft in the lands, because the seller had obtained an implied entry to the same effect as if the superior had granted him a charter, and with the direct result of rendering him and the lands liable for the composition as a debt due to the superior.

The ordinary rule of law is that the delivery of a disposition which is intended merely to pass the title to the lands, with such warrandice as may have been agreed on, does not affect the seller's obligation to clear the lands of all incumbrances; and I see no good reason for holding that this rule does not apply to the liability of the lands for the composition of a year's rent, which is a burden or incumbrance often of very substantial amount. Whether the burden be a heritable debt of £800, or the claim of the superior for that sum as a composition due to him in respect of an implied entry taken by infeftment, the liability of the seller to relieve the purchaser is the same. I am unable to see any good reason for holding that the acceptance by the purchaser of a title to the lands will relieve the seller of his obligation under the contract of sale to free the subjects of the composition any more than it would relieve him of his obligation to have the heritable debt discharged. I am not prepared to say that the taking delivery of a disposition prior to the Act of 1874 would have had the effect of relieving the seller of his obligation to pay the composition, as the Lord Ordinary assumes; but even if this would have been the case on the narrow and technical ground that the superior's claim was one to non-entry duties and not composition, because the vassal was not entered, the case is, I think, now essentially different under the Act of 1874, for the seller having obtained an implied entry, the composition is at once a debt due to the superior and a burden or incumbrance affecting the subjects, and as such the seller is bound to have it discharged in the same way as any other burden.

Accordingly it appears to me that even if the deed of conveyance in this case had not contained the special clause of relief of all casualties, the seller would have been bound, notwithstanding the delivery and acceptance of that deed, to pay the composition due to the superior, for it was quite as much an implied term of the contract of sale that the seller should free the subject of incumbrances as that he should give a title, and the giving of a title did not in any degree supersede or affect the other obligation. Even, however, if this were not so, I agree with the Court in opinion that the clause of relief expressly reserves the pursuers' right to the relief asked, just as that right existed before the disposition was delivered, and in the same way as if the disposition had not

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been granted. I see no other meaning that can be given to the word "casualties" in the clause, occurring as it does in company with the word "feu-duties," than to hold that it applies to the composition then due and payable or prestable to the superior in respect of the death of the former vassal and the implied entry of the seller, the successor of that vassal.

It was maintained that the composition paid by the pursuers was not that for which the defender was liable, but this contention is, in my opinion, unsound.

The casualty which was due at the date of the purchase became payable in consequence of the death of the last entered vassal, the predecessor of the defender, and it was this casualty that the pursuers were obliged to pay, although the obligation arose from their acceptance of the conveyance, or from that acceptance and the infeftment that followed. If the defender is able to shew that the sum paid is in excess of the amount due to the superior by him in respect of his implied entry I do not say he is liable for that excess, for I do not think the delivery of the disposition enlarged the defender's obligation under the contract of sale. On this point there has been no argument, and it raises a subordinate question only. It may be fairly contended, I think, that the amount of the composition for which the defender became liable to the superior must be fixed as at the date of his own infeftment, or rather at 1st October 1874, when the Conveyancing Act came into operation, for on that date he was actually entered as vassal by force of the statute; that it was the benefit of this entry only that he was bound to give; and that his obligation in its pecuniary consequences should not be carried beyond the sum for which he was liable in that view. The pursuers, I understand, get the benefit of an entry in their own favour as at a later date, and if it be the fact that they have paid for this a composition of larger amount than the defender could have been called on to pay to the superior—a point as to which we have not been informed—I am not prepared to say that the defender is liable in the full amount claimed. On this question, and the question of the defender's liability for the expenses of the former litigation which are sued for in this action, I express no opinion. On the general question which has been raised for the opinion of the consulted Judges, and which alone has been the subject of argument, I am of opinion, differing from the Lord Ordinary, that the pursuers are in the right.

LORD YOUNG.—The question for decision depends, in my opinion, on the meaning of the clause in the disposition by the defender to the pursuers binding the disponent to free and relieve the disponees "of all feu-duties, casualties, and public burdens," limited by the Titles to Land Consolidation Act, 1868, and probably also by the common law, to those payable or prestable "prior to the date of entry." At the date of the sale to the pursuers, of the disposition, and of the entry under it, a composition, being a year's rent of the lands, was "payable or prestable" to the superior—or, waiving for the moment a criticism on the applicability of these words, which I shall afterwards notice, the superior had a "right or title" to this casualty as the condition of permitting the proprietor, whoever he might be, to remain in possession of the lands. The defender did not in fact pay this casualty, and in consequence the pursuers were called on to pay it, and did so. I say "in consequence" because it was conceded by the defender's counsel that payment by the defender would have relieved the pursuers of the necessity of making the payment which they did, and of any obligation to pay, at least while the defender lived. The pursuers

now ask relief from the defender under the clause which I have referred to, and No. 63. I am of opinion that their demand ought to be allowed.

The judgment of the Lord Ordinary, which is against the pursuers, seems to rest mainly on the view that the words "payable or prestable to the superior" are strictly inapplicable to a casualty of relief or composition—the casualty being, in truth, a right in the superior to declare a non-entry, and enter on possession of the lands to be retained till the proprietor may choose voluntarily to relieve them out of his hands by a money payment of ascertained amount, which, although the superior is bound to accept of it when offered, is not "payable or prestable" to him, inasmuch as he cannot enforce payment of it directly, or otherwise than by seizing and holding the lands till he gets it.

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I should, I confess, have thought unfavourably of this argument as used to affect the interpretation and effect of a clause of relief irrespective altogether of the Act of 1874. In the common and familiar language of lawyers and men of business, a casualty of composition signifies the money payment on receipt of which the superior is bound when the casualty falls to permit the proprietor to possess the lands as his vassal and forego his right to resume possession, and it is as often as not taxed, as it is called, at a certain pecuniary amount by the name of casualty. The superior's right is, and always has been, spoken of as a right to demand money, and it in truth is so, none the less that his only, though singularly effective, mode of enforcing it is (or at least was prior to 1874) to seize and hold the lands till it is satisfied. The Act of 1874 in many places refers to these casualties in just such language as was always used regarding them. It speaks of them as "due or exigible;" of the superior's right to "demand" them; of the "rights and remedies competent to a superior under the existing law for securing, recovering, and making effectual such casualties;" and of the "payment of any casualty exigible." The Consolidation Act of 1868 also refers to "casualties" as "payable or prestable to the superior." To say that the casualty, strictly speaking, is, if not the occurrence or happening of the death of the last entered vassal, at least the superior's right thence resulting to seize and hold the lands till a certain fixed payment is voluntarily made, and that therefore the words "payable or prestable" are inapplicable, very much resembles a criticism on the words "sunset" and "sunrise" as inaccurate, inasmuch as the sun does not rise or set—the phenomena familiarly and even in statutes referred to by these words being caused, not by the sun rising or setting or moving anyhow, but by the rotatory motion of the earth. What men mean by "sunset" and "sunrise" is not more certain than what Scotch lawyers and conveyancers mean by casualties "due or exigible" or "payable or prestable" to a superior, and it is an idle thing to shew that their language is scientifically inaccurate whether the science involved be astronomy or feudal law.

I put it to the Solicitor-General whether on the contract of sale, assuming it to be in the terms indicated by the disposition that followed on it, i.e., such as the disposition would exactly fulfil, the pursuers as buyers could not have compelled the defender as seller to pay the casualty which the superior had then confessedly right to demand. The answer, candidly given, was that in a case exactly similar Lord Rutherford Clark had decided, on grounds which he (the Solicitor-General) was unable to controvert, that such was the buyer's right. The Solicitor-General, however, contended that this right was lost by the buyer's acceptance of the disposition. I pointed out that this seemed to be a strange result of accepting a disposition which contained an express obligation on the

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It was maintained that the composition paid by the pursuers was not that for which the defender was liable, but this contention is, in my opinion, unsound.

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I should, I confess, have thought unfavourably of this argument as used to affect the interpretation and effect of a clause of relief irrespective altogether of the Act of 1874. In the common and familiar language of lawyers and men of business, a casualty of composition signifies the money payment on receipt of which the superior is bound when the casualty falls to permit the proprietor to possess the lands as his vassal and forego his right to resume possession, and it is as often as not taxed, as it is called, at a certain pecuniary amount by the name of casualty. The superior's right is, and always has been, spoken of as a right to demand money, and it in truth is so, none the less that his only, though singularly effective, mode of enforcing it is (or at least was prior to 1874) to seize and hold the lands till it is satisfied. The Act of 1874 in many places refers to these casualties in just such language as was always used regarding them. It speaks of them as "due or exigible;" of the superior's right to "demand" them; of the "rights and remedies competent to a superior under the existing law for securing, recovering, and making effectual such casualties;" and of the "payment of any casualty exigible." The Consolidation Act of 1868 also refers to "casualties" as "payable or prestable to the superior." To say that the casualty, strictly speaking, is, if not the occurrence or happening of the death of the last entered vassal, at least the superior's right thence resulting to seize and hold the lands till a certain fixed payment is voluntarily made, and that therefore the words "payable or prestable" are inapplicable, very much resembles a criticism on the words "sunset" and "sunrise" as inaccurate, inasmuch as the sun does not rise or set—the phenomena familiarly and even in statutes referred to by these words being caused, not by the sun rising or setting or moving anyhow, but by the rotatory motion of the earth. What men mean by "sunset" and "sunrise" is not more certain than what Scotch lawyers and conveyancers mean by casualties "due or exigible" or "payable or prestable" to a superior, and it is an idle thing to shew that their language is scientifically inaccurate whether the science involved be astronomy or feudal law.

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disponer to pay all casualties due prior to the disponees' entry. It was thereupon urged that the disponees (the pursuers) lost their right, and liberated the defender by recording the disposition, inasmuch as they thereby incurred a casualty on their own account, and in respect of their own entry as vassals in the lands, and that the defender's escape was nothing to them. The point of this argument is that by recording their disposition the pursuers annihilated the casualty theretofore due, and to which the obligation of relief applied, and created another in which they were themselves the debtors without relief.

I think this argument is fallacious. I assume of course (for that is the condition of the argument) that had the pursuers not recorded their disposition they would have been entitled to require the defender to relieve them of the casualty due at their entry to the lands, viz., Martinmas 1876, either by paying it directly or repaying it to the pursuers in case the superior exacted it from them, which, I need hardly observe, he might have done equally whether their disposition was recorded or not. The question then is, Did the pursuers discharge their right by recording their disposition? It is not reasonably supposable that they so intended, and although a valuable right may be unintentionally renounced or obligation discharged, I venture to think that it would be unjust, and contrary to the principles which usually govern our decisions, to attribute this effect to a formal act not intended to that end, and by which the party seeking a gratuitous and undesigned benefit was in no way prejudiced. It was conceded, and is clear, that the defender's original obligation under the clause of relief cannot be enlarged by the recording of the disposition containing it which he granted. But, indeed, it is not suggested that the casualty which the pursuers in fact paid was greater than that which was exigible by the superior at the date of their entry without reference to the recording of the disposition, or that they are now demanding more under the clause of relief than, *ex hypothesi* of the argument I am now considering, they were entitled to demand before the disposition was recorded.

That the pursuers may possibly (for there is no certainty) have a greater benefit, in a question with the superior, by the payment made after recording than they would have taken by a similar payment before, whether by the defender or by themselves, or, in other words, that the superior may possibly be prejudiced by the substitution of the buyer's life for that of the seller, is not, in my opinion, a pertinent consideration. The pursuers suffer no prejudice, for their payment is of exactly the same amount as it would have been had it been made before the recording, and the superior does not complain, and, so far as I see, cannot.

What I have hitherto said is in fact the judgment which I prepared to be delivered in the Second Division, when I thought the case might be decided there without the assistance of your Lordships of the First Division. And it will be observed that I have taken the case exactly as presented, viz., with an express obligation of relief, and without considering what would have been the rights and obligations of the parties *hinc inde* without it. But the case having been so dealt with as to make it eminently a case of "light and leading," I think it according to my duty to say that I should have been prepared to decide it in the same way irrespective of the express obligation, provided always there was nothing to shew that the parties had otherwise bargained. The maxim *expressum facit cessare tacitum* applies only when the *expressum* is at variance more or less with the *tacitum*—that is, with what the law would have implied

in the absence of expression. When the two are in perfect harmony, the *m* is *expressio eorum quae tacite insunt nihil operatur*. Now, I am of opinion with Lord Rutherford Clark, in the decision to which we were referred, that in the absence of express or necessarily implied agreement to the contrary it is the right of the buyer to require the seller to pay any casualty due to the superior at the date of his entry to the lands, and further, and beyond what Lord Rutherford Clark found it necessary to decide, that this right is not forfeited or the corresponding obligation discharged by the acceptance and recording of a disposition. Prior to the Act of 1874 the superior's right to the casualty strictly depended on the question, Is the fee full or are the lands in non-entry? So that if the seller was entered (or the fee otherwise full) the buyer had no occasion to inquire whether the casualty had been paid or not, for whether or not there was none due, and no call could have been made on him. Since the Act the superior's claim is independent of the fact of entry or non-entry, and subsists or not according as it has been paid or not. Under the existing law every seller with a recorded title is entered with his superior, but the superior's right to a casualty subsists nevertheless if he has not been paid any since the death of the last vassal who paid, and this right, if existing, must be satisfied either by the seller or the buyer. I say by either, for it was conceded that payment could not be demanded from both, and that payment by either would satisfy the right. Now, I am of opinion that the common law obligation of the seller on the contract of sale, in the absence of any contrary agreement, is to pay and to relieve the buyer, and that this obligation, which is merely pecuniary, subsists until it is fulfilled by payment, to the relief of the creditor therein, and is not discharged by his accepting and recording a disposition.

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LORD PRESIDENT.—I concur in the judgment proposed. I am of opinion that the seller was bound at the date of the contract to relieve the purchaser of the burdens then due, and particularly of the composition, and that by reason of the clause of relief he is still so bound.

Whether he would have continued so liable without the clause of relief which we have here I do not say. It is not clear whether or not the obligation would have subsisted without the clause of relief.

The case was taken up by the Second Division on 16th December, when the pursuers moved for decree for the composition paid by them, and for the expenses paid by them to the superior, and also for those incurred by them to their own agent in the action at the superior's instance. It was argued for the defender that though he might be held liable in part of the expenses incurred in that action still he should not be held liable for the expense incurred in consequence of the Company having denied all liability to the superior, as that point had already been decided in previous cases.

At advising,—

LORD JUSTICE-CLERK.—All reasonable expenses incurred by the party entitled to relief must be paid. The pursuers were entitled to state all available pleas, and the party found ultimately liable must keep them *indemnitas*. The party liable in relief might have prevented unnecessary litigation by coming forward and taking his proper place. But I think this is a case for some equitable

¹ Ferrier's Trustees v. Bayley, May 26, 1877, *ante*, vol. iv. p. 738; Rossmore's Trustees v. Brownlie, &c., Nov. 23, 1877, *ante*, vol. v. p. 201.

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modification, and that we should therefore find the pursuers entitled to the amount of the composition as ascertained in the previous action, and to the taxed amount of their expenses incurred to the superior, and send the remaining accounts to the Auditor, and consider any further question which may arise on his report.

LORD GIFFORD concurred.

LORD YOUNG.—I am of the same opinion, and am disposed to rest on even more general grounds. The superior raised his action against the present pursuers in May 1877. According to the unanimous decision of this Court the pursuers had no interest in the subject-matter of that litigation. It was no affair of theirs whether the superior's claim was well-founded, or, if well-founded, exaggerated. The seller (the defender here) was bound to relieve them of everything the superior could justly demand, and therefore they had no interest in the question, though they might have to pay in the first instance whatever was due to the superior. But they were entitled to entire relief. They accordingly intimated to the party liable in relief that the superior's action had been brought. The answer was, "I have nothing to do with it; defend the action if you choose. I am in no respect liable." What could they do? Defend the action they must. If, in so defending the action, they had been guilty of any impropriety, it would have been another matter, but if they defended the action justifiably, the party bound to relieve them must keep them *indemnified*. Neither are we to try a party's conduct by very nice rules in such circumstances. The conduct of the litigation having been thus forced upon the present pursuers, there was nothing approaching to impropriety in their stating the plea that the superior had no right at all. In fact after they had stated that plea the point was only decided in the case of *Lamont v. Rankine's Trustees*, by a majority in this Division, Feb. 28, 1879, 6 R. 738, and one of the two Judges who formed the majority intimated that his opinion concurred with that of the dissenting Judge, though he held himself to be bound by previous decisions. That case was afterwards taken to the House of Lords, and the question was only finally settled in February of this year, 7 R., H. L. 10. It was a question also whether the previous cases were applicable. The exact point had never before been decided. The present pursuers being therefore, from the necessities of the case, put either to acquiesce in the superior's demand or defend the action, I think that it is in accordance with a vast amount of practice that the party ultimately liable is responsible for the whole amount of expense incurred, and that it is immaterial that they failed in their defence.

THE COURT pronounced this interlocutor :—"In terms of the unanimous opinions of the consulted Judges, recall the said interlocutor, and decern in terms of declaratory conclusion of the summons, and also decern against the defender as sole accepting trustee under the trust-disposition and settlement of the deceased Peter Brash, merchant, Leith, to make payment to the pursuers of the sum of £824, 6s. 1d., being the amount of the casualty or composition paid by them to William Henry Revell Bedell Sivright of Southhouse, immediate superior of the lands particularly condescended on, which became due and exigible on the decease of the said Peter Brash, and also to make payment to the pursuers of the sum of £100, 3s. 6d., being the amount of the expenses found due

by them to the superior in the action at his instance against them as taxed, with interest on the said two sums of £824, 6s. 1d. and £100, 3s. 6d. at the rate of five per centum per annum from the 8th day of July 1879 till payment: Remit the account of £133, 12s. 11d., No. of process, being the account of expenses incurred by the pursuers to their own agent in the said action at the superior's instance, to the Auditor for his taxation, and report: Find the pursuers also entitled to the expenses incurred by them in this process, and remit," &c.

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JAMES DAVIE, Pursuer.—*Kinnear—Jameson.*
WILLIAM BUCHANAN, Defender.—*Trayner—R. V. Campbell.*

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Partnership—Joint adventure—Rights of co-adventurers where copartnery trade extended on its natural line.—One of three parties to a co-adventure in the purchase and working of a river steamer upon the Clyde purchased three years afterwards, upon the credit of the co-adventure, a second steamer for the same trade. Eleven years later, the position and relations of the co-adventurers having somewhat changed, a third steamer was bought by the same party, the price being paid by aid of a security over the first. In an action of accounting and payment by one of his co-adventurers against the purchaser the Court, in these and the other circumstances of the case, held that the presumption that the second steamer was partnership property had not been rebutted, but that as regarded the third there was no sufficient proof of joint ownership or partnership.

THIS was an action by James Davie, marine architect, Dumbarton, calling upon William Buchanan to produce an account of his intromissions as managing partner of certain steamers upon the Clyde, and for payment.

In 1864 the pursuer, the defender, and a Mr Cook entered into an adventure for the building of a steamer to be named the "Eagle," and to be employed upon the river Clyde service. The pursuer held two eighths, the defender five eighths, and Cook one eighth shares. The defender was registered as sole owner of the vessel. The pursuer's share of the capital was £1962, 10s. An accounting took place between the pursuer and defender for the profits of the first two years, viz., 1864 and 1865, but there had been none since up to the time when this action was brought.

Other three steamers were afterwards bought or built by the defender, viz., (1) the "Rothesay Castle" in 1867, the price, viz., £3500, being paid by funds advanced by the British Linen Bank upon a mortgage for £3700 over the "Eagle," the promissory-notes of Davie and Cook being granted as collateral security; (2) the "Brodict Castle" in 1877, the price being paid by an advance upon a mortgage for £3000 over the "Eagle," dated 18th January 1875, that for £3700 having in the interval been discharged, and another having been granted over the "Rothesay Castle," which latter was discharged upon the sale of that vessel in 1879; and (3) the "Elaine" in 1879, subsequently to the sale of the "Rothesay Castle," the price being obtained upon bills granted by the defender and other parties. These three vessels were registered in the name of and managed by the defender.

The pursuer averred that these steamers had been purchased with the partnership funds, and for its behoof, and he claimed to have an interest in them.

It appeared that from the time that the "Eagle" began sailing in 1864 down to November 1871 the pursuer had resided in London. He then went to Italy. Previously to 1866 he had received several small advances from the defender, and in that year he obtained from him an advance of

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£1000, as he was desirous of commencing business in London. The defender accordingly discounted the pursuer's bill for £1000, the pursuer's acceptance for this sum being renewed from time to time until, on 31st December 1868, the defender paid up the whole sum. In respect of this and other payments the defender stated that, while willing to account to the pursuer for his intrusions in the "Eagle," the latter had ceased, as at that date, to have any share in the co-adventure. He stated, further, that thereafter the pursuer did not concern himself with the management of the "Eagle," and that, subsequently to his taking up residence in Italy in 1871, he had become bankrupt, and had compounded with his creditors.

Mr Cook had been paid up his interest in the "Eagle" as at 31st December 1868.

The pursuer pleaded;—The defender having been managing partner with the pursuer in the joint adventure for the purchase and working of the said steamers, and having failed to account for his intrusions as such, decree ought to be granted in terms of the prayer of the petition.

The defender pleaded;—(1) The pursuer's demands are barred by *mora* and taciturnity. (2) The defender having all along been willing to account to the pursuer for his intrusions in connection with any interest retained by the pursuer, if he any has, in the said steamer "Eagle," he should be absolved. (3) The pursuer having no interest in the other steamers referred to by him in his condescendence, the defender is not bound to count and reckon with him in connection therewith.

After a proof, the result of which sufficiently appears from the above narrative, and from the judgments which follow, the Sheriff-substitute (Guthrie) on 21st May 1880 pronounced an interlocutor, finding, *inter alia*, that "it is not proved that the pursuer has ever been paid out, or ceased to be a partner" of the adventure in the "Eagle": "Finds that in April 1867 the defender, with the knowledge and approval of the pursuer, and the said John Cook, bought the steamer 'Rothesay Castle' for £3500, and afterwards employed her in the same trade as consort to the 'Eagle': Finds that the whole price of the 'Rothesay Castle' was obtained from a bank on the security of a mortgage over the 'Eagle' and of promissory-notes granted by the pursuer and Cook: Finds that the defender has failed to rebut the presumption thus arising that the 'Rothesay Castle' was purchased and employed as partnership property, and as part of the joint adventure: Finds that the 'Eagle' is still held and employed in the same trade under the defender's management, and that the 'Rothesay Castle' was sold by the defender in 1879: Finds that the pursuer has failed to prove that he is a joint owner or partner of the defender in the steamers 'Brodict Castle' and 'Elaine,' and absolves the defender from the prayer of the petition, so far as it craves an accounting for the profits derived from these steamships, and decerns: In respect of the foregoing findings, ordains the defender, within eight days, to lodge a full account of his intrusions and receipts connected with the steamers 'Eagle' and 'Rothesay Castle' from the end of the period embraced in the statement No. 22 of process, all as craved."

The defender failed to lodge the accounts, and on 15th June 1880 decree was given against him for £10,000.

He then appealed to the Court of Session, and argued;—(1) It was conceded that the pursuer was entitled to a count and reckoning as regarded the "Eagle." As to the "Rothesay Castle" the defender was registered owner, and had alone managed her, rendering no accounts to any one. They had never been asked for. It did not follow because the copartnership funds were used to pay for her, that therefore she was copartnership pro-

party.¹ So, too, with the other steamers. (2) The proof allowed by the Sheriff was incompetent. Trusts such as this was said to be could only be proved by writ or oath,² and it was not too late to take the objection.³ The Act 25 and 26 Vict. cap. 63, sec. 3, which was relied upon by the pursuer, allowed the enforcement of equitable rights, but did not interfere with the restriction of proof. (3) It was true that a partner could not take the company funds for extending the same line of business to his own profit. But here it was joint adventure for use of a particular vessel on a particular trade. When other vessels were got the same law did not apply as in copartnery.

Argued for the pursuer;—(1) A partner could not use copartnery funds for his own behoof, as was attempted here.⁴ (2) The objection to the competency of the proof was too late, and even if that were not so, parties having an equitable right in ships might vindicate it in any way they pleased.⁵ The Act of 1696, cap. 25, did not therefore apply. (3) There was no distinction as to legal consequences between partnership and joint adventure. They were nowhere treated separately. No one of several joint adventurers, especially the managing partner, might take any exclusive benefit from an undertaking like the present.⁶ The defender proposed to enter the same field with the joint adventure for the purpose of carrying on a rivalry. To entitle him to succeed it must be shewn that the pursuer agreed to let him have the whole interest in the "Rothesay Castle," &c. *Walton v. Butler* was a very special case, which went beyond the ordinary rule of law, and did not apply here.

At advising,—

LORD SHAND.—In this action, which originated in the Sheriff Court of Lanarkshire, the pursuer, James Davie, a marine architect in Dumbarton, demands an account of intromissions and receipts in connection with the purchase and working of certain steamers on the Clyde, from the defender, William Buchanan, who is a steamboat master in Glasgow. He claims an accounting not only in regard to the s.s. "Eagle," which was purchased in 1864, and is still running on the Clyde, but also in regard to other three steamers. The Sheriff-substitute has found that the defender is bound to furnish an account as regards the "Eagle" and "Rothesay Castle," but has assoilzied him in reference to the "Brodict Castle" and the "Elaine." Both parties have appealed to this Court,—Buchanan maintaining that although bound to account in regard to the "Eagle," he is not so bound with reference to the "Rothesay Castle;" the pursuer Davie, on the other hand, maintaining that he is entitled to an ac-

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¹ *Walton v. Butler*, Feb. 25, 1861, 29 Beavan, 428.

² Act 1696, cap. 25.

³ *Ord v. Barton*, July 3, 1846, 8 D. 1011; *M'Arthurs v. M'Briar*, June 20, 1844, 6 D. 1174, 16 Scot. Jur. 513; *Carlyle v. Macalpin's Trustees*, March 19, 1864, 2 Macph. 882; *Watson v. Duncan*, July 12, 1879, *ante*, vol. vi. 1247; *Dickson on Evidence*, sec. 574.

⁴ *Lindley* (4th ed.), 569; *Russell v. Austwick*, 1 Simon's Reps. 52; *Marshall v. Marshall*, Jan. 26, 1815, and Feb. 23, 1816, F. C.; *M'Niven v. Pelfer*, Dec. 2, 1868, 7 Macph. 181.

⁵ Merchant Shipping Act Amendment Act, 1862 (25 and 26 Vict.) c. 63, sec. 3; *Horne v. Morrison*, July 3, 1877, *ante*, vol. iv. 977; *Boswell v. Selkirk*, Hume, 350; *Simpson v. Stewart*, May 14, 1875, *ante*, vol. ii. 673.

⁶ *Gardner v. M'Cutcheon*, 1842, 4 Beavan, 534; *Lindley on Partnership*, 574; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Smith's Mercantile Law* (9th ed.), 29 and 39.

No. 64. counting not only in reference to the "Eagle," but also with regard to the "Rothesay Castle" and the "Brodict Castle," though it is now admitted that he has not established his case with regard to the "Elaine."

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The parties are agreed that there was a partnership or joint adventure entered into between them in 1864 with regard to the s.s. "Eagle." In the previous year 1863 a steamer of the same name was purchased by a copartnery, including Buchanan and Davie, and sold shortly afterwards at a profit as a blockade-runner, but we have nothing to do with that vessel in this case. Following upon that, however, parties are agreed that in 1864 a new steamer was purchased, of which Buchanan held five-eighths, the pursuer Davie two-eighths, and a Mr Cook one-eighth, and that steamer is the present "Eagle." This steamer after running during the years 1864 and 1865 earned considerable profits, which were divided in the proportion just mentioned. So that with regard to the "Eagle" there is really now no question that the pursuer is entitled to the accounting he asks. It appears to have been maintained in the Court below that Davie's share of the "Eagle" had been paid out or reduced, and that his claim for an accounting was thereby extinguished. But I have no doubt that the view of the Sheriff-substitute on this point is sound, and that the pursuer is therefore still proprietor of that vessel to the extent of two-eighths. The questions in reality in dispute between the parties relate to the s.s. "Rothesay Castle" and "Brodict Castle."

It appears that in 1867, three years after the purchase of the "Eagle," the "Rothesay Castle" was purchased, and as the "Eagle" had been registered in the name of Buchanan, although representing himself and his co-owners, so the title to the "Rothesay Castle" was registered in the same name. She was placed for some time on the same station, and then removed to Ardrossan, where she carried the traffic between that port and Arran till she was sold in 1879 by Captain Buchanan. The question is, whether for this period from the time of her purchase in 1867 to her sale in 1879 the pursuer Davie is entitled to an accounting for the profits earned, and the Sheriff-substitute has decided in his favour. It appears to me, after full consideration, that the Sheriff-substitute has arrived at a sound result. The considerations which have led me, without difficulty, to this conclusion are, that the purchase of the "Rothesay Castle" was made by Buchanan for the purpose of working her as a consort boat with the "Eagle," and that the mode in which the purchase was made, and the price of the vessel raised, shew that the purchase was a transaction for the copartnery firm. The price was paid by means of a series of acceptances between Buchanan, Davie, and Cook, the co-adventurers, and as a security to the bank for their advances in addition to the acceptances the s.s. "Eagle" was mortgaged to the bank as the property of the copartnery. These considerations, even if they stood alone, would probably be sufficient for the decision of the case in point of law. For if the managing partner of a business extends that business in its natural line, and uses the copartnery funds for the purpose of a purchase, or as security for the price of the purchase, and his co-adventurers assist him by bills or otherwise in raising the necessary funds, the conclusion appears to be irresistible that the subject purchased is the property of the copartnery business unless an arrangement to the contrary can be clearly shewn. But the case does not stand there, for the various communings between the parties all go to shew that as a matter of fact the vessel was purchased by arrangement between them for the purposes of the joint adventure. It is a circumstance of considerable

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importance that about six months before the purchase the parties were in communication with a firm of shipbuilders in Glasgow about the building of a vessel to be put on the station. It is proved by the evidence of Mr Wingate the ship-builder and of Davie himself, corroborated by their correspondence at the time, that as the trade furnished a profit, the parties had it in view to build a steamer for themselves, and communicated with Wingate for the purpose, and that these communings would have led to the building of a new steamer but for the fact of the "Rothesay Castle" being then in the market. We have in November 1866 two letters from Mr Wingate's firm to Davie in which reference is made to the new steamer. The first, on November 10th, says—"We enclose an outline tracing shewing how Captain Buchanan would like the boilers, &c. placed. You will observe the machinery space is very long. It is wanted so, and the coal bunkers kept as small as possible in order to keep the tonnage down." That shews that the steamer was one in which Buchanan and Davie were taking an interest. Again, on 16th November they write—"We expected Captain Buchanan would have written you about the new craft. He seems to think now that he would prefer her to be flush-deck forward, as she would be allowed to carry more passengers." Wingate says that she was to be a Clyde steamer, and I do not find that Davie contradicts this. The suggestion that she was intended for sale as a blockade-runner is excluded by the evidence. And when Captain Buchanan is asked, he says with candour that it is quite possible the buying of a new steamer may have been discussed between them, and this occurs in a part of his evidence immediately following upon the questions asked of him with reference to the "Rothesay Castle." The further circumstance ought not to be lost sight of, that at the time when the "Rothesay Castle" was about to be purchased we find Davie writing to Buchanan and giving it as his opinion that she must be worth £3500.

Now, what is there to be placed against that evidence? It is said the vessel was registered in the name of Buchanan alone. But that I think of no moment. The same was done in the case of the "Eagle," and it is quite usual that a vessel should be registered in the name of one partner for the benefit of the other proprietors. Cook, no doubt, depones there was no intention to purchase the "Rothesay Castle" for the joint adventure, but I have not much confidence in that evidence, if it means that there was no such intention at the time of the purchase. Cook was then in difficulties, and had been getting large advances from Captain Buchanan, in respect of which it was arranged, at a later date, that all joint adventure with him was at an end. When that arrangement was made we do not know, but I have a strong conviction that at the time of the purchase Cook understood he was to have an interest in the vessel as well as Buchanan and Davie. This is corroborated by a remarkable letter from Cook when he was first written to by Davie on the subject, in which he says—"Mr William Marshall is still in life, and at the time the 'Rothesay Castle' was bought, him and I knew well enough she was bought for the owners of the steamer 'Eagle,' namely, Buchanan, Cook, and Davie, but I could not say the amount of cash you put in or took out." When the question was first mooted he thus plainly says, that the purchase was made for the joint adventure, and I am not prepared to accept his evidence now to a contrary effect.

Again, it is said that Davie had nothing to do with the negotiations as to the purchase, these being made by Marshall, a stranger, who was brought in. All that Marshall says is, that he was asked to make the purchase on the best terms

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he could, and the object of putting him forward as a stranger is quite evident. Then we have letters written by Davie after getting into pecuniary difficulties, and which I think the Sheriff-substitute correctly describes as not very creditable to him. He mentions his difficulties with his creditors, and speaks of concealing his interest in the copartnery estate. He says in one letter to Buchanan—"Don't admit to anybody that I have any share or interest in the 'Eagle,' and in fact say nothing—deny it to anyone." But it would be putting too much weight upon that letter to hold it as excluding the "Rothsay Castle," although the observation was made with some force that he does not there mention that vessel. The "Eagle" was the main subject of the adventure. That was the vessel which had brought the parties together, and as the principal subject it alone is mentioned. Besides, evidently before the parties were involved in any dispute about this matter, we find Davie writing to Captain Buchanan on 3d December 1877—"If anyone asks such questions again, tell them I have nothing to do with the steamers—you are only a friend of mine." There we have the word "steamers" used, implying that there were more than one, when the parties were not in any dispute, and the terms of that letter appear therefore to me very much to take away the effect of the previous one. It was said, again, that the mortgage of the "Eagle" is a circumstance of no consequence, and it appears to be quite true that at a later date when Davie wanted £1000 for his own use he desired Buchanan to use the security of that vessel to raise the money. But as she was mortgaged really for the price of a new vessel the inference seems irresistible that that vessel must be regarded as the property of the copartnery.

There remains the question as to the "Brodick Castle," in the profits of which the Sheriff-substitute has held that the pursuer has no right to share. The question is not free from difficulty, but I think the conclusion to which the Sheriff-substitute has come must be held correct. It must be observed that the "Brodick Castle" was purchased at a much later date—in fact eleven years afterwards. And it is important to bear in mind the position of parties in the interval. Davie had not only been drawing largely from Buchanan, but his circumstances were such that he was now irretrievably insolvent. It was desired to continue to keep up the bills which he had granted, but his name was then of no value in the market, and Captain Buchanan had to find new ones. We find Davie writing again and again that he is in hopeless bankruptcy, and trying to conceal the fact as well as his share in the copartnery from his creditors. It seems to me that it would be very strong to hold against the defender that in the new purchase of a steamer he was buying not only for himself but also for a man in such circumstances. Besides, by this time (1878) Cook had no more interest in the steamers, and it would be difficult to hold that where one co-adventurer was leaving, the other was buying for a new copartnery between Davie and himself in the absence of all communication between them. Then, in the third place, we have the facts of the purchase. There was not only no communing between the parties as in the case of the "Rothsay Castle," but there is an entire failure to shew that the funds required for the new purchase were furnished by the copartnery or on its credit. The only evidence on this point is in that part of the proof in which Buchanan explained the history of the mortgage on the "Eagle." He says that "was discharged in 1874," three years before the purchase of the "Brodick Castle." "I granted a new mortgage on her on 18th January 1875 for £3000 in favour of the British Linen Company

Bank. It was that last mortgage that was security for the price of the 'Brodict Castle.'" The pursuer's argument comes to this, that because the bank happened to possess a general security which may be regarded as one of the circumstances that enabled the defender to purchase the "Brodict Castle," the pursuer is entitled to have an interest in the vessel. I think that circumstance is not sufficient, looking to the facts, to entitle us to sustain the claim, and on the whole, I agree with the result at which the Sheriff-substitute has arrived, and would therefore suggest to your Lordships to adhere to his judgment.

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LORD DEAS concurred.

LORD MURE.—In this case there is no difference between the parties as to the liability of the defender to account for his intromissions with the proceeds of the "Eagle." The dispute is confined to the other steamers. I have carefully considered the evidence and arguments stated to us, and have no difficulty in coming to the same result as that at which the Sheriff-substitute and your Lordships have arrived with regard to the non-liability of the defender to account for the earnings of the "Brodict Castle," and the "Elaine." But I have had considerable difficulty in coming to the conclusion that there is evidence sufficient to instruct that the pursuer is entitled to an accounting for the "Rothesay Castle." I do not dispute, but concur, in the general doctrine laid down by the Sheriff-substitute when he says—"It is a reasonable and proper presumption that when a partnership or joint trade is once established, and the profits derived from it on the credit of the partners are made the means of extending that trade or starting a new enterprise of the same kind, the new enterprise or the extension of trade shall be held to be undertaken by the same partners and on the same terms and conditions as the original concern, unless the party denying it and claiming the exclusive benefit of it shall bring forward evidence to shew that he has the sole interest." The presumption is well-founded in law, and is laid down by Erskine, iii, 3, sec. 20. But there may be circumstances sufficient to displace the presumption, and there seems to me to be difficulty in holding that there are here no such circumstances, and that the pursuer became a partner in the "Rothesay Castle," because the price of that vessel was raised by a mortgage over the "Eagle," of which the pursuer and Mr Cook, as well as the defender, held a share. The defender's name alone appeared on the registry of the "Eagle," and if that vessel had been mortgaged to its full value, in order to pay for the "Rothesay Castle," and the latter vessel in that way paid for with the money of the whole of the partners, it would then be a question of the company's money. But the difficulty is that the £3500 raised on the "Eagle" was less than the value of the defender's share of that vessel, so that he was really applying his own money alone in the new purchase. Cook explains that he had no interest in the new vessel, but he, notwithstanding, signs the bills along with Davie for the purchase money, so that there is as much reason as regards Cook to hold him a shareholder as Davie, and yet Cook was undoubtedly not a partner in the "Rothesay Castle." These circumstances appear to me to raise considerable difficulty, and it is not without hesitation that I do not differ from your Lordships in the result you have arrived at in regard to that vessel.

LORD PRESIDENT.—I am of the same opinion. I will merely say with reference to the difficulty expressed by Lord Mure, that I proceed chiefly upon the ground that the "Rothesay Castle" was purchased on the credit of the copart-

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ners and the copartnery estate. It suits Cook now to say he had no interest in the "Rothesay Castle," but I am satisfied that he had originally an interest as well as Davie. The money for its purchase was procured partly by the assistance of the three partners, and partly by a mortgage over the "Eagle." It may be that £3500 was less than Buchanan's interest in the "Eagle," and if Buchanan had made the mortgage, not of the "Eagle" but of his share in her, there would have been force in the observation. But the "Eagle" itself, the entire vessel, was the subject of the mortgage, and the result is that the "Rothesay Castle" was purchased by the partners with money raised on their credit and belonging to the copartnery.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of 15th June 1880 pronounced by the Sheriff-substitute: Find that in the beginning of the year 1864 the pursuer and defender and John Cook entered into a joint adventure or partnership for the building or purchase and working of a river steamer called the 'Eagle,' trading between Glasgow and Rothesay, that the defender's share was five-eighths, the pursuer's two-eighths, and Cook's one-eighth, that the said ship was registered in name of the defender as owner, and that the defender was managing owner and master: Find that the defender has accounted with the pursuer for the earnings or profits of said joint adventure or partnership for the seasons of 1864 and 1865, as shewn by the statements Nos. 6/1 and 22 of process, but that no accounting has taken place between them for the subsequent years during which the defender has continued to manage the 'Eagle': Find that it has not been proved that the pursuer has ever been paid out or ceased to be partner of said adventure: Find that in April 1867 the defender, with the knowledge and approval of the said John Cook, bought the steamer 'Rothesay Castle' for £3500, and afterwards employed her in the same trade as consort to the 'Eagle': Find that the whole price of the 'Rothesay Castle' was obtained from a bank on the security of a mortgage over the 'Eagle,' and of promissory-notes granted by the pursuer and Cook: Find that the defender has failed to rebut the presumption thus arising, that the 'Rothesay Castle' was purchased and employed as partnership property, and as part of the joint adventure: Find that the 'Eagle' is still held and employed in the same trade under the defender's management, and that the 'Rothesay Castle,' which was sold by the defender in 1879, was partnership property, and was employed as such from the time of purchase till the date of sale: Find that the pursuer has failed to prove that he is a joint owner or partner of the defender in the steamers 'Brodict Castle' and 'Elaine,' and assoilzie the defender from the prayer of the petition so far as it craves an accounting for the profits derived from these steamships, and decern: Therefore adhere to the interlocutor of the Sheriff-substitute of 21st May 1880, except in so far as it ordains the defender to lodge an account within eight days from the date of the interlocutor: Find no expenses due to or by either party in this Court: Remit to the Sheriff to proceed further in the cause, and to dispose of the expenses in the inferior Court."

ALEXANDER KIRKPATRICK, Pursuer.—*Kinnear—Lorimer.*
THE ALLANSHAW COAL COMPANY, Defenders.—*Asher—Lang.*

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Lease—Verbal alteration—Proof—Acquiescence—Rei interventus.—In an action by a landlord for payment of £1500 as the half year's rent of a coalfield, under a written lease, of which upwards of twenty years were still to run (with certain breaks in favour of the tenant), the tenant alleged that with the view of enabling him to resist demands of workmen for an increase of wages, the landlord, who had the option of a royalty or a fixed rent, had verbally agreed to reduce the fixed rent by one-third, and that on the faith of this agreement he (the tenant) had resisted the demands of the workmen and shut up the colliery for two months. *Held (diss. Lord Shand, rev. judgment of Lord Rutherford Clark)* that as the tenant had merely averred a verbal agreement to alter the rent from £3000 to £2000, unsupported by any facts which necessarily implied acquiescence on the part of the landlord in an alteration of the lease, he was not entitled to probation.

Wark v. The Bargaddie Coal Company, H. of L., 3 Macq. 467, and *Sutherland v. Montrose Shipbuilding Company*, Feb. 3, 1860, 22 D. 665, commented upon.

ALEXANDER KIRKPATRICK of Allanshaw, Lanarkshire, raised this action against the Allanshaw Coal Company, his mineral tenants, for payment of £1500 as the half year's rent due to him at Whitsunday 1880 under a written lease, dated 24th December 1873, in favour of Alexander Simpson. The lease stipulated for £3000 per annum of fixed rent, or, in lieu of that, for certain lordships, in the option of the landlord. The lease was for thirty years from Martinmas 1873, with breaks in the tenant's favour in 1876 and at the end of each subsequent period of three years, upon six months' notice to the landlord. There was this provision as to the rent:—"With power, however, to the second party, in the event of the fixed rent paid for any one of the years of the lease exceeding the lordships at the rates foresaid upon the output raised and carried away during that year, to make up and retain the short or deficiency from the excess of the lordships over the fixed rent of the three years immediately succeeding the year or years in which any such short or deficiency may have occurred, but of those three years only, and to the extent of such excess." The Allanshaw Coal Company, of which Alexander Simpson was one of two partners, were now in right of that lease. The defenders alleged that subsequent to the lease an agreement had been made with their landlord for a reduction of the rent from £3000 to £2000 per annum.

They stated upon record,—(Stat. 1) "The working of the coalfield in question has, since the opening of the pit a few years ago, been carried on with great expedition, and during the three years ending Martinmas 1879 the lordships have exceeded in amount the stipulated fixed rent. The defenders, however, found themselves at a considerable disadvantage in dealing with the men in their employment in consequence of the fixed rent being so high. At various times prior to the month of October 1879 suggestions have been made and discussed by the pursuer and the defender" (i.e. Alexander Simpson) "as to a reduction of the fixed rent, but no final agreement was come to. In the months of September and October 1879 the miners in the Hamilton district; in which the coalfield in question is situated, maintained an agitation for an increase of wages. The defenders experienced great difficulty in dealing with this agitation, in consequence of being compelled to keep up a large output in order to meet the fixed rent, and were in fact prevented from taking up a firm position with the men in consequence of this necessity." (Stat. 2) "On a day about the end of October or beginning of November 1879 the pursuer called at the colliery and had a conversation with the defender Simpson on the subject of the disputes between the masters and the miners. The pursuer expressed wonder

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that the masters did not take up a stronger ground, to which the defender Simpson replied that he was surprised that the pursuer should so express himself, as he had done nothing towards reducing the fixed rent, and so had left it impossible to stop working. The pursuer then said that the defenders should not allow that to stand in the way, that he did not require the money, and had never intended taking more than the lordship on the coal actually put out. He added that he would lose nothing by such an arrangement, as the coal would still be there. At the pursuer's request a meeting was then arranged to take place in the office of Mr Robertson, C.E., Glasgow, at which the matter might be discussed and settled." (Stat. 3) "On 3d November 1879 the pursuer, in terms of the above arrangement, met the defender Simpson in Mr Robertson's office, there being also present at the meeting Mr Robertson, and the Rev. T. M. B. Paterson, a son-in-law of the pursuer. After an arrangement had been come to as to the rate at which small dross was to be charged, the pursuer brought up the subject of the fixed rent, and asked the defender Simpson if a reduction of £1000 per annum would satisfy him. The defender replied that it would, and asked the pursuer to give him a letter to that effect, so as to put the matter beyond dispute. The pursuer said that his word was quite sufficient, and that there was no need for any writing; but, on the suggestion of the Rev. Mr Paterson, he undertook to indorse the agreement on the back of the lease." (Stat. 4) "On 15th November 1879 Mr Mitchell, salesman to the defenders, called on the pursuer at Allanshaw with reference to the receipt for the lordship due at the term of Martinmas which had been sent him, and in course of their conversation the proposed indorsation of the agreement on the lease was mentioned. The pursuer then said that the arrangement was concluded, and there was no need to put it in writing, as the defenders had his word, and that he had also entered it in his private note-book, and mentioned it to his trustees, and especially to his son-in-law, Mr Paterson, so that there could be no dispute about it even in the event of his (the pursuer's) death. The defenders thereupon, having then full confidence in the pursuer's honour and integrity, considered the matter finally settled." . . . (Stat. 5) "Immediately after the conclusion of this agreement, and in reliance thereon, the defenders took up a decided position with their men, who were, in consequence, out on strike from the beginning of December 1879 till the end of January 1880. In acting in this manner the defenders had full reliance on the binding nature of the agreement come to with the pursuer. But for this reliance they would not have thought of entering upon the struggle with the men to the extent they did; there would have been no strike, and the output from the colliery would have been kept up to an amount sufficient to cover the fixed rent. In order to cover the original fixed rent of £3000 the annual output of coal from the colliery requires to be 80,000 tons; and since the opening of the colliery the defenders have been able to turn out very little more than that quantity. About five-eighths of the total output is turned out during the winter months, or from Martinmas to Whitsunday, in consequence of the demand for coal being much greater in winter than in summer. The stoppage of work during the winter months thus seriously affected the defenders' ability to turn out such a quantity of coal as would suffice to cover the fixed rent. The pursuer was well aware of the nature of the defenders' controversy with their workmen, and also knew that in refusing to accede to the terms demanded by their workmen, which resulted in the strike by them as abovementioned, they were acting in reliance on the said agreement come to with him. The pursuer's residence is situated within 400 or 500 yards of the defenders' colliery, and in sight

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thereof. During the time the strike lasted, and for some weeks before it began, the pursuer was in the habit of visiting the colliery almost daily, and was fully aware of the whole negotiations between the defenders and their men. The pursuer knew quite well that, but for the said agreement with him, the defenders would not have allowed their men to go out on strike, and he never suggested that they were in error in so acting, or that the agreement which had been made would not be fulfilled. While the strike lasted, work in the colliery was entirely suspended. Had the colliery been in operation during that time there would have been an additional output of coal for the year of at least 12,000 tons."

Mr Kirkpatrick denied the alleged agreement, and declined to take £1000 as in full of the rent for the half year ending Whitsunday 1880.

The defenders, *inter alia*, pleaded;—(1) The pursuer is barred by the said agreement from insisting in payment of the full fixed rent stipulated in the said lease. (2) The said agreement, having been finally concluded and acted on by the parties, cannot now be resiled from by the pursuer.

The Lord Ordinary allowed both parties a proof of their averments, the defenders to lead in the proof.

Leave being given, the pursuer reclaimed, and argued;—The defenders' averments could not be admitted to proof. The acts on which the plea of *rei interventus* was based were not "unequivocally referable" to the alleged verbal agreement. Neither did they result from it. Either of these alternatives was necessary to substantiate *rei interventus* following upon a verbal agreement.¹ It was said that, with the pursuer's consent, the defenders allowed their men to strike. That did not amount even to acquiescence, which must arise from a permission of conduct at variance with the terms of the written lease. But *rei interventus* was necessary here. It was properly a bar to *locus penitentie*, or a mode of perfecting a hitherto imperfect contract.² That was not the nature of this case. The case of *Emslie v. Duff*, 2d June, 1865, 3 Macph. 854, shewed what was necessary to set up a verbal agreement. That was not to be found here. *Wark's* case had been frequently explained. It was a case of acquiescence in acts at variance with the written contract, and therefore did not apply. The judgment of the House of Lords in *Wark* did not trench upon the reasoning of the Judges of the Court of Session as applied to verbal agreements. The effect of the defenders' contention was that the landlord must abandon one-third of his rent for twenty-four years; but there was nothing to that effect in the alleged agreement.

The other side seemed to rely upon a class of cases of which *Johnston v. Grant*, Feb. 28, 1844, 6 D. 875, was one, where it had been held that it was unnecessary to prove that the person against whom *rei interventus* was pleaded had knowledge of the thing done. But proof of such waiver as the defenders averred here was quite a different thing from proof of a new agreement.

The defenders argued;—Proof should be allowed. The averment of the agreement was quite distinct; it included the date, the parties, and the subject. The averment of *rei interventus* was relevant. It included acts done in performance of the agreement. There was an antecedent consent on the part of the pursuer, and there was no need of actual

¹ *Wark v. Bargaddie Coal Co.*, March 6, 1856, 18 D. 556, *rev. H. of L.* March 15, 1859, 3 Macq. 467; *Sutherland v. Montrose Shipbuilding Co.*, Feb. 3, 1860, 22 D. 665; *Gowans' Trustees v. Carstairs*, July 18, 1862, 24 D. 1382 (Lord Deas, p. 1389); *Walker v. Flint*, Feb. 20, 1863, 1 Macph. 417; *Fowlie v. Maclean*, Jan. 18, 1868, 6 Macph. 254; *Philip v. Gordon Cumming's Trustees*, June 3, 1869, 7 Macph. 859.

² *Bell's Principles*, 26, 945, 946.

No. 65. knowledge at the time of the acts being done.¹ Acts were done here which could not have been done in carrying out the original lease. Dec. 17, 1880. Where these were to the prejudice of the one party, and to the benefit Kirkpatrick v. of the other, and both followed upon a verbal agreement, though neither Allanshaw might suffice when alone to found *rei interventus*, yet *juncta jvant*.² Coal Co. In the *Church of England Life and Fire Assurance Company v. Wink and Others*,³ the Judges dealt with the question of the necessity for knowledge that the act was being done. The case of *Wark* laid down general principles. In it there was a distinct averment of a verbal agreement and of acts inferring acquiescence following upon it. Lord Chelmsford pointed out there that where there was a verbal agreement set forth much less was necessary to constitute *rei interventus* than where it had to be presumed. *Baillie v. Fraser*⁴ and *Gibb v. Winning*⁵ were cases in which previous agreements were presumed.

At all events, this was a case of *pactum liberationis* or waiver. The original agreement was brought within narrower bounds.⁶ There was enough to constitute that, although there might not be enough to found a new agreement.

If proof were not allowed, it would tend to undue restriction in such cases.

At advising,—

LORD PRESIDENT.—This is an action for payment of the sum of £1500, being the amount of a half year's rent due at Whitsunday last under a mineral lease entered into between the pursuer, the proprietor of the mineral subject, and the defender Simpson, the original tenant, the fixed rent under the lease being £3000, the half year's rent accordingly being £1500. The defence to the action is an averment that the pursuer consented to reduce the fixed rent from £3000 to £2000. The lease is dated 24th December 1873, and its currency is for thirty years from the term of Martinmas of that year, so that it does not expire till the year 1903. The subject let is coal and fire-clay, and the provisions with regard to the payment of rent and lordships are very precise and detailed. The tenant binds and obliges himself and his heirs, successors, and assignees, to pay "the sum of £3000 per annum of fixed rent for the coal and fire-clay hereby let, and that during the whole years of this lease (subject to the exemption afterwritten for the first three years of the lease), and proportionally for any part of a year, and whether the second party shall work the minerals or not." Then there is an option given to the landlord in lieu of the fixed rent to claim lordships at a certain specified rate, and a restriction, as to the first three years of the lease, of the fixed rent, as it is expressed, "declaring that no fixed rent shall be exigible for the first three years of this lease ending at Martinmas 1876, for which period the for-said lordships only shall be payable upon such minerals as shall be raised and carried away out of the said lands." And then there is a provision for the period over which the landlord is to exercise his option of having the fixed rent or the lordships. There are two other very important provisions in favour of the tenant. The one is that he is to be entitled to renounce the lease at the expiry

¹ Johnston v. Grant, Feb. 28, 1844, 6 D. 875 ; Beattie v. Lord Wharncliffe, March 6, 1873, 11 Macph. 490 ; Dobie v. Lauder's Trustees, June 24, 1873, 11 Macph. 749.

² Bell's Comms. (M'Laren's ed.), i. 346 ; Menzies on Conveyancing, 185.

³ July 17, 1857, 19 D. 1079.

⁴ June 17, 1853, 15 D. 747.

⁵ May 8, 1829, 6 S. 677.

⁶ Erskine, iii., 2, 3 ; Dickson on Evidence, 241.

of every term of three years. The provision is that the tenant shall have right to break and renounce the lease at the term of Martinmas in any one of the years 1876, 1879, 1882, and so on, being the whole triennial periods embraced within the currency of the lease. And there is this further provision also, that he, the tenant, shall have the power, "in the event of the fixed rent paid for any one of the years of the lease exceeding the lordships, at the rates foresaid, upon the output raised and carried away during that year, to make up and retain the short or deficiency from the excess of the lordships over the fixed rent of the three years immediately succeeding the year or years in which any such short or deficiency may have occurred, but of those three years only and to the extent of such excess."

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No one could read these clauses of the lease without seeing that they have been the subject of very deliberate negotiation and contract between the parties, and a great many events are foreseen and provided for. And it is needless to say that in a subject of this extent and value the amount of the fixed rent is a matter of the greatest possible moment to the landlord. If the minerals are not worked the rent is still payable, although it is within the power of the tenant to put an end to that condition of matters by renouncing the lease at the end of three years. But if the fixed rent exceeds the amount which would be payable as lordship, the landlord is to have the benefit. On the other hand, there is a very equitable power in favour of the tenant to enable him to make up a deficiency of one year out of the surplus or excess of the lordships over the fixed rent of the three years immediately succeeding. Altogether I do not remember to have seen a better considered lease, or one which contained more explicit terms defining the respective interests of the landlord and tenant.

Now, the defenders' averment is that this fixed rent of £3000 has been reduced to £2000, and this is said to have been done by a verbal agreement. It is necessary to attend to the precise averments made on this subject by the defenders. They say that during the three years ending Martinmas 1879 the lordships have exceeded in amount the stipulated fixed rent, but that at the same time they experienced considerable difficulty with their workmen in consequence of being compelled to keep up a large output in order to meet the fixed rent, and that consequently the latter had them very much in their power. Indeed, they were compelled to yield to the demands of the workmen to prevent their going out on strike, which would have resulted in a failure to raise the amount of mineral necessary to payment of the fixed rent. The defender Simpson is said to have stated this to the landlord, who answered that he would not allow that to stand in his way, and that he would be satisfied with the lordships. And then the defenders go on to state more particularly what passed at a certain interview between Simpson and the landlord on 3d November 1879. The pursuer met the defender Mr Simpson in the office of Mr Robertson, civil engineer, in Glasgow,—“there being also present at the meeting Mr Robertson and the Rev. T. M. B. Paterson, a son-in-law of the pursuer. After an arrangement had been come to as to the rate at which small dross was to be charged, the pursuer brought up the subject of the fixed rent, and asked the defender Simpson if a reduction of £1000 per annum would satisfy him. The defender replied that it would, and asked the pursuer to give him a letter to that effect, so as to put the matter beyond dispute. The pursuer said that his word was quite sufficient, and that there was no need for any writing, but on the suggestion of the Rev. Mr Paterson he undertook to indorse the agreement on the

No. 65. back of the lease." Then (Statement 4) "On 15th November 1879 Mr Mitchell, salesman to the defenders, called on the pursuer at Allanshaw with reference to the receipt for the lordship due at the term of Martinmas, which had been sent him, and in course of their conversation the proposed indorsation of the agreement on the lease was mentioned. The pursuer then said that the arrangement was concluded, and there was no need to put it in writing, as the defenders had his word, and that he had also entered it in his private note-book, and mentioned it to his trustees, and especially to his son-in-law, Mr Paterson, so that there could be no dispute about it even in the event of his (the pursuer's) death. The defenders thereupon, having then full confidence in the pursuer's honour and integrity, considered the matter finally settled." And the bargain was held to be concluded.

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There is a good deal of vagueness about these statements, and it is not quite clear upon the record, as it stands, to what the defenders allege the pursuer actually agreed. They say he agreed to reduce the rent from £3000 to £2000. They do not say that that was to operate during the whole currency of the lease. But I understand from the defenders' argument that that is what they intend to say, and that they do in fact claim immunity to the extent of £1000 a-year from the obligations of the lease during the whole remaining currency thereof. Now, that is certainly a very strange subject for a verbal agreement, and the defenders themselves seem to be conscious of that, because they say they wished very much to have it in writing. If anything of the kind passed, it is entirely denied by the landlord. Nothing can be more foolish or absurd than to allow such an agreement to stand upon words without being reduced to writing. It must be observed that this is not the constitution of an original and independent agreement by parole, but it is an alteration of a written contract by a parole agreement. These two things stand on a somewhat different footing in regard to their legal aspect and effect. The rule in regard to parole agreements respecting heritage is that they are not of any effect unless they can be proved either by the writ or oath of the parties. But with regard to the variation of a formal written contract by words only, the rule is that that cannot be done—that a formal written contract cannot be varied or altered by words merely. That is the rule we have to apply in the present case. Now, that being so there can be no doubt that, in so far as regards the averments I have hitherto read, the rule is plainly applicable, and I am therefore clearly of opinion that the defender is not entitled to prove this verbal agreement *pro ut de jure*.

The defenders farther contend that they have averred acquiescence and *rei interventus* sufficient to entitle them to get into an investigation into the whole proceedings between the parties as to this alleged reduction of rent. Now, before reading this averment, just let us consider for a moment what the variation is which is said to have been made by this verbal agreement. It is a reduction of rent by one-third, an alteration of the rent clause of the lease to that extent operating in the future, during a period of twenty-four years, and therefore involving an interest of £24,000. The sort of acquiescence or *rei interventus* which one would expect to follow upon that is payment of the short rent by the tenants and acceptance of it by the landlord in such circumstances as to be plainly referable to an agreement to reduce the rent for the remaining years of the lease. Anything short of that, I apprehend, would not be that sort of acquiescence and *rei interventus* which is inconsistent with the rent clause of the lease and its obligations. One could easily understand that a landlord might

accept a short payment of rent for one term, or for several terms, and that the acceptance of that short payment might be referable not to such an agreement as this, but to an agreement of a very different kind, to give the tenant a consideration for losses sustained by him temporarily owing to bad times and bad markets. Such things are perfectly well known in practice, and if these short payments were referable to that, they would not constitute acquiescence or *rei interventus* of such a kind as to vary or alter the obligations of the rent clause of the lease. Therefore it appears to me that this is a kind of parole agreement which it is very difficult to fortify by acquiescence and *rei interventus*, unless it can be shewn that what was done or implied was plainly referable to an agreement of this continuous character, which was to last for the whole remaining years of the lease.

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Now, let us see what the averments are. The defenders say that "immediately after the conclusion of this agreement, and in reliance thereon, the defenders took up a decided position with their men, who were in consequence out on strike from the beginning of December 1879 till the end of January 1880. In acting in this manner the defenders had full reliance in the binding nature of the agreement come to with the pursuer. But for this reliance they would not have thought of entering upon the struggle with the men to the extent they did; there would have been no strike, and the output from the colliery would have been kept up to an amount sufficient to cover the fixed rent." Then, it is said, that "the pursuer was well aware of the nature of the defenders' controversy with their workmen, and also knew that in refusing to accede to the terms demanded by their workmen . . . they were acting in reliance on the said agreement come to with him." Then they mention that he resides near the colliery, and was aware of the negotiations between the defenders and their men, the pursuer knowing that, but for the agreement, "the defenders would not have allowed their men to go out on strike, and he never suggested that they were in error in so acting, or that the agreement which had been made would not be fulfilled."

Now, what do these averments amount to? Simply to a statement that relying upon the parole agreement, on which they were not entitled to rely, the defenders did something which they would not have done if they had not supposed that that parole agreement would be fulfilled. Is that sufficient as *rei interventus* or acquiescence in a case of this kind? They were dealing with their workmen, and they took a firm position with them, which they would not have done if they had thought that they would be required to put out 80,000 tons of coal from the mine so as to enable them to pay the £3000 of fixed rent. That may be so, and we must assume that it was so; and if there had been a separate and independent agreement between the parties, stipulating, on the one hand, that the defenders should insist upon the men working at certain rates, or otherwise allowing them to go out on strike, a stipulation advantageous not merely to the landlord (although primarily to the landlord) but to the tenant also, and containing, on the other hand, a stipulation for a reduction of the rent,—the one being a consideration for the other,—if that, I say, had been contained in a separate original agreement, there would have been great force in the contention. The tenant having performed his part of the agreement, the landlord would have been bound to perform his also, and that would have been *rei interventus* following upon a parole and informal agreement.

But that is not the nature of the present case. Here we have nothing but

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an alleged verbal variation of one of the most important clauses of a formal written contract, and the acquiescence or *rei interventus* which is necessary to fortify that must be something done which is inconsistent with the terms of the written contract. It is here that the point in this case arises which involves a question of law of the very greatest importance. I should have thought that there was not much doubt about it but for the very urgent arguments that were addressed to us upon the case of *Wark v. The Bargaddie Coal Company*, 3 Macq. 467, as decided in the House of Lords. And it is most important that there should be no misunderstanding as to what the effect of that judgment is. If it be what the defenders contend for, it introduces a very serious and a very startling innovation upon the law of Scotland. But I do not think it does so. I think it only affirms a principle that is perfectly consistent with the law of Scotland as it has been hitherto understood and interpreted in practice. There are, no doubt—it is impossible to withhold the observation, but I make it with all due respect for the noble and learned Lord to whom I refer—some loose expressions in the judgment of the Lord Chancellor (Chelmsford) in that case, which are capable of being twisted and misunderstood. But I think the true principle of the case is to be found in a single sentence of Lord Cranworth's opinion, and it is not in the least inconsistent with that given by Lord Chelmsford, who preceded him. He says :—"With regard to the general principle I should be very sorry to think there was any doctrine in the Scotch law which rendered it at all possible, uniting law and equity together, that if a person having what we should call here a legal right under a lease, authorises something to be done by his tenant in contravention of that lease, and it is done accordingly—I say I should be very sorry to think that, according to the law of Scotland, the tenant is still liable as for a breach of contract, having done that which his landlord authorised him to do."

Now, that is in a few words what was decided in the case of *Wark v. The Bargaddie Coal Company*. In that case the tenant was prohibited by his lease from working within a certain distance of a barrier which separated his coal-field from the neighbouring coalfield. But he did work nearer—in fact he worked through the barrier. That was a contravention of the lease, and he justified it by alleging that his landlord had consented to it verbally, or at any rate that the fact was within the knowledge of the landlord, who had seen him do it and had not objected to it—in short, that the contravention of the prohibition in the lease had been with the landlord's knowledge and assent. Now, I think, taking the case in that point of view, that the doctrine here laid down by Lord Cranworth is such as would commend itself to the mind of every lawyer. There cannot be a doubt that if the landlord, having right to insist upon a certain prohibition, consents to dispense with it or allows his tenant to do something inconsistent with it, and the tenant, with his knowledge and assent proceeds to do that, then the tenant cannot be sued as for a breach of contract. That appears to me to be all the length that this case goes.

The case of *Wark v. The Bargaddie Coal Company* was within a year after the judgment in the House of Lords brought under the notice of this Court, and its import and effect were very seriously considered in the case of *Sutherland v. The Montrose Shipbuilding Company*, before the Second Division. That was a case of contract for the building of a ship, in which the time of finishing the vessel was a material stipulation in the contract, and the time had been exceeded. The contractors averred that there was an agreement to prolong

the time, that in consequence of that agreement they delayed and took certain steps which they would not otherwise have done. Now, that looks very like the averments in the present case, indeed it is very difficult to distinguish the averments there from those in the present case. The defence there failed, and the clause in the contract was given effect to in accordance with the case of *Wark v. The Bargaddie Coal Company*. In commenting upon *Wark's* case, Lord Cowan, who gave the leading opinion in *Sutherland's* case, says :—"The recent judgment in the House of Lords in *Wark v. Bargaddie Coal Company* recognises no more than this, that acts of acquiescence at variance with the terms of a written agreement may be the subject of parole proof." In that opinion Lords Wood and Benholme concurred, and in making some additional observations, I, being then in the chair of the Second Division, said :—"The rule of law as standing on that judgment I take to be that where there are averments of acquiescence in operations inconsistent with the terms of the written contract they may be admitted to proof."

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After that judgment, I think it would be a strong measure to say that anything short of acquiescence or consent to variations inconsistent with the terms of a written contract would be sufficient, under the principle of the judgment of the House of Lords, to justify a tenant in refusing to fulfil the stipulations of his written contract. The same view has been taken of that judgment of the House of Lords in some subsequent cases. The expressions of opinion have been mainly *obiter dicta*, but they are evidence, and very important evidence, of the construction which has been put upon the judgment of the House of Lords by different members of this Court. I think it is the only true construction, and I may say that I do not see any good reason for extending the meaning and effect of the judgment of the House of Lords, even if I thought it was at variance with the principles of this Court, which I do not. It appears to me that when you once lay down the general rule, stated most emphatically by Lord Chelmsford in that case, that a clause of a written contract cannot be varied or altered by words only, that that means that the clause of the written contract can be varied by acts acquiesced in by the landlord, and by nothing else. In the present case I apprehend we have nothing of that kind. We have simply an averment of acts arising out of this verbal agreement or arrangement, an averment that the tenants at once did something which they otherwise would not have done, something which, even if the landlord was aware of it, was not in the slightest degree inconsistent with the rent clause of the lease. But what is it that they do? They quarrel with their workmen, and the manner in which they deal with them forces them out on strike. But that has nothing to do with the rent clause of the lease, and is not in the slightest degree referable to the rent clause of the lease. There is no inconsistency between the two, and the one is not referable on the face of it to the other, and therefore there is not that acting inconsistently with the written stipulation that is indispensable, I think, to entitle a party to a proof in circumstances like the present.

I am therefore for recalling the interlocutor by which a proof was allowed before answer, for I think there is no case which can competently be admitted to probation, and of course we shall decern in terms of the conclusions of the summons.

LORD DEAR.—There are two ways in which I might express my opinion applicable to this case. The one would be by going over the averments in the present

No. 65. case and the observations which were made in the House of Lords in the *Bargaddie* case, as your Lordship has done, and the other would be simply to express my concurrence in the detailed observations which have been made by your Lordship both on the averments in the present case, and on the views said to have fallen from the House of Lords in the *Bargaddie* case. I think the clearest, as well as the shortest, way in which I can express myself is to say that I entirely concur in both branches of the opinion which has now been delivered by your Lordship. We considered these matters very fully and anxiously in consultation on the case we are now deciding, and having done so I then concurred entirely in the views expressed by your Lordship. I do so still. I presume that I am one of the Judges to whom your Lordship has referred, who, in cases subsequent to the *Bargaddie* case, have expressed opinions on the general and important question not absolutely necessary for the decision of the case then in hand. If *Gowans' Trustees v. Carstairs*, in January 1862, be one of those cases, I can only say that, whether that opinion be regarded as, to some extent, *obiter* or not, I am clearly of opinion that the law so laid down was sound. I do not think, any more than your Lordship, that anything more was intended to be decided, or was decided in the *Bargaddie* case in the House of Lords, than that if the thing permitted by the landlord to be done, in direct contradiction to the written lease, has been actually done, the terms of the agreement under which it was done may be relevantly inquired into. In point of fact there is no doubt that such was the nature of that case ; and it is generally and rightly to be presumed that, when Judges are dealing with a particular case, their opinions are to be construed very much with reference to the facts of that particular case, and that they are not speculating on and deciding some other case. All that has followed in the case of *Walker* and other cases, as your Lordship has observed, goes to shew that the Judges of this Court so understood it. As regards the alleged agreement in the present case to reduce the fixed rent, what is averred is of the most vague and indefinite description possible. The lease is for a considerable term of years, but I cannot make out whether it is meant to be said that the alleged reduction was to be for one year or for how many years. Then, what may be called the facts and circumstances by which that agreement is proposed to be supported are all averments of the most vague description. We could not anticipate that anything could come out of allowing a proof of these averments except endless confusion and contradiction on mere matters of opinion. Instead, however, of entering into any further particulars, I confine myself to the adoption of all the observations of your Lordship as to this part of the case, as well as the general law on the subject as on the details set forth in the record.

LORD MURE.—I am of the same opinion, and in coming to that conclusion I do so on very much the same grounds as those which have been explained by your Lordship in the chair. In dealing with the case it is necessary to look to the special terms of the lease, and to refer to one or two passages in it. There is a power which the tenant has of renouncing every three years during the lease, and there is then a clause by which, if in any one year the lordships, calculated at the rates fixed in the lease, shall be less than the amount of the fixed rent, power is given to the tenant to equalise the payments by retention of the excess of lordship over the fixed rent during the three immediately succeeding years ; so that if there is a strike in the colliery, or if from that or any other cause the colliery is stopped, and there is no output for a considerable period, the loss so sus

tained by the tenant is to be made good to him out of the excess, if any, of the lordships over the fixed rent in the three next ensuing years. No. 65.

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Such being the terms of the lease, the ground of defence to the present action for rent is that there was a verbal agreement come to between the defenders and the pursuer when they were discussing the subject of the strikes that were going on in other collieries, by which the pursuer verbally agreed to abate £1000 a-year of the fixed rent under the lease for the period of twenty-four years that were to run. The averment, therefore, is that there was a verbal agreement to alter the rent fixed by a written lease from £3000 to £2000 a-year. That is an allegation of a total departure by the pursuer from one of the most important clauses in the lease. Now, the only way in which a verbal agreement of that sort could be set up as against a written contract, in the view I take of the law, is by an averment and proof of actings, and acquiescence on the part of the landlord to abate £1000 a-year of the fixed rent. But there is here no such averment. On the contrary, it is stated that when the defenders offered to pay the reduced rent it was at once rejected by the pursuer. If there had been an acceptance of the reduced rent for a certain period on the footing of an agreement to that effect, the question would then have arisen whether in the circumstances that would amount to such acquiescence or homologation by the pursuer of a verbal agreement to reduce the rent, as would bind him for the rest of the lease. It did not require the case of *Wark v. The Bargaddie Coal Company* to settle that question. It was, I think, settled in the law of Scotland before that decision, that in such circumstances the landlord would be bound, as will be seen on referring to the case of *Baillie v. Fraser*, 15 D. 747. In that case there was a series of acts and transactions between the landlord and tenant in regard to the rent payable under a lease, for which receipts had been granted, and entries in conformity with these receipts had been made in the rental-books of payments of rent at a reduced rate, and in a manner different from that fixed by the lease, and it was held that these amounted to such *rei interventus* as imported an alteration of the written lease in that respect, and it was held that the written lease was altered. But we have nothing of that kind here. The only substantial averment I can find is that the defenders state that, in consequence of the alleged agreement, they allowed their men to go out on strike for about six weeks in the end of 1879 and beginning of 1880, and that the pursuer was in the knowledge of that proceeding upon their part. There is, however, no express provision as to strikes in the lease, or about preventing the men from going out on strike. But allowing that there was something done as to strikes that might be construed as being at variance with the lease, what does the defenders' averment come to? Simply to this, that they sustained a loss by the want of output from the pit during the strike, which is just one of the things which the equalising clause was intended and calculated to meet. There is not, therefore, in the defenders' allegations, so far as I can see, anything said to have been done by them, and tolerated by the pursuer, which was unequivocally inconsistent with the terms of the lease. Now, that, I apprehend, is necessary to make a relevant case, and to bring this case within the ruling of the *Bargaddie* case. In that case the Lord Chancellor said that a written contract could not be altered "by words only." To do this, acts inconsistent with the written contract must, as I apprehend, be averred as having been done by the one party and sanctioned by the other in virtue of the alleged verbal agreement. Now, the strike is the only act mentioned, and that, in the view I take of it, is not an act inconsistent with the terms of the lease in question.

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The passage in Lord Cowan's opinion in the case of *Sutherland*, which your Lordship has read, clearly points to this, that the acts alleged and founded on must be at variance with the written contract, and in that I concur. In the *Bargaddie* case the variation or alteration of the written contract was complete. The landlord authorised the tenant to do something that was a direct contravention of the written lease, and it was done. The company were prohibited from working within a certain number of yards of their march, but it was alleged that they had worked through this barrier, and that their whole working was carried on by means of this encroachment; it was also alleged that the landlord was quite aware of this, and had verbally authorised it. It was, in these circumstances, held that, as these operations constituted a complete contravention and alteration of the written lease, and as the landlord was said to have acquiesced, the averments were relevant. But there are no similar averments here, and I have, therefore, no difficulty in agreeing with your Lordships that a proof ought not to have been allowed. And I have had the less hesitation in coming to this conclusion, as it is clear, on the defenders' own statements, that from the first they felt this matter to be one of great importance to them, and that the agreement ought not to be allowed to stand on mere words, but that it ought to be reduced to writing; for, as we see from the statements, they twice applied to the pursuer to have that done, and on each occasion it was refused.

Upon these grounds, I think the Lord Ordinary's judgment should be recalled, and that decree should be given for the sum sued for.

LORD SHAND.—The Lord Ordinary, by the interlocutor brought under review, has, before answer, allowed the parties a proof of their respective averments, his Lordship being of opinion either that proof of the facts alleged is competent, or that it is undesirable in a case of this kind to determine *ab ante* the abstract question of competency of proof of all the matters alleged, and that in any view the Court would be in a better position for determining the whole questions involved, including the admissibility of parole evidence to the full effect contended for by the defenders, when they have the best means of knowing the truth on all the material facts. It appears to me, with all deference to your Lordships, that the Lord Ordinary was right, and that it would have been better to have reserved the decision of the whole case until the result of the proof was seen, the order for proof being in terms which shew expressly that all questions as to the competency of evidence on particular matters was left open for consideration and determination.

In the view which your Lordships have taken, however, it has become necessary to form an opinion now as to the legal right of the defenders to the inquiry they ask, and my opinion on that question differs from that entertained by your Lordships. The case is of importance to the parties, but its chief interest arises from the important consequences of the principle or rule on which the judgment proceeds, a rule which must apply to many future cases; and I confess I am apprehensive of these consequences. In the state of the law of evidence as now settled, by which, through the examination of the parties themselves, and all others connected with them, the means of getting at the truth in disputed questions of fact is now so ample, I regret any decision which appears rather to narrow than extend and relax existing rules, and apart from the merits of the dispute in this particular case, I fear the decision to be pronounced will seriously diminish the salutary effect of the principles announced by the House of Lords

in the case of *Wark v. The Bargaddie Coal Company* in 1859, reversing the decision of this Court. No. 65.

It humbly appears to me that the law laid down in that case substantially comes to this, that although the terms or stipulations of a written agreement cannot be waived or varied by words only—that is, by proof of a verbal agreement to that effect not reduced to writing or proved by the writ of party—yet if the verbal agreement be followed by *rei interventus*, consisting of acts of sufficient importance in pursuance of the verbal agreement or in reliance on it, an alteration or waiver of the original agreement will be effectual, and the verbal agreement and *rei interventus* may be proved by parole. Dec. 17, 1880.
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The case of *Wark v. The Bargaddie Coal Company* was one in which it was alleged the landlord verbally consented to waive a stipulation that a barrier of fifteen feet should be left unwrought all round the boundaries of the mineral field, and that the barrier was thereafter at various points broken through with his knowledge and acquiescence. The agreement and the acts of the tenant following on it were alike inconsistent with the stipulation of the original lease. Your Lordships, as I understand, are of opinion that the rule or principle of the decision is to be applied only where substantially the particular state of the facts averred is the same, as occurred in that case,—that is, where not only the parole agreement is inconsistent with or opposed to some stipulation of the lease, but the acts following on it are obviously also of the same nature. It seems to me that this is too narrow a view of the principles or rules established by that case; that it is not warranted by the terms of the opinions of the noble and learned Lords who decided it; and that if given effect to the benefit of the decision in declaring and defining the law will in a great measure be lost or restricted.

It would not serve any good purpose to go over in detail the expressions used in the opinions of the Lord Chancellor (Lord Chelmsford) and Lord Cranworth in delivering their judgments. Conceding that the case was one of the nature I have mentioned, it nevertheless appears to me that the decision was fully explained to rest on general principles, not limited to the special circumstances then before the Court, but of application generally to the case of a waiver or variation of a written contract followed by acts of sufficient importance, consequent on the parole agreement, that is, in pursuance or part performance, or on the faith of it. The Lord Chancellor, after referring to the two leading passages from Bell's Principles (secs. 26 and 945-6), on the important effects of actings proceeding on the faith of a verbal agreement or consent, observed (3 Macq., p. 480):—"Now, as I understand this passage, the acquiescence which will support and give validity to a previous parole agreement is something less than the facts and circumstances which will be required to enable you to presume an agreement. It is clear that with regard to the facts and circumstances from which the agreement is to be presumed there must be great costs incurred by the operations, something allowed to be done which manifestly cannot be undone, and under these circumstances the law will presume an agreement or conventional permission."

There is no suggestion in this or any other part of his Lordship's opinion that I can discover in which the limited view of the decision maintained in the defenders' argument is either expressed or indicated. It is nowhere said that the acts following on the parole agreement must be of a nature inconsistent with the original contract, or that the cost incurred or the act done, which manifestly

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cannot be undone, all proceeding on the faith of the verbal agreement, must be of this character. The same observation seems to me to apply with force to the observations of Lord Cranworth. The general case with which his Lordship deals in the passage following that read by your Lordship is that of a consent or previous consent given, which his Lordship says "taken by itself is nothing," unless as ancillary to some acting "which is to follow that consent." This expression, "some acting which is to follow that consent," in terms covers actings by way of part performance of the parole agreement, or on the faith of it, and is not limited to actings in themselves contradictory of a term of the agreement. Indeed, his Lordship's reference to the practice of the Court of Chancery in directing an issue to be tried where the question was whether there had been verbal consent followed by part performance with the effect of setting up even a new and independent agreement, appears to me to exclude the limited view of the judgment contended for by the defender, and to shew that his Lordship was referring to the verbal waiver or alteration of some term in a written contract followed by acts of sufficient importance on the faith of it. His Lordship seems to have had in view such a case as that of *Nunn v. Fabian*, which he afterwards decided on appeal in the Court of Chancery (L. R., 1 Ch. Appa. p. 35).

In regard to the cases which have occurred in this Court since the case of *Wark v. The Bargaddie Coal Company*, it is sufficient to say that the question here raised has not been decided in any one of them. In two of the cases, viz., *Gowans v. Carstairs* and *Walker v. Flint*, the question was not one as to the waiver or alteration of an existing agreement. The point in dispute was entirely whether a new and independent agreement affecting heritage was well constituted or not, and I find that throughout the opinions in both these cases a distinction is expressly drawn between such a case and one like the present. The Judges are careful to say that a different principle applies in the case where the evidence offered is to be used to set up a new agreement from that which holds in the case of an alteration of an existing written agreement. The observations which fell from the Judges in these cases in regard to the case of *Wark* were clearly *obiter*. The case of *Sutherland v. The Montrose Shipbuilding Company* is one, no doubt, of a different character, but it appears to me that the true ground of judgment in that case was that the proof led on the issue that the agreement had been waived or altered had entirely failed, and that although there are observations by the Judges on the question whether proof was admissible in the case at all, these do not contain the grounds of judgment. I do not think that a reference to the various opinions which have been delivered in which the case of *Wark* has been referred to in this Court lead to the conclusion that the Judges have taken at all the same view of the judgment in that case. I may illustrate what I mean by referring to the opinion of Lord Curriehill in the case of *Gowans v. Carstairs*, in which his Lordship's view of *Wark v. The Bargaddie Coal Company* is thus expressed (24 D. 1387)—"The case of *Bargaddie* was referred to as an authority, but in reality it is none, because the ground of decision there was in effect that the piece of ground upon which the operations complained of took place was not included in the lease at all. I am aware that there were *dicta* of the noble and learned Lords who addressed the House in that case, which taken abstractly may appear to countenance the doctrine for which the case was cited to us, but when the nature of the case is fully attended to, it will be found that they have no bearing on the question before us." And in the same case my learned brother, Lord Deas, seems to attach considerable im-

portance to the circumstance that the alternative of referring the question to the oath of the landlord was not suggested. His Lordship says (p. 1389),—"The House of Lords held that if the restriction against working through the barrier had been dispensed with by the landlord's consent, the landlord could not require the tenant to restore the barrier, and claim damages for what had been done, and that the mode of proof of the alleged consent was not limited to the landlord's writ. The alternative of the landlord's oath, so far as we can see from the reports, was not suggested by the parties either in this Court or in the House of Lords, probably because the landlord was not prepared to deny the fact upon oath, and stood only on the legal necessity of writ." And on a reference to the opinions in the case of *Gowans*, it will also be seen that there is a considerable difference in the views taken by the Judges.

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Holding the view that I do of the principles settled by the case of *Wark*, the next question is, what are the averments in the present case? The pursuer and defenders were respectively landlord and tenants of a mineral property. It is obviously for the interest of both parties, in order to the advantageous and successful working of the field, and in order that as large an output as possible may be got from it, that the tenant should not be compelled, owing to the effect of any stipulation in their lease, to yield, it may be, to most unreasonable demands on the part of their workmen. A large fixed rent compels the tenant in a mineral lease to put out a large quantity of minerals upon the very barest profits, indeed it may be without profit, if he can cover working expenses, and pay the rent. But if the tenant is in a position to resist demands by his workmen when they become unreasonable, by stopping the work for a time, he may thus in the end benefit both the landlord and himself. Keeping that in view, and that the landlord has always this security that no mineral can be removed without payment of the stipulated royalties, it is not an improbable or unnatural arrangement that a fixed rent should be relaxed in the interest of both parties if it be found to further the tenant in his dealings with his workmen. It is notorious that throughout Scotland there were many cases in which, during recent struggles which ended in prolonged strikes, fixed rents were relaxed, I do not say for the whole period of the lease, but for such periods as to enable the tenants to offer resistance to the demands of their men, which, it was said, could not possibly be excused to without great loss in carrying on the business of mining. The statement made in the present case is that from the position of the tenants they were unable to resist the demands of the men, and on that being represented to the landlord, he agreed, in order to enable the tenants to resist the demands made on them for increased wages, to restrict the rent from £3000 to £2000 during, as I understand, the whole term of the lease. Then it is stated that immediately upon that having been arranged,—it being agreed that the fixed rent should be reduced from £3000 to £2000, the landlord having of course his lordships if they exceeded the reduced rent,—the tenants, with his knowledge and assent, resisted the demands of their men, with this result, that the men were either locked out or refused to work during two of the most profitable months of the year, and the output and sales for that period were thus entirely lost. These are the facts stated. If the truth of the case be as alleged, if it be true that there was such an agreement as this, and that the tenants, in the landlord's knowledge, acted on the faith of it, in the very direction which the agreement pointed at, and in the way in which it was expected and intended they would do, with the result of disabling themselves from turning out so much coal as would enable

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them to pay their rent, justice would seem to require that they should be allowed a proof of their averments and obtain relief if the facts alleged be proved. It is said that even if the agreement was made and acted on, as alleged, the defenders cannot be allowed a proof or obtain any remedy. I confess I feel the force of what your Lordship in the chair has pointed out as to the special nature of the averments in the case. I see difficulties in the way of the tenants making out their case upon a proof. The cause assigned for so important a change as an alteration of the fixed rent throughout the whole period of the lease is, as your Lordship has said, apparently inadequate, although it might be otherwise with reference to the rent of a particular year, or of any year in which strikes might occur. And, again, the acts which followed are not on the mere statement of them to be traced to such an agreement, but might have resulted from other reasons altogether. These are very important difficulties in the defenders' way in this proof. It would require, in such circumstances, very clear evidence to affect and vary a written agreement. The *prima facie* improbabilities of the defenders' case make it one of great difficulty in the proof. But though it may be difficult, that is no good reason for not allowing a proof if a relevant case be averred; and upon the grounds I have stated it does appear to me that the case is relevant, and that the proof asked is competent.

Your Lordships are of opinion that if the agreement alleged is inconsistent with the provisions of the lease, and the actings on the agreement are also inconsistent with the lease, the proof ought to be allowed. The agreement here undoubtedly is inconsistent with the lease. The actings which are alleged to have followed are not so. But the agreement, according to the pursuer's statement, was followed by actings of the very kind which it was intended by both parties to lead to, and this to the serious prejudice of the defenders, who acted on the faith of it. That being so, I ask why should they not be allowed a proof. The reason of the rule to which effect was given in the case of *Wark v. The Bargaddie Coal Co.* I take to be this, that where a verbal agreement to waive or alter a term of a written contract has been followed by acts to which it has naturally given rise on the part of one of the parties, and these acts must be to his serious prejudice if the other party should be permitted to repudiate the agreement because it was not committed to writing, justice requires that parole evidence of the agreement and actings should be admitted. It is not because the acts are inconsistent with the lease that the proof is admitted, but because the acts are the direct consequence of the parole agreement, that is, because the alleged variation does not rest on words only, but on an agreement constituted by words and made binding by important acts which cannot be undone, and which took place on the faith of it. With reference to the passage in Bell's Principles, in which the doctrine of *rei interventus* is mentioned—I mean section 26, in which it is thus described,—“*Rei interventus* raises a personal exception It is inferred from any proceedings not unimportant on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract as if it were perfect, provided they are unequivocally referable to the agreement, and productive of an alteration of circumstances, loss or inconvenience, though not irretrievable,”—the pursuer maintained that the alleged actings are not unequivocally referable to the agreement. It appears to me that that is a matter not to be determined by shutting out proof which will shew whether they are unequivocally referable to that agreement or not, but by admitting the proof, which alone will throw light on that subject. I do not

understand Professor Bell in this passage of his Principles to lay down this, that the actings must be of such a kind as, apart from any evidence, to be clearly and unequivocally referable to the parole agreement or parole variation of a written agreement. And accordingly it appears to me that a proof here should be allowed for the purpose of shewing whether these actings were or were not unequivocally referable to the agreement alleged.

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It was very fairly put by Mr Asher in the argument, that if it be supposed that this agreement, instead of standing upon entirely verbal communications, had for its basis an informal improbativ writing which would have been of no effect, but would simply be a record of what took place, the acts alleged might surely have been proved to have taken place on the faith of it. If an improbativ writing passing between the parties had contained a statement that both the landlord and tenant were satisfied that in order to enable the tenant to resist the unreasonable demand of the men it was proper to reduce the rent, and accordingly it had been agreed to do so, the writing would have been of no value unless acted on, and unless the acts founded on were distinctly referable to the parole agreement. But suppose the tenant to have proceeded to act in the very way in which it was contemplated he should do, by immediately afterwards refusing to accede to the demands of his men, shutting them out and shutting up his colliery for a few months, could it be said that that was not an acting referable to the agreement? It could not be shewn without evidence. The fact of his having shut out his men a week or two afterwards might have been caused by other reasons not connected with the agreement; on the other hand, evidence might shew that his actings had reference to and were a direct consequence of the agreement, so that the case would come under the rule of *rei interventus*. A proof alone could clear up this question of fact. I think that is substantially the state of matters in this case, although there is no writing to which you can refer. If the parole agreement is proved, then the action of the defender would be a proper subject for proof, for he undertakes to shew that he resisted the demands of his men and shut up his colliery on the faith of it. We have an illustration of the same class of questions in the ordinary case that occurs of advances made by bankers and others on improbativ documents. A person undertakes, by a writing which is of no value, until it is acted upon in some way, because it is not tested or is wanting in some of the solemnities required by law, to repay any advances that may be made on the faith of his undertaking. The banker proceeds, weeks or months it may be afterwards, to advance the money. The banker then brings an action for repayment, and says, I advanced the money on the faith of that document. Would it be an answer to say that these advances were not unequivocally referable to the agreement, that they might have been made on the credit of some other guarantee, or without a guarantee at all, and therefore a proof should not be allowed to clear up the question of fact? The answer would be, I undertake to prove that my actings in making the advances had reference solely to the agreement or undertaking, and that answer is conclusive. Accordingly proof in this class of cases has been allowed frequently. A direct authority on that point is to be found in the case of *Johnston v. Grant*, 6 D. 875, in which I think the general principle is correctly laid down, that if a man by an improbativ writing undertakes an obligation of guarantee, and actings of the kind which he contemplated follow upon it, then the actings will validate the obligation or agreement. The principle of that case applies to the present to this

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extent, that it is a question to be determined on evidence whether acts are or are not distinctly referable to a previous parole agreement.

This case is one in which the agreement suggested by the defenders wants the feature of probability in its favour. But the rule now announced will, it appears to me, apply to cases where this is not so, and may result in great hardship and injustice. I can very well suppose a case in which a landlord residing close to the mineral field worked by his tenant, observing and knowing that his tenant is working at a disadvantage in not being able to resist the demands of his men for higher wages because he has to get a large output from the field to enable him to meet his fixed rent, agrees with his tenant that he shall be placed in a position to resist the men's demands, and that a reduction shall be made from the fixed rent for the year, or for each year in which a strike occurs. This agreement is not reduced to writing, but the tenant thereupon proceeds on the first occasion of a demand for an increase of wages to resist it, and shuts up his works. Thereafter the landlord, ignoring his agreement and the acts following on it, demands his fixed rent, and is met with the answer, You varied the settled terms of the lease, and with your knowledge I acted on the faith of this. Is proof in such a case to be disallowed, and all remedy refused because the acts are not in contradiction of the lease? I apprehend not; and in one view even of this case it might turn out that an agreement to this limited effect was made and acted on. Again, suppose that a landlord agrees with his tenant that he will make a reduction from his rent under a lease of several years' duration, if the tenant will make a large outlay in the way of building, draining, planting, or other permanent improvement. The tenant goes on to make the expenditure. The acts are not inconsistent with the lease, though the agreement alters one of its terms. According to the present decision it seems to me the tenant would be at the mercy of his landlord. If the view I take of the case of *Wark* be sound, a proof would be competent, and justice would be done. Take, again, such a case as that of *Sutherland*. A person undertakes to perform a contract of furnishing machinery or other articles by a date fixed. While in course of carrying out the work the other contracting party finds he cannot take delivery, and requests that the work be delayed, and in consequence the contractor, with his knowledge, dismisses his workmen and delays the work. It seems to follow from the decision to be now given that the variation by parole, followed by acts, however important, cannot be proved, because they are not directly inconsistent with the contract. The result would be to deprive the Court of the power to do justice, by allowing proof in circumstances in which it appears to me that proof is admissible. These are illustrations of the result of the view which your Lordships take of this case, and I feel constrained, for the reasons I have given, to differ from a judgment which would lead to such results.

The only other observation I have to make has reference to a point referred to by two of your Lordships. In this particular case there is a power of renunciation or break at the end of every three years of the lease in the tenant's option, a clause which is generally spoken of in this way, that it is a right "to make up shorts," so that when the fixed rent in any year exceeds the lordships the tenant is entitled to make up the shortcoming in future years. I do not understand your Lordships' judgment to proceed on these clauses. For my own part I think they have little, if any, bearing on the case, and the judgment would obviously be the same if they were both wanting. Upon the whole, I think the case is one in which we should have inquiry by proof before proceeding to

deal with the merits of the case, and that parole evidence of the facts alleged is competent. No. 65.

THIS interlocutor was pronounced:—"The Lords, having heard counsel on the reclaiming note for Alexander Kirkpatrick against Lord Rutherford Clark's interlocutor of 9th November last, recall the interlocutor, repel the defences, and decern in terms of the conclusions of the summons," &c.

Dec. 17, 1880.
Kirkpatrick v.
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MACBRAIR & KEITH, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

ANDREW WALLACE (Inspector of Poor of Govan), Pursuer.
PETER BEATTIE (Inspector of Poor of Barony Parish), Defender and Appellant.—*J. Burnet—Ure.*
THOMAS HIGHT (Inspector of Poor of Muirkirk), Defender and Respondent.—*Guthrie Smith—J. A. Reid.*

No. 66.

Jan. 6, 1881.
Wallace v.
Beattie and
Hight.

Poor—Residential Settlement—Sailor—Poor-Law Act, 1845, 8 and 9 Vict. c. 83, sec. 76.—A sailor maintained his wife and family for six months in partly furnished lodgings, and thereafter for four and a half years in a house rented by him as tenant in the same parish. When at home between voyages he resided with his wife and family. *Held* that he had acquired a settlement by five years' residence.

ANDREW WALLACE, inspector of poor of Govan Combination, Glasgow, raised an action in the Sheriff Court of Lanarkshire to recover advances for behoof of an insane pauper, David Ross, against Thomas Hight, inspector of the poor of the parish of Muirkirk, the pauper's birth parish, and against Peter Beattie, inspector of poor of the Barony Parish, Glasgow, where the pauper was said to have acquired a residential settlement. 1st Division. Sheriff of Lanarkshire. C.

In a proof led in the Sheriff Court the following facts were established :—The pauper was born in Muirkirk in 1838. His occupation was that of a fireman on board steamboats. In April 1872 he went with his wife and family to lodge in the house of Mrs Devine, in Barony Parish. Mrs Devine deponed:—"I think they came to me in April. They would be with me from April to June of the following year. It was David Ross who took the lodgings with me. I can't say whether he was often at home while they stayed with me, but she got his money all the time he was away. Her husband was at home sometimes. From my house they removed to Clyde Street. They had no furniture in my house except bedding." After this, on 6th June 1873, the pauper took an unfurnished house as tenant in Clyde Street, Barony, and his wife and family resided in it for 4½ years, and then left the parish. In order to complete a five years' residential settlement in the sense of the 76th section of the Poor-Law Act it was necessary to reckon the last six months of the residence at Mrs Devine's lodgings.

The Sheriff-substitute (Erskine Murray) found, *inter alia*, "that at Mrs Devine's they were practically subtenants of a room, for which they themselves provided bedding," and that the pauper had acquired a residential settlement in the Barony Parish, which was not lost at the date of chargeability.*

* "NOTE.—The point whether a sailor can acquire a residential settlement by holding as tenant a house of his own, in which he is only personally present at intervals between his voyages, was finally settled in the affirmative by the whole Court, only two dissenting, in the case of *Greig v. Miles and Simpson*, July 19,

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The inspector of Barony Parish appealed, and argued ;—During the time the family were in lodgings at Mrs Devine's they were in a state of migration, and had no fixed home, and could not be acquiring a settlement.¹

LORD DEAS.—I do not think it is necessary to say anything in this case except that the judgment of the Sheriff-substitute is perfectly right, both on the facts and on the law. The case of *Greig v. Miles* has been followed by other cases decided on similar principles ; for instance, *Moncrieff v. Ross*, Jan. 5, 1869, 7 Macph. 331. Your Lordship in the chair at one time dissented in that class of cases, but latterly I understand it to have been conceded that the law must be regarded as now settled in accordance with them.

LORD MURE.—I think that the Sheriff-substitute has taken a correct view of the evidence in this case. There is no difficulty as to the four years and a-half when the parties lived in Clyde Street. But the important question is, whether during the half year which preceded their residence in Clyde Street there was such a residence at Mrs Devine's as can be computed in reckoning the five years continuous residence in the Barony Parish. Now, that depends mainly on the evidence given by Mrs Devine, and according to that evidence the pauper came with his wife and family, and took lodgings for them in her house in April 1872, before he went to sea. Her account is distinct to the effect that the lodgings were taken by the husband, that he came and stayed there with his family on several occasions when he was at home, and that his wife drew his money when he was away. In these circumstances, I think the Sheriff-substitute is right in holding that when the pauper so placed his wife and family in lodgings, and left them to reside there for about a year, he made these lodgings their home during the time he was absent, and that their residence may be counted as his residence in a question of settlement, according to the rules laid down in various decisions.

LORD SHAND.—I am of the same opinion, and I think the case a very clear one. There is no dispute about the residence for the last four and a-half years, but it was maintained that for six months previous the residence had not been established. I think it is proved that it was the husband who took the lodgings in Devine's house where he placed his wife and family. But I do not think that of consequence, because if the wife took the lodgings and the husband

1867, 5 Macph. 1132. But the present case offers certain differences from that of *Greig*, which fall to be considered. . . .

“But a nicer question remains. If David Ross acquired a residence settlement in Barony it must be by counting, along with the above four and a-half years, part of the time that he and his family held lodgings at Mrs Devine's. Now, it has never yet apparently been held that a sailor can acquire a settlement by taking lodgings. That point has never arisen. In the only decided cases he was tenant of a house. . . .

“But as regards Mrs Devine's, these lodgings were actually taken by David Ross for himself and his family. Farther, it was more than a case of mere lodgings, it was practically a sublet of a room, for which the Ross's themselves supplied bedding. Altogether the habitancy there had a more permanent character, and being initiated and maintained by David Ross himself, the Sheriff-substitute thinks that on the whole, though undoubtedly the question is a narrow one, it must be dealt with on the same footing as if David Ross had been a regular tenant there.”

¹ *Greig v. Miles and Simpson*, July 19, 1867, 5 Macph. 1132, 39 Scot. Jur. 617 ; *Moncrieff v. Ross*, Jan. 5, 1869, 7 Macph. 331, 41 Scot. Jur. 196 ; *Jackson v. Robertson*, Jan. 7, 1874, *ante*, vol. i. p. 342.

adopted her act the legal effect would be the same, and there can be no doubt that he did adopt her act. He placed his wife and family in the lodgings, he paid for their maintenance there, and he made it their home and his own on the occasions when he returned between April 1872 and June 1873. The real test in questions of this kind is, where is the person's home? I have no doubt that the pauper's home and that of his family was Mrs Devine's house, and that the family residence there must be taken into account in calculating the five years residence necessary for the acquisition of a settlement.

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LORD PRESIDENT.—I am of the same opinion.

THE COURT pronounced this interlocutor:—"Find that the pauper's wife and family resided continuously for more than five years in the parish of Barony before and down to December 11, 1877: Find that the pauper, who during the said period was employed as a fireman on board of steam vessels, resided with his wife and family in the said parish whenever he was not at sea in prosecution of his calling and employment as a marine fireman: Therefore refuse the appeal, and decern," &c.

MACKENZIE, INNES, & LOGAN, W.S.—JOHN GILL, S.S.C.—Agents.

DUNCAN FRASER, Pursuer (Respondent).—*C. S. Dickson.*

No. 67.

JOHN ROBERTSON, Defender (Appellant).—*Rhind—J. M. Gibson.*

Jan. 7, 1881.
Fraser v.
Robertson.

Landlord and Tenant—Bankruptcy—Claim for rent against sequestrated bankrupt.—When the tenant of an urban subject has been sequestrated under the Bankruptcy Act the landlord has a claim in the sequestration for the current year's rent, but no claim against the bankrupt, even although he may have been allowed to remain in possession from the date of sequestration to the end of the year.

THIS was an action by Duncan Fraser, Blantyre, with consent of John Watson of Earnock, against John Robertson, Hamilton, concluding for payment of £27, 13s. 4d.

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Sheriff of
Lanarkshire.
M.

The pursuer averred;—(Cond. 2) "For several years the defender has been tenant of the dwelling-house in Clydesdale Street, Hamilton, presently occupied by him, and belonging to John Watson, Esq. of Earnock, at the yearly rent of £42 sterling. The estates of the defender were sequestrated on 21st October 1879, and since then he has occupied, and continues to occupy, the said dwelling-house, and the proportion of said yearly rent of £42 for the period from 21st October 1879 to 21st May 1880 amounts to £24, 10s. sterling." (Cond. 3) "The pursuer has paid to the landlord of the said dwelling-house the rent due to him by the defender for the same, and has acquired the landlord's whole right and interest in and to the said rent, and his claim against the defender for payment thereof. The pursuer has also been under the necessity of paying the taxes applicable to the said period, and payable by the defender, conform to account thereof herewith produced and held as repeated herein *brevitatis causa*, amounting to £3, 3s. 4d. The said sums of £24, 10s. and £3, 3s. 4d. amount together to the sum of £27, 13s. 4d. sterling, being the sum for which decree is craved in the petition."

The defender admitted the first article, and in answer to the second article stated:—"Denied, and explained that defender was allowed by his trustee to remain in the said house."

The pursuer pleaded;—(1) No relevant defence having been stated, the pursuer is entitled to decree as craved. (2) The defender being

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indebted in the rent condescended on, and the pursuer having paid the same; and acquired the landlord's whole rights thereto, the defender is bound to make payment thereof to the pursuer. (3) The pursuer having, on behalf of the defender, paid the taxes condescended on, he is entitled to repayment thereof from the defender.

The defender pleaded;—(1) The defender is not responsible to pursuer for the debt now sued for, it having been incurred by him prior to the date of his sequestration. (2) Any claim for rent should be directed against the trustee on defender's estate, in terms of the Bankruptcy Statutes, and the defender should be assoilzied, with expenses.

The Sheriff-substitute (Spens) pronounced this interlocutor:—"Repels the defences as irrelevant, and, under reference to note, decerns as craved: Finds defender liable in expenses," &c.*

On appeal, the Sheriff (Clark) adhered.

The defender appealed, and argued;—The pursuer had not set out any title to the house, or shewn any right to demand payment of rent. Besides, the bankrupt could not be liable for payment of the rent, as that was an obligation undertaken before his sequestration on 21st October 1879, and the claim for payment of the whole year's rent lay against the trustee in bankruptcy.¹ There was no ground for the Sheriff's judgment, as all the material facts were denied by the defender, and had not been proved.

Argued for the pursuer;—The pursuer, having paid the rent, was entitled to recover it, and he made his title to sue good, by having obtained the concurrence of the landlord. The bankrupt having occupied the house after sequestration was personally liable for the rent. The defender having admitted that he occupied the house there was no need for any proof. Bankruptcy did not put an end to a lease, but merely entitled the landlord to turn out the tenant, or, if he allowed him to remain, to come against him for the rent of the period subsequent to the sequestration. The tenant, having occupied the house after bankruptcy, was liable for the rent.²

LORD PRESIDENT.—It is almost an idle thing to talk of the facts in this case, for nothing has been proved, and scarcely anything is averred. If it were not an affair of about £27 I should be much inclined to order the record to be amended to enable us to know the facts to which we were asked to apply the law; but I am unwilling to occasion additional expense in so trifling a case, and we must therefore endeavour to extricate the matter as it stands.

There is no objection on record to the pursuer's title to sue. The action is brought by a Mr Fraser, with concurrence of the landlord of the house occupied by the defender; and he, bringing the landlord with him, avers that he has paid the rent for a certain portion of the year from Whitsunday 1879 to Whitsunday 1880, and has acquired all the landlord's rights in respect thereof. The part of the rent so paid is that applicable to the period from 21st October 1879

* "NOTE.—It is not disputed that the defender was sequestered in October 1879. The rent claimed is the rent of the house occupied by defender since that period. Defender's agent seems to imagine that the sequestration bars decree. I know of no authority for this contention. It seems to me that pursuer is entitled to decree against the defender, even although he is an undischarged bankrupt, for the rent applicable to the period of occupation subsequent to bankruptcy."

¹ Phosphate Sewage Co. v. Molleson, March 18, 1874, *ante*, vol. i. p. 840.

² 1 Bell's Com., 5th ed., p. 80, M'Laren's ed., p. 76; 2 Hunter on Landlord and Tenant, p. 585.

to 21st May 1880. That is not rent for a term, but for a fraction of a year, No. 67.
 and the reason why the pursuer's claim is thus limited is that 21st October 1879
 is the date of the defender's sequestration, and 21st May 1880 is the date when Jan. 7, 1881.
 the defender gave up possession of the house. The Sheriff-substitute says the Fraser v.
 rent claimed is the rent of the house occupied by the defender since his sequestra- Robertson.
 tion; and he thinks the pursuer is entitled to decree, though the defender is an
 undischarged bankrupt, for the rent applicable to the period of occupation sub-
 sequent to the bankruptcy. Now, in the first place, this is a very curious obli-
 gation for a fractional part of the year's rent, which year's rent is payable at two
 half-yearly terms by equal portions, and I do not understand exactly the
 ground on which the Sheriff-substitute thinks the claim should be made good
 against the bankrupt, for the year's rent is payable in respect of his posses-
 sion of the house from a period beginning prior to his bankruptcy, and it
 would not be a good claim unless it were for a debt contracted subsequent
 to that event. But there is no doubt that the debt was contracted prior to the
 sequestration. Whether the tenure was for a term of years or from year to
 year we are not told; that, like everything else in this case, is in a state of
 obscurity; but whether it was for the one or the other, the debt was contracted
 at the beginning of the year's occupancy, i.e., at Whitsunday 1879. That debt
 was payable half at the Martinmas following and half at the Whitsunday after
 that, but it was all contracted at Whitsunday 1879, and therefore this was a
 debt of the bankrupt contracted prior to his bankruptcy, and so his discharge
 will remove all liability in respect of that debt, by the creditor having got
 a composition in respect of it, or a dividend in the sequestration. How in
 the face of this the landlord can make him liable for a part of the time I fail
 to see. Mr Dickson ingeniously argued that although that may be the nature
 of the debt yet the occurrence of the bankruptcy introduced an element entitling
 the landlord to turn out the tenant or to come against him personally for the rent
 applicable to the period subsequent to sequestration, on the ground that the
 lease was practically ended and the bankrupt had come under a new arrange-
 ment in consequence of his bankruptcy. I do not see how this can be. Bank-
 ruptcy does not bring a lease to an end. If the tenant has an existing lease
 it belongs to his trustee, unless there is an express exclusion of assignees, legal
 and voluntary. This is the case of an ordinary urban subject, and whether the
 trustee here chose to take up the lease or not does not appear, but the bankrupt
 continued in possession of the house. Would he not be entitled under his lease,
 which began before bankruptcy, to continue in possession of it on condition of
 paying his rent and the other prestations exigible? I think he clearly would
 be, and the words of Professor Bell on this matter are well worth quoting. He
 says (1 Comm. 76, M'Laren's ed.)—"Bankruptcy does not of itself annul a
 lease. The tenant, though bankrupt, may still continue in the possession, pro-
 vided he pay the rent regularly, and perform the other stipulations of the contract.
 All the landlord is entitled to do in case of his tenant's failure to pay the rent is to
 have recourse to the hypothec and the proceedings prescribed in the Act of Seder-
 unt 1756." That is to say, the right to the lease, not being taken up by the trustee,
 remains in the bankrupt; he remains as tenant, and the landlord has the ordinary
 remedies at common law and under the Act of Sederunt. He may use his right
 of hypothec, or raise an action for his rent, or remove the tenant if he is in
 arrear with his rent, but nothing else. Now, what is the state of matters here?
 If the rent for the current year was a debt contracted before bankruptcy and

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sequestration, then it cannot be claimed against the bankrupt, but can only be made available by a claim in his sequestration. For future rents, of course, the bankrupt will be liable. But as regards every part of the rent for the period from Whitsunday 1879 to Whitsunday 1880 the landlord has no claim against the bankrupt tenant, for it was a debt contracted prior to his sequestration. On these grounds I am for sustaining this appeal, and dismissing the action.

LORD MURE.—I am of the same opinion. On this record I think it is clear that the judgments appealed against cannot stand. These judgments repel as irrelevant a defence which amounts simply to a denial that the debt is due. The few facts stated by the pursuer are denied. There has been no proof, and *ex facie* of the averments the claim ought to have been made against the trustee on the sequestrated estate, because the debt was contracted before the date of the sequestration. In these circumstances, and in the absence of any more special averment or explanation, I see no ground on which the pursuer can ask decree against the defender on this record.

If the amount sued for had been large I might have been disposed to allow the record to be opened up, in order to give the pursuer an opportunity of shewing that there are specialties in the case which are sufficient to give him a claim against the defender. But the amount involved is so small I do not think we should now be justified in allowing the pursuer to amend. The proper course is to dismiss the action.

LORD SHAND.—I agree in your Lordships' observations with regard to the record in this case. It is important to observe that the claim made is for the rent due for part of the year which was current when the sequestration occurred, for I think a different principle might and would have applied if the circumstances had been different, and the rent claimed had been for a period beginning subsequent to sequestration. In that case there might have been room for holding that the fact of the bankrupt remaining as tenant implied a personal contract for payment of the rent. Keeping this distinction in view, it is to be observed, in the first place, that it is admitted that what is here asked is not merely decree of constitution, and, in the second place, that there is no averment of any special agreement as to this period; it is not said that any new bargain was made between the parties under which this rent is now sued for. Now, I think in a case of this sort, when the subject is an ordinary urban one, when during the currency of the year's rent the tenant's bankruptcy occurs, and the trustee refuses to take up the lease, and the bankrupt stays on in the house, his obligation is for the year's rent, and that obligation was undertaken before the year began to run. There is no other contract in the matter. It was argued that the law will rear up the implied obligation, but I cannot think that is so. It is said the landlord might have brought an action of ejectment against the tenant. I doubt if such an action would have lain—I think it would not; at all events after the second half year had begun to run. The answer to it would have been—"I have got the occupancy of this house for a year under my obligation to pay the year's rent; that is a good obligation against my estate, and if my trustee does not take it up I shall continue to occupy as tenant." The case here is simply one where the bankrupt remains under an obligation for rent contracted before the year began, and I think his possession is to be attributed to that obligation which is good as against his estate, and not to any new or implied one.

LORD DEAS was absent.

No. 67.

THE COURT pronounced the following interlocutor:—"Recall the interlocutors of the Sheriff-substitute and the Sheriff, dated respectively 29th June 1880 and 16th July 1880: Dismiss the action, and decern: Find the defender (appellant) entitled to expenses, both in this Court and in the inferior Court: Allow an account thereof to be lodged, and remit," &c.

W. OFFICER, S.S.C.—JAMES COUTTS, L.A.—Agents.

Jan. 7, 1881.
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Robertson.

COLTNESS IRON COMPANY, Appellants.—*Asher—Mackintosh.*
SOLICITOR OF INLAND REVENUE, Respondent.—*Sol.-Gen. Balfour—Rutherford.*

No. 68.

Jan. 7, 1881.
Coltness Iron
Co. v. Solicitor
of Inland Re-
venue.

Revenue—Income-Tax—Exhausted Capital—Income-Tax Act, 5 and 6 Vict. c. 35, sec. 100, rule 3, and sec. 159—Customs and Inland Revenue Act, 41 Vict. c. 15, sec. 12.—Held that a tenant of mineral fields, in computing profits from mines of coal and iron for assessment of income-tax, was not entitled to make deduction from the yearly profits of a sum representing the average amount of capital expended on sinking pits exhausted by the year's working.

(*Ante*, Feb. 6, 1879, vol. vi., p. 617, and vol. vi. (H. L.), p. 122.)

Exchequer
Cause.
1ST DIVISION.
S.

In 1879 the Coltness Iron Co. appealed to the First Division of the Court of Session against a decision of the Property and Income-Tax Commissioners of Lanarkshire, disallowing a deduction from assessable income claimed by the company of the sum of £9027, being the cost incurred in sinking new pits. The Commissioners found that in computing the profits for assessment of income-tax the company, who were tenants of certain mineral fields, were not entitled to make deductions from their yearly profits of sums necessary to replace capital expended in sinking pits, either under the Income-Tax Act, 5 and 6 Vict. c. 35, sec. 100, rule 3, and sec. 159, or under the Customs and Inland Revenue Act, 41 Vict. c. 15, sec. 12. The facts on which the Commissioners proceeded are fully set forth in the report of the appeal to the Court of Session, *ante*, vol. vi., p. 617.

On 6th February 1879 the Court of Session affirmed the determination of the Commissioners, and the Coltness Company then appealed to the House of Lords.

After hearing counsel for the parties their Lordships, on 1st August 1879, remitted the case to the Court of Session for amendment, on the ground that the statement of facts was insufficient.

On 10th March 1880 the appellants, in terms of this order, presented a petition to the First Division of the Court of Session praying the Court "to remit the case to the Commissioners, in order to the same being amended by adding thereto, in form of schedules or otherwise,—(1) statement of the amount expended by the company in sinking pits, and charged to capital account, from 30th June 1858 to 30th June 1878; (2) statement of pits exhausted from 30th June 1858 to 30th June 1878, shewing the total cost in sinking the pits, the depth of them, and the length of time they were in operation; (3) statement of the amount expended on pit-sinking, and charged to capital account, from January 1872 till 30th June 1878, giving the depth of each pit; (4) list of pits exhausted from January 1872 to 30th January 1878, giving the depth of each pit, when the sinking of the pit commenced, when each pit was exhausted, and the cost of sinking each pit; (5) list of pits at present working, giving the depth of each pit, when the sinking of each pit commenced, and when the output commenced, and the expense of sinking each pit; also by

No. 68. adding a statement as to the schedules and rules of the schedules of the Income-Tax Acts on which the assessment of the duty was made on the appellants; also by adding a statement explaining how the sum of £9027, claimed as a deduction from the assessment by the appellants is arrived at.”

Jan. 7, 1881.
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The Court remitted to the Commissioners “with instructions to them to amend the case in terms of the prayer of the petition.”

The amended case set forth, *inter alia*,—“The sum of £9027 claimed as a deduction from the assessment by the appellants does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating two shillings a-ton on iron made, and a penny halfpenny a-ton on coal sold during the year, it being estimated that this will properly represent the amount of capital expended on making bores and sinking pits which has been exhausted by the year’s working. The cost of making bores and sinking pits is charged in the books of the company to an account called ‘Sunk Capital Account,’ and is written off annually by a sum computed at the respective rates above specified, on the quantities of iron made and coal sold in the year, as representing the capital expended on pit-sinking exhausted by the year’s working. The working charges deducted and allowed in ascertaining the profits for assessment include the whole cost of getting and raising the minerals after the pits are sunk, and of manufacturing the metal and selling the iron and coal, and the general expenses of the concern.”

The statement of additional facts may be summarised as follows :—(1) Sums annually expended by the company in sinking pits, and charged to capital account, from 30th June 1858 to 30th June 1878, varying from £2000 to £22,000, amounting together to £165,825, 3s. 6d. This included ventilation-pits and pits for pumping water, as well as the expense of boring for mineral. There was thus an average annual expenditure of about £8500. (2) The cost of sinking pits which had become exhausted during the same period was £102,678, 6s. 10d., being an annual average of about £5000, varying from £639, 4s. 4d., being the lowest, to £11,234, 15s. 1d., being the highest expenditure in any one year. The depth of these pits varied from about 9 fathoms to 114 fathoms, and their endurance in operation varied from one year to twenty-one. (3) Taking a shorter period of time, from January 1872 to June 1878 the total cost of sinking pits was £71,964, 10s. 2d., or an average annual expenditure of about £11,000. This included air-pits and boring. (4) During the same period nineteen pits became exhausted. These pits had cost on an average £2300 each, in all £44,013, 13s. 1d. These pits lasted on an average nine and a half years each. (5) The pits at present working (June 1878) were forty-three in number, and cost in all £97,537, 7s. 1d., or an average of about £2250 each pit. The earliest was sunk in 1849, the latest in 1876.

The company in the original case had contended that “the sinking of the pits was expenditure in winning the minerals, and not, as the surveyor stated, an investment of capital.” This contention they now abandoned, and admitted that the sum claimed as a proper deduction to be made from profits “represents the amount of capital expended on pits and exhausted by the year’s working.”

At advising the judgment of the Court was given by the

LORD PRESIDENT.—In the case originally presented to the Court on the 28th of January 1879 by the Coltness Iron Company against the determination of the Commissioners of Income-Tax for the Middle Ward of Lanarkshire, they maintained that, from the amount of the profits of their business for the year ending 5th April 1878, as assessed to the income-tax, there ought to have been

deducted a sum of £9027, being the cost incurred by them in sinking new pits. No. 68.

The case stated, as matter of fact, that for a number of years the appellants have "carried on business as coal and iron-masters, and have opened up several mineral fields, sinking new pits, at their own expense, from time to time as the old ones have become exhausted ; . . . that when a mineral field is wrought out the pits on it become useless to them, and they receive no compensation from the landlord or any one else in respect of them ; and that they have no means of compensating themselves for the loss of those pits, other than out of the gross annual returns derived from the minerals worked from them." Jan. 7, 1881.
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Upon these facts, "the appellants maintained that there could be no profits till the expenditure of sinking was repaid, any more than there could be profits before the wages of the miners in working the minerals were repaid ; that, in fact, the sinking of the pits was expenditure in winning the minerals, and not an investment of capital ; that in the case of wages expended in sinking there is nothing to represent capital, and the money so expended cannot be an investment, because it can never be recovered."

On these statements and this contention the Court gave judgment on the 6th of February 1879, holding that the case thus presented to them did not in principle differ from the case of the tenant of a mineral field sinking one pit, and one only, and proceeding by means of that pit to work out the whole minerals let to him. They therefore affirmed the determination of the Commissioners, and refused the proposed reduction, on the grounds stated in the judgment and on the authority of the earlier case of *Addie v. The Solicitor of Inland Revenue* (Feb. 16, 1875, *ante*, vol. ii., p. 431), in which it was expressly decided that the cost of sinking a pit and carrying on the business of mining is an expenditure of capital, and cannot be taken into account in assessing the profits of the business to income-tax.

The Coltness Company appealed to the House of Lords, and it appears that in the course of the appellants' argument at the bar facts and considerations were advanced and urged, which were not stated or suggested in the case on which the Court gave judgment. On the conclusion of the argument, the House of Lords "being of opinion that the statement of facts contained in the case submitted to the Court of Session on this matter is not sufficiently full to enable this House finally to dispose of the points of law on which its decision is asked," was pleased to remit the case to this Court in order that it might be amended, "pursuant to the power conferred for that purpose by the Act of Parliament of the 37th and 38th years of Her present Majesty, chap. 16, and that an adjudication be had on such amended case, and reported to this House."

The case has been amended accordingly, and the Court having heard a full argument from counsel now proceed to give their judgment, in compliance with the order of the House.

The amended case contains the following new and important statements in addition to certain details as to pit-sinking, which will be immediately noticed : — "First, The working charges deducted and allowed in ascertaining the profits for assessment include the whole cost of getting and raising the minerals, after the pits are sunk, and of manufacturing the metal and selling the iron and coal, and the general expenses of the concern. Secondly, The sum of £9027, claimed as a deduction from the assessment, does not represent the cost of pit-sinking during the year, but is a sum arrived at by calculating 2s. per ton on iron made,

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and 1½d. per ton on coal sold during the year, it being estimated that this will properly represent the amount of capital expended in making bores and sinking pits which have been exhausted by the year's working."

It will be observed that while in the original case the deduction asked by the appellants was in respect of "the cost incurred by them in sinking new pits," and it was contended "that in fact the sinking of the pits was expenditure in winning the minerals, and not, as the surveyor stated, an investment of capital," the appellants no longer maintain that the deduction claimed does not represent capital invested or expended in carrying on the business of the company. On the contrary, it is now distinctly stated that the sum proposed to be deducted from the profits "represents the amount of capital expended on pits and exhausted by the year's working."

The facts regarding pit-sinking in the appellants' mineral field, as now amplified and explained, may be summarized as follows:—First, During twenty years, from 30th June 1858 to 30th June 1878, the appellants expended in sinking pits £165,825, 3s. 6d., or on an average annually about £8500. This includes the costs of many pits used only as air-pits, and pits for pumping water, as well as the expense of bores made in searching for minerals. Secondly, During the same period many pits have become exhausted. The total cost of sinking these pits, including air-pits, pumping-pits, and bores, as above, was £102,678, 6s. 10d., being about an annual average of £5000, varying from £639, 4s. 4d. in one year, being the lowest, to £11,234, 15s. 1d. in another, being the highest. The depth of these pits varies from 9 fathoms to 114 fathoms. Their endurance in a state of usefulness varies from about one year to twenty-three years. Thirdly, Taking a shorter period of about six and a half years, from January 1872 to June 1878, the total cost of pit-sinking is £71,964, 10s. 2d., including £10,337, 10s. 9d. for air-pits and boring, or an average annual expenditure of about £11,000. These pits vary from 4 to 134 fathoms in depth. Fourth, During the period of six years from January 1872 to January 1878 the nineteen pits which became exhausted had cost £44,013, 13s. 1d., or about £2300 each pit on an average. They vary from 13 to 100 fathoms in depth, and lasted on an average about nine and a half years each. Fifth, The pits at present working—that is, in June 1878—are forty-three in number, and cost £97,537, 7s. 1d., or an average of about £2250 for each pit. They vary in depth from 14 to 134 fathoms, and were sunk, the earliest of them, in 1849, and the latest in 1876.

The question thus comes to be, whether the statutes authorise any deduction to be made from profits on account of capital expended and exhausted in the conduct of the company's business. The general principle of the property and income-tax, to which effect is given by the statutes, is that everything of the nature of income shall be assessed, from what source soever it may be derived, whether from invested capital, or from skill and labour, or from a combination of both, and whether temporary or permanent, steady or fluctuating, precarious or secured. Nor does it make any difference on the incidence of the tax that the income has been created by the sinking of capital, as in the case of purchased annuities, instead of being merely the natural annual product of an invested sum, which remains unconsumed, and undiminished by the consumption of the income which it yields.

In applying this general principle to an assessment on profits of trade, the Act 5 and 6 of Her present Majesty, chapter 35, speaks in very clear language

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The first rule, sec. 100, schedule D, provides that "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, &c., upon a fair and just average of three years, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed." The third rule provides, that in estimating the balance of profits and gains no deduction shall be allowed "for any sum employed, or intended to be employed, as capital in such trade, &c., nor for any capital employed in improvement of premises occupied for the purposes of such trade, nor on account of or under pretence of any interest which might have been paid on such sums if laid out at interest." And the fourth rule provides that "no deduction shall be made on account of any annual interest on any annuity or any annual payment payable out of such profits or gains."

The term, "full amount of the balance of profits" in the first of these rules is something very different from the amount of the nett profits of the year which would appear in the ordinary annual balance-sheet of a trading company; for in ascertaining nett profits there falls to be deducted, not only annual working expenses, but interest on capital employed in the business, and every kind of annual payment which, either by the original constitution of the company or by its subsequent obligations, falls to be paid out of the profits.

So, also, in ascertaining the amount of nett profits for the purpose of division, the state of the capital account necessarily affects the balance-sheet. If any part of the capital is lost, or if, from the nature of the business, the capital employed can never be recovered or restored, that is an element of primary importance in fixing the financial condition of the company, and the true amount of its nett earnings.

But the statute refuses to take an ordinary balance-sheet, or the nett profits thereby ascertained, as the measure of the assessment, and requires the full balance of profits, without allowing any deduction except for working expenses, and without regard to the state of the capital account, or to the amount of capital employed in the concern, or sunk and exhausted, or withdrawn.

Any other construction of the statute would not only be inconsistent with the leading principle on which it is based, and with its express words, but would lead to very embarrassing consequences.

A man who employs his whole capital in the purchase of terminable annuities increases his income and is assessed to the income-tax for the full amount of the annuities; but after the step has been taken he is in practical effect living on his capital, and when the annuities terminate it will be all gone. He might have left his money on an ordinary investment, and have consumed every year a portion of the capital in addition to the interest. Nay, he might calculate the matter so nicely, that the whole capital would be gone just at the same time that the annuities would terminate. In this case his assessable income would be only the interest accruing annually on the principal sum, gradually diminishing year by year, and would not include the portion of the capital which he chose to expend year by year. But when he purchases an annuity he converts his whole estate into an income which represents no capital, but that which he has paid away and exhausted to procure the income. But the statute takes no heed of his exhausted capital, and makes no deduction from the actual amount of his income on that account.

In like manner, one may buy a business which is necessarily of a temporary character, but the endurance of which may extend over a series of years. He

No. 68. realises a large income from the business, and in the end he may find that the profits derived from the business while it lasted have repaid him the full amount he paid for it, with interest, and left an ample margin of gain beyond. On the other hand, he may find that though he drew considerable profits from the business annually during its continuance, the balance is the wrong way in the end, and he has lost a great part of the money he paid for it. But the statute is not concerned with the failure or success of his speculation, and looks only to what is the income derived from the business year by year.

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To come nearer to the case before us, one man takes a lease of the minerals under the ground of a certain estate, which have never been wrought, and to which there is as yet no access by pit or otherwise. Another buys from a former tenant the unexpired term of a lease of minerals, which are in the course of being wrought by means of numerous and well-constructed shafts. Are these two men to be assessed to the income-tax on different rules? Is the former to have such an allowance or deduction as is claimed in the present case, on account of capital expended and exhausted in the sinking of pits, and is the other to have no such allowance, when the pits sunk by his predecessor in the mine become exhausted and useless? Such a result would seem very unjust to the latter, for his pits have possibly cost him quite as much, in the shape of purchase-money of the lease, as the former has expended in actually sinking his. And yet to give the latter the same kind of allowance as is now claimed for the former would involve such an inquiry as the Legislature could never have contemplated, and as seems almost inextricable,—an inquiry into the manner in which the purchase-money of the lease ought to be apportioned between the minerals themselves and the pits, and the other advantages and conveniences of the going mine at the date of the purchase, including an estimate of the worth of each pit at that date, its probable continuance as a useful pit, and the expense of maintaining it. But, besides all this, the supposed claim of the purchaser of the lease would be nothing less than a proposal to deduct from the income arising from the subject purchased a proportion year by year of the purchase-money. This would be to establish a distinction between temporary and permanent income, in the mode of imposing the assessment, to which the statute gives no countenance.

As already noticed, the contention of the appellants in the original case was that the expenditure in respect of pit-sinking was not outlay of capital at all, but the ordinary working expenses of the mine. For the reasons given in our former judgment, we thought that former argument unsound, and in the amended case it is abandoned, and the expense of pit-sinking is admitted to be outlay, or investment of capital. But the claim of the appellants, as made in the amended case, though thus differing in form, does not differ in any material respect from the claim made in the original case. Capital expended in the sinking of pits must necessarily become exhausted and lost sooner or later, and that is foreseen when the expenditure is made. The only distinction between the two claims is that, in the original case, the deduction was asked of expenditure actually made in the year of assessment; while in the amended case the deduction is asked to be made in the year of assessment in which the pits created by the expenditure ceased to be useful. But it is not the less in the one case than in the other a deduction from annual profits of capital employed in the business of the appellants' company, which the statute expressly prohibits.

A certain appearance of plausibility is given to the appellants' argument by

the great number and variety of pits sunk and worked by them. The constant employment of capital year by year in such sinking, by reason of the great extent of their business, gives to this expenditure a certain similarity to ordinary working expenses. But the likeness is merely on the surface. If a man buys an unwrought mineral field, and sinks one pit, by means of which he works out all the minerals, he has converted the dormant, inaccessible, and unproductive subject into a going mine. He has made a new subject, which differs from the unwrought mineral field, just as a railway or canal is a different subject altogether from what the ground on which it is constructed originally was. The miner has invested his capital in creating the subject, which consists partly of the minerals and partly of the access by which the minerals are approached and worked; but the cost of the one, equally with the cost of the other, is an employment of capital, and it would be quite as reasonable to ask for an allowance for the general exhaustion and loss of capital embarked in paying the price of the mineral, as of that employed in sinking the pit.

The Court had occasion, in the case of *Miller v. Farie*, Nov. 29, 1878, *ante*, vol. vi., p. 270, to decide that no allowance could be made for depreciation of the subject or the gradual extinction of the capital employed, by the constant diminution of the quantity of minerals remaining to be won, and we have seen no reason to doubt the soundness of that judgment. But if these considerations are conclusive in the case of a small mine, with a single pit, it seems impossible to dispute their equal applicability to a large subject of the same kind. Instead of 50 acres in the case supposed, the mineral field may extend to 1000 acres; but the extension of the area, the multiplication of the strata worked, and of the pits sunk to reach them, do not alter the character of the subject, or the nature of the trade, and cannot make that in the latter case working expenses which in the former is employment of capital.

Having regard to the express words of the statute, and the principle of assessment which runs through all its provisions, the Court are of opinion that the claim of the appellants ought to be rejected, and the determination of the Commissioners ought to be affirmed.

As to the matter of expenses, we apprehend that we have no power to dispose of that question, at least at present.

Lord Deas entirely concurs in the judgment of the Court, although he is not able to be in Court to-day.

THE COURT pronounced the following interlocutor:—"Of new affirm the determination of the Commissioners of the Middle Ward of Lanarkshire, dated November 7, 1878, and decern; and appoint the clerk to report this judgment to the House of Lords, in terms of the order to that effect, of date August 1, 1879."

MURRAY, BEITH, & MURRAY, W.S.—DAVID CROLE, Solicitor of Inland Revenue—Agents.

ALASTAIR M'LAIR M'DONALD, Petitioner.—*Pearson*.

ELIZABETH MOORE MENZIES M'DONALD AND ADRIANA M'DONALD,
Respondents.—*J. P. B. Robertson*.

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Proof—Confidentiality—Reports to insurance companies by medical advisers.—In an inquiry regarding the probable duration of life of a first substitute heir of

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entail, with the view of ascertaining the value of the expectancy of the second and third heirs prior to the disentail of the estate, diligence *granted* (by Lord Fraser (Ordinary) and acquiesced in) for the recovery of certain medical reports in the hands of insurance companies with whom the life of the heir in question was insured, and plea of confidentiality stated by the haver *repelled*.

OUTER HOUSE.
Lord Fraser.

(*Vide ante*, March 12, 1880, vol. vii. (H. of L.), p. 7.)

This was a petition for disentail of certain estates in Perthshire, in which the House of Lords had found that, in order to the ascertainment of the value of the expectancy or interest of the second and third substitute heirs of entail, the respondents, under sec. 5 of the Entail Amendment Act, 1875, these parties were entitled to bring before the Court any facts bearing upon the probable duration of life of Captain M'Donald, who was the first substitute heir.

The cause was remitted to the Court of Session for that purpose, and a proof was thereafter fixed to take place before the Junior Lord Ordinary. There were averments that the heir in question had suffered from ailments which reduced his life below the average, and, preliminary to the proof, a diligence was granted to the respondents for recovery of certain medical reports made to insurance companies on Captain M'Donald on the occasion of applications for insurance on his life.

One of the havers, the manager of the Scottish Equitable Insurance Company, declined to produce such documents, on the ground of confidentiality and privilege. His declinature was reported by the commissioner to the Lord Ordinary (Fraser), who, after hearing parties, pronounced this interlocutor:—"Having heard counsel for the parties on the interim report of the commissioner appointed to execute the commission and diligence for the recovery of documents mentioned in the specification, No. 103 of process, repels the plea of confidentiality stated by the haver, William Finlay, secretary to the Scottish Equitable Life Assurance Society, and ordains him to make a further search for the documents called for, and, if found, to produce the same to the commissioner: Of new, remits to Mr John Burnet to execute and carry out the commission and diligence, and to report the same *quam primum*: Finds the haver, William Finlay, liable in expenses of the discussion on the interim report to the respondents, Misses Elizabeth M. M. M'Donald and Adriana M'Donald; modifies the same to £5, 5s., and decerns: Grants leave to reclaim against this interlocutor." *

* "NOTE.—The proof in this case has been fixed for the 10th of March, but, preliminary thereto, a diligence was granted for the recovery of certain medical reports upon Captain M'Donald's health made to insurance companies on the occasion of his applications for insurance on his life. One haver declines to produce these documents on the ground that they are confidential, and come within the class of privileged communications. This objection the haver is entitled to state, although diligence has been granted for their recovery—(See *M'Donald v. M'Donald*, March 6, 1844, 6 D. 954).

"The tendency of modern decisions is to increase the class of cases coming under the category of privileged communications. Hitherto the protection has been given to the limited class of communications between a husband and his wife, of the client and his legal adviser, of reports by public officers upon matters of state to their superiors. It has also been extended to communications passing between two defenders to a suit—(*Rose v. Medical Invalid Insurance Society*, Nov. 27, 1847, 10 D. 156)—and, although it has been decided by the English Courts that a medical man who acquires information from his patient, or a Roman Catholic priest who hears the confession of one of his flock, cannot refuse in a Court of justice to disclose the information they possess, yet these decisions have been regretted by later English Judges, and none such have been pronounced

hitherto by the Scottish Courts. The case of the Roman Catholic priest was discussed and considered in *M'Laughlin v. Douglas and Kidston*, Jan. 17, 1863, 4 Irvine, 273, but no decision was given upon the general point; and, as regards the physician, Mr Greenleaf mentions that a number of the States in America, in the new codes passed by them, have enacted (as in the revised statutes of New York) that 'no person duly authorised to practise physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon'—(Greenleaf on the Law of Evidence, 13th edn., i. 290, note).

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"If the present was a case where a communication made to a physician by his patient was sought to be recovered for a purpose antagonistic to the patient, the Court would have to consider whether the English rule denying the protection should be followed, or whether the Scotch Courts, not being controlled by precedents, would create one the other way by ranking this within the class of privileged communications. But the case is not so. An insurance company in the course of its business requires to obtain information as to the health of the person wishing to deal with it, promising, at the same time, to the doctor who gives the report, that it will be treated as a confidential communication. This does not possess any of those elements which lie at the root of the protection given to the classes above referred to. It may, no doubt, be inconvenient for the insurance company to be compelled to produce the reports of their medical adviser, and it may hamper the medical adviser in the expression of his opinion if it were known that on the occasion of a dispute the production of these reports in a Court of justice could be enforced. But, notwithstanding this, the mischief would be greater if such important evidence were withheld. A decision of the Common Pleas in 1871 is very much in point upon this subject (*Mahoney and Another v. The National Widows' Life Assurance Fund*, 5th May 1871, L. R. 6, 252). The action there was directed against the assurance company, to recover the sum insured upon a life. The company pleaded that the policy had been obtained by fraudulent concealment and misrepresentation of material facts. The plaintiffs applied for inspection of (1) two reports made to the company by private friends of the assured, to whom the company were referred, with relation to the assured's health and habits, and (2) a report made by a medical man to whom the assured was referred for examination on behalf of the company. At the head of the printed forms of questions, upon which these reports were made, were statements that the company would regard the answers given as strictly private and confidential. The Court allowed inspection of the documents, on the ground that they were not privileged from inspection, and regarded the statement that the report would be considered strictly private to mean no more than this, that the company would not needlessly disclose it. It is right, however, to notice, that the Judges in that case did indicate that there might be circumstances that might warrant the extension of the rule as to privileged communications to such reports. Thus Bovill, C. J., said—'I do not say that in every case the Court would order such documents as these to be produced. The Court has a discretion, and is bound to exercise it according to the circumstances of the particular case. It is easy to see that in some cases these documents may be of importance, and in others not. Here, there are no grounds shewn by the affidavits why they should not be produced, except the mere fact that they are stated to be confidential as between the insurance office and the parties who wrote them. This is not any legal ground of privilege.' This remark had reference to what seems to be more confidential than the medical report, viz., the report of private friends as to the state of health of the insured. If the Court does possess such a discretion as is thus claimed, it can only be exercised upon very special grounds indeed. If it were made clear that the document when produced would not be competent evidence at the trial, that might be a ground for refusing an order to produce it. But such an objection to the production, though it may be suggested by a haver for the consideration of the Court, is one that can only be competently taken by a party to the suit. The medical reports here sought to be recovered have been given (as was stated

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to the Lord Ordinary) by living men, whose evidence may be obtained at the trial, and therefore it may be said that there is no necessity for admitting the reports which they made years ago; and consequently, it is argued, if any judicial discretion is to be exercised in the matter it should be in favour of the objection to production. Whether the evidence be competent or not is a question that must be argued by the parties to the cause when the reports are tendered in evidence at the trial, and cannot be determined now, and therefore there is no specialty in the present case that would induce the exercise of any discretion against the non-production."

THE interlocutor was acquiesced in, and the cause was thereafter settled and taken out of Court without further procedure.

A. P. PURVES, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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—
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M'Bain v.
Wallace & Co.
&c.

JAMES M. M'BAIN (Roney's Trustee), Complainer.—*D.-F. Fraser—Rhind.*
JOHN WALLACE & CO. AND OTHERS, Respondents.—*Guthrie Smith—
Vary Campbell.*

Ship—Sale—Delivery.—*Held* that when a ship in the course of building is sold for a price payable by instalments, during its completion, the property in the ship passes to the purchaser as the instalments of the price are paid, without delivery of the subject.

Right in Security—Ship—Sale—Bankrupt.—A person agreed verbally to make advances to a shipbuilder on the security of a ship he was in the course of building, on condition that the ship should be sold to him for a certain sum to be advanced, the contract of sale not to be qualified by any back-letter or other legal obligation. A formal and unqualified contract of sale was thereafter completed, the price to be payable in two instalments. The price was paid before the vessel was completed, and before delivery had been made the shipbuilder was sequestrated. In a question between his trustee and the purchaser, *held* (rev. judgment of Lord Rutherford Clark) that the latter was entitled to delivery of the vessel, although only to the effect of securing repayment of his advances, with interest.

Remarks on the cases of *Simpson v. Duncanson*, Aug. 2, 1786, M. 14,204, and *Leckie v. Leckie*, Nov. 21, 1854, 17 D. 77.

2D DIVISION.
Lord Rutherford Clark.
M.

JAMES RONEY, shipbuilder in Arbroath, towards the end of the year 1875 commenced to build at his yard a barquentine or three-masted schooner of the burden of 297 tons. This vessel he entered in his books as No. 2, and for the purposes of survey he entered her at Lloyds. Towards the end of December 1877 her hull, with all her internal fittings, was nearly completed and ready for launching. During these years he was also engaged in building various other vessels, and in doing so he had incurred various liabilities. In particular, he had obtained and discounted an accommodation-bill for £500 from Messrs John Wallace & Co., iron-merchants, Dundee, from whom he was in the habit of getting iron and other goods. He had also incurred with the same firm an open account for goods supplied to the extent of £300, making his total liability to them as at January 1878, £800.

Following on verbal communings between the parties, Roney entered into a contract with Messrs Wallace & Co., of date 17th and 25th January 1878, for the completion and purchase of the schooner No. 2, at the price of £2500.*

* The more important clauses of this contract were as follows:—Clause 3.—"It is hereby agreed and declared that when any sum shall be paid or appropriated by the second parties towards payment of the said price, the said vessel in her present unfinished state, and at the stage of her build at which she has reached,

The effects of James Roney were sequestrated on April 24, 1880, and on 4th May Mr James M'Bain was elected trustee thereon, and an act and warrant of confirmation in his favour was issued on 7th May.

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as shewn by the said specification, and all materials and articles of wood or iron &c. or other metals of every description, furnished and unfurnished, and whether made up or not, but intended or destined to be used in the construction, fitting up, and completion of the said vessel, and her appurtenances, which shall be lying or situated in or about the vessel, where she is building, or elsewhere in or near the shipbuilding yard or other premises occupied by the first party at Arbroath, shall thereupon *ipso facto*, to all intents and purposes, become and remain the property of the second parties, although they may be used by the first party as materials for the completion of the vessel, or of her appurtenances; and it is further and in like manner agreed, that all subsequent additions made to the vessel and her appurtenances as the work proceeds, and all additional materials and articles of any description that shall be brought to or belong, or be situated as aforesaid, intended or destined to be used in the construction, fitting up, and completion of the vessel or her appurtenances, shall *ipso facto* of such intentioned destination or situation, become and remain the property of the second parties, although, without prejudice to such right of property, they may be used by the first party as materials for completion of the vessel or her appurtenances as before mentioned; and generally, it is hereby agreed that the said vessel and her appurtenances, or any part thereof, or materials or articles intended or destined for the completion of the same as aforesaid, shall not be or become liable to any debts, contracts, or engagements of the first party, or be otherwise affected by or attachable for his acts or deeds, or be at his order and disposition, but shall, subject to the uses foresaid, be and remain the absolute property of the second parties: Declaring that the instalment of price applicable to the present stage of the vessel's build is agreed to be £2000 sterling, and that the final instalment of price payable for the vessel and her appurtenances on complete fulfilment of this contract and said specification, is £500 sterling, making together the foresaid price of £2500 sterling, which respective instalments shall be payable on the completion of the said vessel and its appurtenances, to the second parties' satisfaction, and after the vessel has been launched by the first party, and full legal possession thereof received by the second parties, and also after delivery by the first party to the second parties in proper order of the certificates of the builder of the Board of Trade, and of Lloyds' surveyor, and any other documents requisite to instruct that the vessel has been completed in terms of said specification and this contract, and according to the requirements of the Board of Trade and Lloyds' registry. But it is hereby agreed that if the second parties shall elect to pay, or appropriate any sum or sums for settlement of any part of the foresaid instalments sooner than the date fixed for payment thereof, then and in that event the sum or sums that may be so paid or appropriated shall bear interest from the date of advance or settlement at the rate of five pounds per centum, and the advance or advances and interest thereon shall be deducted from the foresaid price at final settlement."

Clause 6.—"In case the first party shall suspend the work on the vessel or her appurtenances, unless compelled to do so from the effects of fire or bad weather, or strike of workmen, to such an extent as to cause a suspension of work, or if he shall refuse or fail to carry out and complete this contract, and said relative specification as hereinbefore agreed to, then, and in any such case, it shall be lawful for the second parties, by themselves or others employed by them, and without any judicial warrant, unless they may consider such expedient, but only after a previous notice to the first party of fourteen days by letter, put prepaid into the post-office at Dundee, to enter into and upon the first party's shipbuilding yard and premises at Arbroath, and take and retain possession thereof, and of the whole materials and articles intended and destined to be used for the purposes of this contract and said specification, and thereafter to sell the said vessel and her appurtenances, and the materials and articles before referred to, or any part thereof, in the condition in which they may then be, at

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On 29th and 30th April 1880, Messrs Wallace & Co., founding on the 6th clause of the contract, gave notice to Roney that they intended, in consequence of his having suspended the work on the vessel and her appurtenances, and so failed to execute his part of the contract, to enter upon his shipbuilding yard, "and take and retain possession thereof, and of the whole materials and articles intended and destined to be used for the purposes of the said contract and specification," and thereafter to sell the said vessel and her appurtenances, and the said materials, either at valuation or by public sale, and to do anything further that might be necessary, and which they were authorised to do by the terms of the contract.

On receipt of this letter, Mr M'Bain, the trustee on the sequestration, raised the present action of suspension and interdict of the said proceedings against Messrs Wallace & Co.

valuations to be put thereon by the arbiter aftermentioned ; and failing such valuation, then by public sale, on such terms as the second parties may think proper, and to receive and discharge the prices thereof, and apply the free proceeds, after deduction of all costs and charges, towards repayment of any instalment or portion of any instalment of the price that may have been advanced or appropriated by the second parties as before mentioned, and any other payments or outlays that they may have made or incurred in the premises, with interest thereon from the date of advance, at the rate foresaid. And after full payment and satisfaction to the second parties in the premises, and relief and reimbursement to them of all obligations, payments, and charges of every kind, which they may have contracted or incurred in relation to this contract and the consequents thereof, and any other debts or obligations due and owing by the first party to the second parties, on any other ground whatever, relating thereto or not, any free balance shall be paid to the first party, or the second parties may, if they see fit, instead of selling the vessel and her appurtenances, and the said materials and articles, or any part thereof as above mentioned, complete the vessel and her appurtenances, in terms of the present contract and said relative specification, and for these purposes employ all necessary workmen, and use all the machinery, working tools, implements, stock, and material of every kind necessary for such purposes, in and about or near the said premises of the first party, situated at Arbroath ; and in case the second parties shall expend any sums in so completing the vessel and her appurtenances over and above the said contract price, the same, with all costs and outlays incurred by them, shall be recoverable by them from said first party."

Clause 7.—"In the event of the vessel and her appurtenances, when delivery thereof is tendered by the first party to the second parties, being disconform to the stipulations in this contract and in the said specification, the second parties shall be entitled, notwithstanding anything to the contrary herein contained, to refuse to take delivery thereof, and to demand and recover from the first party repayment of any sum or sums that they may have paid or appropriated towards payment in whole or in part of any instalment of the said price, and the other outlays, charges, and expenses that they shall have paid and incurred, and obligations that may have been undertaken by them in relation to the present contract and subject-matters thereof, with interest thereon at the rate foresaid from the date of advance till repaid ; and in the event foresaid it is further expressly agreed that the second parties shall have a real specific and preferable right of lien, retention, and possession of, in, and over the said vessel and her appurtenances aforesaid, until full payment be made to them as above provided, and be entitled to claim and hold possession under such right of lien and retention, and to realise payment of the sum or sums that may be so due to them by a sale of the said vessel, and charge the first party with the expense of so doing, and with any deficiency that may remain for payment to the second parties as aforesaid, but in that event the second parties shall have no further claim for loss or damage against the first party."

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He averred that (Stat. 6) "the price of the vessel was under the contract stipulated to be paid on the completion of the ship, which by article fifth of the contract was to be within three months from the last date thereof. The vessel, however, was not finished within the three months, and is not even now completed, she being still on the stocks. No part of the pretended price of the said vessel has been paid, but the respondents, who had already made advances to Roney of £800, continued from time to time to make advances to him, for which they afterwards drew on him, and discounted at the Royal Bank in Dundee his acceptances. The respondents charged interest and commission on the same, the reality of the matter thus being simply that, in respect of certain sums of commission, the respondents lent their names to Roney, who obtained the proceeds arising from the discounting of his own acceptances." (Stat. 12) "The intention of the parties in entering into the foresaid contract was, that it should be simply as a security for the debt already due by Mr Roney to the respondents, and for the accommodation-bills to which they were to become parties for his behoof. And accordingly after the contract was entered into, Mr Roney was left by the respondents in the uncontrolled possession, management, and ownership of the schooner. They got and took no possession, symbolical or otherwise, and in no shape interfered with Mr Roney with reference to the ship. The contract has all along been kept latent, and has not been published or made known to any one. From time to time Mr Roney corresponded with various parties with a view to a sale of the vessel. He advertised her in his own name, and at his own expense, to be disposed of. He was under no restraint, verbal or otherwise, from selling the ship, so far as the respondents were concerned. He met them very frequently when in Dundee, and communicated to them his prospects of selling the vessel, and they never sought to control him as to the amount of the price he asked for the ship, nor even indicated that they had any right or interest in her, other than a right in security for the accommodation transactions above mentioned. On the contrary, they corresponded with him on the footing that the vessel was his vessel, and in their correspondence they asked him the lowest price at which he would sell her."

He pleaded, *inter alia* ;—(1) The vessel and others not having been sold to the respondents, and no price having been paid for the same, the respondents are not entitled to take possession of them. (2) There having been no delivery to the respondents of the vessel and others in question, interdict should be granted as prayed for. (3) The transaction between the respondents and the bankrupt being one by way of security only, and this fact being instructed *in gremio* of the contract, the respondents are not entitled, as in a question with the trustee on the bankrupt's sequestrated estate, to insist on delivery of the vessel and others, and for that purpose to take at their own hand possession of the bankrupt's shipbuilding yard, stock, and plant, as intimated by them.

The respondents, in their answers, denied that no price had been paid, and averred that sums to the extent of £2550 had been paid to Roney to account on the price of the ship, and that he had granted receipts therefor, the said receipts bearing to be for part of the contract price. They denied that the contract was intended to be only in security, and that there were any accommodation-bills for Roney's behoof. Further, they denied that the contract was kept latent, and that possession was not taken by them. It was well known both in Dundee and Arbroath that they had bought the ship, and that when Roney endeavoured to find a purchaser it was at their request, and in doing so he was acting solely for their behoof, and not for his own interest.

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They pleaded, *inter alia* ;—(2) The contract being a contract of sale, and reduced to writing, the allegation that it was truly a security cannot be proved otherwise than by writing. (3) When a ship is purchased on the stocks on the terms that it shall be finished and launched by the builder, and paid for by instalments, the property of the materials as they are put together, at all events after payment of the first instalment, belongs to the purchaser, and not to the trustee in the builder's bankruptcy. (4) The right of a trustee in a sequestration being *tantum et tale* as it stood in the person of the bankrupt, and the respondents having bought the vessel and paid the stipulated price, they are entitled to delivery and possession in terms of the contract. (5) Assuming that the transaction amounted to a security only, the transfer being *ex facie* absolute, the complainer is not entitled to possession, except on payment of the sums received and due by the bankrupt to the respondents.

A proof was led,* and on 23d November 1880 the Lord Ordinary (Lord

* James Roney, *inter alia*, deponed,—“About the end of the year 1877 I met Mr Wallace and Mr Stewart in their office in Dundee, with the view of getting the bills renewed. They demurred to renewing the bills unless I could give them some security. They asked how I stood about my affairs. I explained how I was hampered with this vessel on the stocks,—that I could not get her sold, that I could not get any money on her, and that if I had her sold I would be able to meet the bills. After some talk I offered to give them the vessel if they could raise any money on her in security for the bills,—to allow them to lie over till I got the vessel sold. Mr Wallace, I think, suggested they should consult Mr Thomson (a law-agent) about it. I came back next day, or the day after, and Mr Stewart and I called upon Mr Thomson, solicitor, Dundee. It appeared that Mr Wallace had been there before us, because Mr Thomson knew what we had called for. He explained that the respondents could not take a mortgage on the vessel unless she was launched and registered, and that the only way would be a sale. I understood that this was the only way in which they could take the vessel as security. It was then arranged that the bill of sale, or whatever it is, should be made out in that way, and that they should advance the money as I required it in the future on the vessel. There was no price agreed on. The reason why £2500 was put in was that Mr Stewart asked me in the office if £2500 would put me over my difficulties till I got the vessel sold, and I said, ‘Plenty; perhaps I would not require it all if I got her sold soon.’ I agreed to grant the security in the form of an absolute conveyance. In the first arrangement the £2500 was put in for the vessel without an outfit—that is, just the hull and spars—but when the contract was made out it embraced the whole outfit, to make the vessel ready for sea. I was never even consulted about that; Mr Thomson prepared the conveyance, and Mr Stewart and I signed it in Mr Thomson's office on 17th January 1878. . . . (A.) £2500 was mentioned for the vessel finished. She would be worth close upon £4000 at that time. I would not have sold her for anything like £2500 then. I got £2950 for her subsequently, and vessels had very much depreciated in value during the interval. . . . I got various advances from the respondents during the years 1877-78, for which I granted receipts. The mode in which these advances were made was by bill drawn by the respondents, accepted by me, and discounted by them. I generally got a cheque from them, but not always, for the full amount of the bill drawn. When I got those cheques I granted receipts in the terms of No. 74. On one occasion they got a receipt for £120, when no money passed at all. It was the balance of a bill for £300. They asked for a receipt for that sum as if they had paid it to me, which they had not done. The form of receipt was written out by Mr Thomson on the day the contract was signed, and it was adhered to right through. I agreed to grant receipts in those terms without any remonstrance. I asked a back-letter from Mr Stewart a week or two afterwards. I demurred to granting receipts and accepting bills at the same time. I thought they were having too much security over the vessel. I said to

Rutherford Clark) issued the following interlocutor:—"Sustains the reasons of suspension, and interdicts, prohibits, and discharges the re-

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Mr Stewart it was all well enough as between him and me, but something might happen to either of us, and then they could claim the vessel. 'Oh,' he said, 'never mind that; the heavens might fall,' and he did not give me the back-letter. . . . Nothing took place in Mr Thomson's presence to shew that the transaction was to be a security, and not an out-and-out sale."

David Stewart, a partner of Wallace & Co., deponed,—“Roney came back to me early in January 1878, and asked me whether we could not buy the ship ourselves. I said we had quite enough of shipping, unless we could get a bargain of it. I said I would consult my partner, Mr Wallace, who lives in London. Roney on this occasion suggested a price, £2500. I understood that was to include the completion of the vessel, and to make her ready for sea. Mr Wallace came down to Dundee and saw Roney. At the meeting which took place Mr Wallace spoke about buying the vessel at the price named by Roney, but said he would go to Mr Thomson, and see if he could prepare a proper buying contract that would keep us secure for what we were to pay for the vessel until she was launched. The reason why he desired to see Mr Thomson was that the vessel was then on the stocks unfinished. . . . On 18th January, Roney and I called at Mr Thomson's office. The contract was read over by Mr Thomson's clerk, and Roney heard it read. We there and then signed it, and it was sent to London for Mr Wallace's signature. On our return to my office that day, Mr Roney said, 'Now suppose you were to sell this ship for more than £2500, what is my position to be?' I said, 'You have signed a contract of sale.' 'But,' said he, 'suppose you were to make a big profit,' and he wanted a back-letter. I said, 'There will be no back-letter. There is no understanding or misunderstanding upon the subject with me, and neither let there be with you. It is an out-and-out contract of sale, and any agreement, verbal, implied, or written, may vitiate the contract.' I throughout held this contract to be an out-and-out absolute sale. . . . When Roney asked for the back-letter he seemed to have a floating idea in his mind that the ship had been parted with as security. I suspect I must have known what he meant when he asked for the back-letter. He seemed to think that the transaction, though in shape a transaction of sale, was in reality a security. I at once refused to give a back-letter, assigning as a reason that it might vitiate the contract. (Q.) Why were you afraid of the contract being vitiated? (A.) Because we wanted to be absolutely safe, and have the contract to express actually what it was. (Q.) Were you afraid that if you granted the back-letter it might be found out that the contract was one of security only? (A.) A back-letter might have indicated that. (Q.) And you were afraid of that? (A.) Well, I was just wanting to go upon the contract, and there was no occasion for him asking a back-letter. My explanation of the words I used is this, that if we had parted with the money without a proper buying contract we might have been held as taking security, and there was no occasion for a back-letter, seeing a proper buying contract had been signed by both parties. Had this vessel been sold for more than what paid our debt, I would have considered myself morally but not legally bound to account to Roney for the excess, because he had been in business for a while and lost a lot of money, and we did not want to make a profit of his necessities. I was willing to give him a share of the profit. I don't know whether he understood that too; but this is what I would have done, though only from moral obligation. (Q.) Was that not what you understood at the time was to be done? (A.) It was never so expressed. (Question repeated.) There was no understanding. (Q.) Was it not really in your mind at the time that that was to be the result of the transaction? (A.) I suppose may be it was; at the same time we must keep ourselves legally right whatever our moral obligation may be."

The following among other letters were produced:—Wallace & Co to James Roney, 4th May 1878.—“Dear Sir,—Please send full particulars of the 3 masted schooner to Mr David M'Kenzie, shipbroker, 27 Leadenhall

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spondents, in terms of the prayer of the note of suspension and interdict, and decerns: Finds the complainer entitled to expenses: Appoints an account," &c.*

The respondents reclaimed, and argued;—The contract was one of sale, and not merely of security. By the construction of the ship under the contract it became the property of the reclaimers *specificatione*. As the building progressed such an appropriation to him took place as prevented the creditors of the builder from attaching it without refunding the sums advanced by the reclaimers. The rule of the case of *Duncanson* was not confined to the case of an actual sale, and delivery following thereon, but included such delivery as there was here.¹ The builder was under an absolute obligation to build, just as the reclaimer was under an absolute

Street, London, E.C. Tom Anderson, of London, has just lost one. M'Kenzie is employed trying to get one to replace. Let the particulars be as full as possible; size of hatchways, whether beams in hold, and lowest price."

Wallace & Co. to James Roney, 6th September 1879.—"Dear Sir,—Enclosed is letter from Beardwood, Jones, & Co.

"We have written them that they should get their clients to run north and see the ship, as we know she is not dear, and they will be satisfied of that when they see her.

"Meantime, is £3600 the very lowest at which you would be disposed to sell? Please say for our guidance, and we will use the information judiciously in writing to B., J., & Co."

Wallace & Co. to Beardwood, Jones, & Co., 11th September 1879.—"We are favoured with yours of yesterday *re* Roney's ship. We know you will do your best in this matter. We have a personal interest in it, as we are under considerable advances to Mr Roney against this vessel, and we want to realise, and he wants to retire from shipbuilding; so if your correspondents are *bona fide* enquirers, kindly do what you can to hurry them on judiciously."

* "OPINION.—The complainer's case is that the ship was his. The answer to this is twofold—that the ship was sold, and the property transferred, or at least that they have a security which they are entitled to enforce. There is no doubt that the contract which is founded on is one of sale. I do not doubt that Mr Thomson believed there was no other contract but this one, and I am disposed to assume that was also the idea of Mr Wallace. He seems not to have paid so much attention to the matter as Stewart, between whom and the bankrupt the chief communications were. But though the contract does express a contract of sale, that may not be an expression of the true contract which the parties made with one another, although they may have concealed from the law-agent what was the true contract. But does this writing express the true contract? I do not think it does; and I think I can rely more on the evidence of Roney than on Stewart's, because Roney's is consistent with all that passed subsequently, and Stewart's not at all, while Stewart on pressure told the real truth. The contract is for immediate execution. The ship remains in the hands of the bankrupt. Payments are made, and receipts given, but Roney gives his name to furnish accommodation. The correspondence is, to my mind, in favour of my view. Mr Stewart's evidence also tended to shew he did not believe he had bought the vessel, because he said he had a moral obligation to return excess of the price obtained, and he said he would not give Roney a back-letter, because he thought it would vitiate the contract. As to the security, I think the constitution of that security must be ascertained. It is hardly contended that any possession was changed, and therefore the security is unavailing by reason of want of possession."

¹ *Simpson v. Duncanson's Creditors*, Aug. 2, 1786, M. 14,204, and 1 Bell's Comm. 189; *Orr's Trustees v. Tullis*, July 2, 1870, 8 Macph. 936, 42 Scot. Jur. 566; *Scottish Heritable Securities Co. v. Allan, Campbell, & Co.*, Jan. 14, 1876, *ante*, vol. iii. 333; *Miller's Trustee v. Shield*, March 19, 1862, 24 D. 821, 34 Scot. Jur. 416; *Holderness v. Rankin*, Aug. 3, 1860, 29 L. J. Chan. 753; *Trovinston v. Clay*, Jan. 24, 1862, 32 L. J. Chan. 388; *M'Meehan v. Ross*, Nov. 22, 1876, *ante*, vol. iv. 154.

obligation to pay for work done. Such an arrangement was equivalent to a sale, and the complainer, after the contract was once entered into, simply acted as the servant of the reclaimers. If the transaction was of the nature of a security it was of the nature of an *ex facie* absolute disposition, under which a title could be completed and delivery enforced just as under a sale.¹

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Argued for the respondent;—There had here been no delivery, without which the sale could not be held to have been completed. A ship required delivery just as much as any other moveable. The authority of *Duncanson's* case was very doubtful,² and had not been followed in subsequent cases.³ If this was held to be a sale it would give the reclaimers an unfair advantage over the other creditors in the competition.⁴ The facts proved that the arrangement was simply one of security.

LORD JUSTICE-CLERK.—This case has been elaborately argued, and embraces some questions of considerable general importance, especially that part of it which relates to the principle on which the case of *Duncanson* was decided. I differ from the Lord Ordinary in holding that the instrument in this case only conferred a right in security; but I agree with him as regards the claim of Messrs Wallace for the surplus of the price over the amount of the sums advanced.

I cannot hold that this written instrument was only a security. It is drawn up in a most formal manner, and it professes, at least, to describe the Messrs Wallace & Co. as the purchasers, and Roney as the seller, of the vessel in question, then lying uncompleted, on the stocks. That is what the written instrument purports, and its terms are quite unambiguous. If we are to read it according to its plain meaning, its phraseology is quite distinct. It was argued that the sixth clause in this agreement gives a different effect to the whole instrument. But I think this view proceeds on an erroneous construction of its terms. It relates to a different matter. It runs as follows:—(Reads). The effect of this clause was to provide for the protection of the shipbuilder, in the event of the owner entering into possession before the vessel was finished, in which case the balance remaining over, after a sale of the vessel, and the liquidation of all expenses, was to be made over to the builder. This was a reasonable provision, and was entirely confined to the case contemplated, of the vessel not being finished.

I am of opinion, therefore, that this contract discloses only a transaction of purchase and sale, and, indeed, ultimately, this was not disputed on the part of Roney's trustee.

It was, however, contended, that, granting that the contract was one of purchase and sale, it was not completed, because the vessel never was delivered, and by our law the sale of a moveable article is only completed by delivery; and we have had an able commentary on the case of *Duncanson* on this head.

¹ *Leckie v. Leckie*, Nov. 21, 1854, 17 D. 77, 27 Scot. Jur. 13.

² *Brodie's Stair*, 900.

³ *Clarke v. Spence*, 1836, 4 Ad. and Ell. 448.

⁴ *Heritable Securities Investment Association v. Wingate & Co.'s Trustee*, July 8, 1880, *ante*, vol. vii. 1094; *Cropper & Co. v. Donaldson*, July 8, 1880, *ante*, vol. vii. 1108; *Ex parte Williams*, Nov. 29, 1877, 7 L. R. Chan. Div. 133.

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I have always considered this leading case as establishing the doctrine that if the price of a vessel in the building-yard be payable by instalments, as the vessel proceeds, payment of the first instalment will suffice to transfer the property without farther delivery, on the principle of specification, the shipbuilder holding thereafter for the true owner. In *Abbott on Shipping*, Lord Tenterden refers to that judgment as having settled the law on that subject, in conformity with the prevalent opinion among English jurists. It is true that since the case of *Duncanson* there has been no direct decision on this matter; but I believe the practice in the shipbuilding trade has been entirely consistent with that judgment ever since it was pronounced; and I am of opinion that if the price of the vessel in this case had in point of fact been paid, the property of it had duly passed to Wallace & Co.

It has been argued that at least the price here had not been paid by instalments. But payment of the whole price was, of course, payment of the different parts of it; and all the money which was paid by Wallace & Co. was in fact paid before the bankruptcy of Roney.

That the price was paid I cannot doubt. The price was advanced by cheques, and against these cheques corresponding bills were negotiated, drawn by Wallace & Co., and accepted by Roney. It is not denied that the amount thus received by Roney was more than sufficient to extinguish the whole price; and if Roney had remained solvent he was fully paid. But it is maintained that there is no evidence that the sums so received were applied to the finishing of the ship. But this is surely immaterial. The money was received from time to time during the period occupied in the construction of the vessel, and it is of little moment to inquire what Roney did with the money when the cheques were paid, if, in point of fact, the money came into his hands.

It is, however, said farther, and this is the only point of difficulty in the case, that although, on the face of it, this may be and is a contract of sale, yet the right was qualified by an agreement, separately concluded, which restricted it entirely to a security. I was under the impression from the first, and that impression strengthened in the course of the discussion, that the evidence of a separate contract was of the scantiest. There is no back-letter, nor any stipulation for one. I think, however, that there is sufficient evidence in the correspondence that Wallace & Co. would not have felt justified in retaining from the proceeds of the ship more than their advances, and that it was understood between the parties that they would not do so. But, assuming this to be so, that would in no degree prevent their title under the contract from remaining that of purchasers. The parties meant nothing but a sale, but it was quite within the power of the purchasers to undertake to hold the property only until they were paid their advances. Such a stipulation would not derogate in any way from their absolute title, until that title had operated full repayment. Until then, and to that effect, it must remain what it plainly is on the face of the contract.

The nature of such a right—an absolute title qualified by a personal undertaking—is very familiar, and the rules of law applicable to it are well settled. If one man stipulate with his debtor that he shall be put in the place and have all the rights of a proprietor against him, and obtain an absolute conveyance of his property, he may, if he pleases, stipulate that in certain contingencies he will restrict the operation of his absolute title. That would be matter of contract, and, to the extent of his undertaking, he will be liable to fulfil it. But

even in the fulfilment of his personal stipulation the rights and powers of his absolute title shall be effectual, and aid the subordinate or qualified operation of his absolute conveyance. Such a personal agreement does not derogate from the absolute title, but only restricts, in certain events, the operation of it. Such is the tenor of all the opinions in the case of *Leckie v. Leckie*, 17 D. 77, and especially of that of Lord Colonsay, which is of the greatest weight.

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I think, therefore, that this is nothing but an absolute sale, qualified, it may be, by collateral and subordinate stipulations, which do not affect the right of the purchaser to plead his absolute title effectually, until his advances are repaid. The conditional agreement could only come into force when the sums advanced are repaid, and I think that until that event occurs the collateral agreement gives no right to the shipbuilder's trustee. It would be an unjust, and, as I think, an untenable result, that the persons who made these advances for behoof of the builder should be compelled to abandon the property on the faith of which alone the funds by which it was created were furnished.

I am therefore of opinion that the Lord Ordinary's interlocutor should be altered to the effect of finding that Wallace & Co. have a preferable right under the contract of sale over the vessel in question to the extent of £2500.

LORD YOUNG.—The primary question regards the validity and effect of the contract of 17th and 25th January 1878, assuming that the rights of the parties under it are not affected by extrinsic evidence. Whether or not they are so affected is a subsequent question.

The contract is for the purchase and sale of a ship on the stocks in a building-yard, and still unfinished. The seller (the builder) undertook to finish and deliver the ship to the buyer, who, on his part, undertook to pay the price (£2500) by instalments, or on the completion and delivery of the ship. There can be no doubt that this was, *ex facie*, a good contract of sale, enforceable by either party against the other, and that, as between them, it was immaterial to its validity and enforceability whether the price had been paid in whole or in part. Nor, so far as I can see, would the subsequent bankruptcy of either party have affected the validity of the contract, although in that case the solvent party must have been content with such remedy as he might have under the bankrupt laws against the estate of the other.

Between the date of the contract and the seller's sequestration the respondents (the buyers according to the contract) made thirteen payments to the seller, to the total amount of £2550, on receipts bearing that the payments were made and received to account of the contract price of the ship. The contract price being thus fully paid up (at least ostensibly) the seller became bankrupt on 24th April 1880, and the question now raised is whether the respondents are entitled to the property and possession of the ship, which is still on the stocks.

Now, on the assumption which I am making, viz., that the contract was in truth what it bears to be, and that the price has been paid, I do not think this question doubtful. For I hold it to be law that the property of a ship on the stocks in the course of building passes by a contract of sale, accompanied with payment of the price, either in full or by instalments corresponding to the progress of the building. This is no doubt an exception to the general rule that the property of goods sold passes only by tradition, but since the case of *Duncan*, M. 14,204, it has been a recognised, and, I had thought, familiar, exception, and the expediency or utility of it is obvious, for, otherwise, a ship on the stocks

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and in course of building being incapable of delivery could not be purchased and paid for as it advanced with any safety to the buyer.

But it is said that there is here extrinsic evidence which shews that the respondents were not in truth buyers, but money-lenders, and that the contract of sale was only a device to procure a security on the ship for money lent. And, assuming the fact to be so, it is contended that the respondents can take nothing under the contract as a contract of sale, while it is ineffectual to give them a security as by pledge.

I think it is probably true that the respondents did not desire to purchase the ship either for use or as a speculation, and that they were only willing to accommodate the shipbuilder with advances of money on what was thought to be good security for repayment, viz., a contract which should make them the owners of the ship as by purchase, and whereby their advances should be accounted payments to account of the price. Assuming this to have been the intention of the parties, there was nothing fraudulent or reprehensible in it that I can see, and I am ignorant of any rule of law which hinders its accomplishment. It is only reasonable to hold, and, indeed, is according to the assumption of the suspender's argument, that the contract, together with the receipts granted for the payments subsequently made, put the respondents exactly in the position which they contracted for, and in reliance on which they paid their money. Why shall they not occupy it? There was no fraud, and no contravention of the bankruptcy law, and no undue advantage is sought to be taken of the title bargained for and given. It is according to the general rules of law, and quite familiar in practice, that an *ex facie* absolute title of property, whether to land or goods, as upon sale, may be given by a borrower to a lender of money. It is true that the Court will get behind the appearance or form of the transaction, and proceed on the reality, in order to do justice, as, for example, to restrain the holder of the title from using it beyond what is necessary to recover his debt and interest, but beyond this any interference with what has been lawfully covenanted and done, although between borrower and lender, would be unjust. It is quite lawful, as I have said, for a lender to bargain for a property title which shall give him all the rights of a proprietor, subject only to this, that he may be equitably restrained from taking more by it than payment of his debt, and a contract of sale, with delivery or its equivalent, is a very common form of such title. In the case of a ship on the stocks in course of building I have already stated my opinion to the effect that delivery (which, indeed, is impossible) is not needed to pass the property or give a *jus in re*, and that a contract of sale, together with payment of the price according to the contract, will have this effect. Whether the contract is with a real buyer, or with a money-lender who honestly bargained for it as the condition of his loan, is plainly immaterial to the shipbuilder's creditors. It is not to be assumed, and probably nobody dealing with a shipbuilder ever assumed, that the ships building in a yard are the builder's property, unaffected by contracts with others.

It is here admitted that the respondents are creditors of the bankrupt for money advanced and paid to the bankrupt to the amount of £2500 in reliance on the contract in question. The respondents distinctly undertake that their title by the contract shall be used by them only to the effect of recovering this debt, and interest. The equitable intervention of the Court to prevent any excess of use is therefore not invoked. The ship is said by the complainers to be worth much more than the debt, and the import of our decision thus amounts

only to this, that the respondents are entitled to payment of their debt preferably and in full, their title of property in the ship being available to them to this extent, and no further. We might have allowed the ship to pass to the trustee in bankruptcy, and tried the question on his deliverance on the respondents' claim, but the question as to their preference being before us now, and having been fully argued, it is convenient for all parties that we should decide it, and we shall do so, to the effect I have stated, by refusing this suspension.

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LORD CRAIGHILL.—I concur in the result at which both your Lordships have arrived; and, as the grounds of Lord Young's opinion are precisely the grounds on which I rest my judgment, I need scarcely add anything in explanation of the views by which I am influenced.

THE COURT pronounced this interlocutor:—"Recall said interlocutor: Repel the reasons of suspension: Refuse the note of suspension and interdict, and decern: Find the respondents entitled to expenses."

WILLIAM OFFICER, S.S.C.—WILLIAM ARCHIBALD, S.S.C.—Agents.

WILLIAM RALSTON (Pursuer), Reclaimer.—*D.-F. Fraser—Nevay.*

CATHERINE RALSTON, Defender.

THE LORD ADVOCATE.—*Rutherford—Omond.*

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Ralston v. Ralston and Lord Advocate.

Husband and Wife—Divorce—Condonation.—The wife of a sailor confessed to her husband that she had committed an act of adultery. After she made that statement the parties never lived together as man and wife, but the husband soon after went to sea, and during his absence wrote affectionate letters to his wife expressing his forgiveness of what had happened, signing himself "your loving husband." On his return home he discovered that his wife had committed adultery previous to the act which she had confessed. In an action of divorce raised by the husband, *held* that the letters, even if they amounted to condonation of the act of adultery which the wife had confessed, could not be pleaded in condonation of the previous act, of which the husband was ignorant when he wrote them.

Condonation by letters.—*Question*, whether letters of forgiveness from a husband to a wife, without any subsequent cohabitation, will support a plea of condonation.

Conjugal Rights (Scotland) Amendment Act, 1861 (24 and 25 Vict.), cap. 86, sec. 8—Appearance for Lord Advocate—Condonation.—*Question*, whether in an action of divorce it was competent for the Lord Advocate to insist in a plea of condonation which had been stated and subsequently withdrawn by the defender.

On 29th June 1880 William Ralston junior, captain of the ship "Selene," raised an action against his wife, Catherine Smith or Ralston, concluding for divorce on the ground of adultery with David Langwell, formerly mate of the ship "Lochlong," of Glasgow, "and with a person or persons whose names or designations are to the pursuer unknown."

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Lord Adam.
M.

The defender stated defences to the action, pleading, *inter alia*;—(2) The pursuer's statements as to the defender's adultery, except in so far as the said adultery has been known to and condoned by him, being unfounded in fact, the defender ought to be assoilzied.

This plea proceeded on averments that letters had been received by the defender from the pursuer expressing his forgiveness after the adultery with Langwell had become known to him, and on an averment that the

No. 71. pursuer had, on his return home from the voyage on which these letters were written, resumed cohabitation with the defender.
 Jan. 13, 1881. **Ralston v. Ralston and Lord Advocate.** A day for proof in the action was fixed, but before it arrived the defender abandoned her defence.

On 25th November 1880 the Lord Ordinary (Lord Adam) pronounced the following interlocutor:—"The Lord Ordinary appoints this case to be laid before the Lord Advocate, in terms of the 8th section of the 'Conjugal Rights Amendment Act, 1861,' in order that he may determine whether he should enter appearance therein."*

The Lord Advocate entered appearance, and was represented by counsel at the diet of proof.

From the evidence, the following facts were proved to the satisfaction of the Court:—

In the beginning of August 1877 the pursuer left Glasgow, where he and his wife were staying, to join the ship "Oimara," and was out of this country for twenty months. He never afterwards lived with her as his wife. On his return on 22d April 1879 he telegraphed to her to meet him at Newport, Monmouth. When she arrived there she informed the pursuer that she was with child to a person she named, but whose name the pursuer did not remember; it was not Langwell. The pursuer and his wife lived in the same house at Newport for eight days. The child was born on the 29th. The pursuer then left the country in the ship "Selene," and during his absence wrote the letters quoted below.† About twelve

* The Conjugal Rights (Scotland) Act (24 and 25 Vict.) c. 86, sec. 8, enacts,—
 "It shall be competent to the Lord Advocate to enter appearance as a party in any action of declarator of nullity of marriage or of divorce; and it shall be competent to him to lead such proof and maintain such pleas as he may consider warranted by the circumstances of the case; and the Court shall, whenever they consider it necessary for the proper disposal of any action of declarator of nullity of marriage or of divorce, direct that it be laid before the Lord Advocate in order that he may determine whether he should enter appearance therein."

† The first of these letters was in the following terms:—"Ship 'Selene,' Zanzibar, August 22d.—My dear Wife,—I write you a few lines to let you know that I am well, and hoping these few lines will find you all enjoying the same blessing. I received your two kind letters of the 16th and 24th July, and, dear Kate, you remember that I told you that I told Captain Clink that £5 would do; and I hope, dear Kate, you will try and make that do until we meet, if it is God's will, for I am wearying very much for to see you once more; and, dear Kate, as for any of them watching you, never distress yourself about it. I was: nothing to do with any of them, and so keep up your heart—it is you and me for it, and never you mind what they say or think; as long as you do right for the future towards me you need care for no one. Dear Kate, I am all discharged, and will sail in two or three days more, and this is a very bad time of the year in the Bay of Bengal, and if anything should happen to me, you will know that you have my full forgiveness for what has happened; and I hope you will sometimes think of me, for I often think of you; but, dear Kate, with God's help all will go well, and we will meet and be happy yet, I hope. As I told you, I answered my father's letter, but gave them no news, only that I was well; and, dear Kate, don't let that distress you.—I remain your affectionate husband.
 WM. RALSTON, Master, Ship 'Selene.'" On two subsequent occasions on the same voyage the pursuer wrote affectionate letters to his wife, commencing "my dear wife," and ending "your loving husband," and lastly a letter, also on the same voyage, in the following terms:—" . . . hoping to have a happier meeting next time, the best we ever had. Dear Kate, as I have plenty of time, and I expect to get your other letters before the mail sails for home, so this letter will be an answer to all that I have received from you—that is, if the mail

months after he left Newport the pursuer was at Bremerhaven, where his wife went to see him, uninvited. He did not, however, live with her, and sent her home three days after she arrived.

In cross-examination the pursuer stated that at the time he wrote the letters he intended to raise an action of divorce against his wife, and only intended her to believe that she had his forgiveness that she might take charge of their only child, and not sell the furniture he had left in their house.

It was further proved that the defender had committed adultery with David Langwell in October 1877, shortly after the pursuer left the country in the "Oimara."

On 20th December 1880 the Lord Ordinary pronounced the following interlocutor:—"Finds it proved that the defender, Catherine Smith or Ralston, committed adultery with David Langwell, mentioned on record, and was delivered of an illegitimate child on or about the 29th April 1879: Finds it not proved that the defender committed adultery with any other person: Finds that the pursuer, in the knowledge that the defender had committed adultery, condoned the same: Therefore assoilzies the defender from the conclusions of the action," &c.*

It will be observed that his Lordship's finding implies that the adultery with Langwell was committed in October 1878, which would have ac-

come up to time. Dear Kate, you may be sure that I will be as quick as ever I can, as I am wearying to see you; and as long as a mast stands above the 'Selene's' deck, she will catch it. I will astonish some of them that thinks Bill Ralston a fool; but never mind, dear Kate, it is you and I for it, and let all others climb a tree as they like, I care for none of them. . . . I am trying to get away next week. You will get a letter ten days after this, so you will be all right. No more at present.—From your loveing husband, WM. RALSTON, Master, Ship 'Selene.'"

* "NOTE.—The pursuer met the defender in Newport at the end of April 1879. He had been at sea continuously for about twenty months before this time. The defender was then pregnant of a child, which was born a few days after their meeting. The pursuer could not possibly be the father of this child, and knew, beyond doubt, that his wife had committed adultery in his absence.

"After remaining about eight days with his wife at Newport, the pursuer again went to sea. The letters to his wife founded on in record were written during this voyage.

"Although the evidence is meagre, the Lord Ordinary thinks it sufficiently proved that the defender committed adultery with David Langwell in the previous October, which would account for the birth of the child.

"It is also attempted to prove that she committed adultery in October or November 1876 with a person of the name of Newlands, but the Lord Ordinary does not think this is sufficiently proved.

"In these circumstances the question arises, whether the pursuer condoned the defender's adultery? The Lord Ordinary thinks that no one can read the pursuer's letters to his wife without being satisfied that he had fully forgiven the act or acts of adultery which led to the birth of the child. The pursuer avers that he never forgave his wife, but that the letters were written for the purpose of deceiving her into the belief that he had, in case that she should, in his absence, sell their furniture, and go away with their child. The Lord Ordinary does not believe a word of this. For reasons which do not appear, the pursuer seems to have changed his mind since his return from his last voyage. But that cannot take off the effect of his previous forgiveness of his wife's offence.

"Had the Lord Ordinary thought that the alleged adultery with Newlands had been proved, a question would have arisen how far the condonation would have applied to that act; but, in the view the Lord Ordinary takes of the case, it is not necessary to consider it."

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No. 71. counted for the birth of the child in April 1879, but the proof of adultery with Langwell applied to October 1877.

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The pursuer reclaimed.

Argued for the pursuer;—Although by the Conjugal Rights Act, sec. 8, it was competent for the Lord Advocate to enter appearance in any action of declarator of nullity of marriage or of divorce, this was to prevent collusion. It never was intended that he should insist in a plea of condonation which had been abandoned. That was a plea entirely personal to the defender, in which the public had no interest. The defence of condonation was untenable, because (1) the pursuer did not resume cohabitation with the defender after he knew of her adultery; mere verbal forgiveness would not sustain the plea.¹ (2) The plea of condonation could only be stated as against the adultery known to the condoner.² Now, the only adultery which he knew, when he used the words “I forgive you,” was that which produced the child in April 1879. He did not know of the other and prior adultery with Langwell, which took place in 1877 (not in 1878 as the Lord Ordinary had erroneously held).

Argued for the Lord Advocate;—(1) The right of the Lord Advocate to appear as a defender in suits of declarator of nullity of marriage and divorce was given by the Conjugal Rights Act in the most ample and explicit terms. It was given to him in the public interest, on the ground that the public had an interest in the status of each member of it, so that *bona gratia* divorces should not be allowed to be carried through under the forms of law. The right thus given to the Lord Advocate to intervene in such cases was only a continuation of a long pre-existing practice, under which the procurator-fiscal of the Consistorial Courts aided the Court in such cases.³ The matter was left entirely to his discretion; and it was just as allowable to him to plead that divorce was barred by condonation as that it was barred by collusion. (2) In regard to what constituted condonation the consistorial law of Scotland was different from that stated in the case of *Keats* in the English Courts. The canon law, which was adopted in the Scottish Consistorial Courts, held that condonation could be pleaded when there was express forgiveness by word of mouth or by letter, without any subsequent conjugal cohabitation; and the institutional writers and the decisions of the Commissary Court adopted and enforced that law.⁴

LORD JUSTICE-CLERK.—The main question which is raised in this case (on which I do not propose to give any express opinion) is one of considerable importance and novelty, whether, where a plea of condonation is withdrawn, it is competent or right for the Lord Advocate to take up the plea and maintain it. The words of the statute that authorise the Lord Advocate's intervention now are as broad as they can possibly be, and it is a matter entirely in the discretion of the Lord Advocate under what circumstances he will or will not appear; and I have not the least desire to say a word to limit that discretion. It is vested in perfectly good hands; but when the question does come up I wish to reserve

¹ *Keats v. Keats*, 28 L. J., Mat. Cases, 57.

² *D'Aquilar v. D'Aquilar*, 1 Hogg, Eccl. Rep., p. 781; and *Fraser on Husband and Wife*, p. 1182.

³ *Fraser on Husband and Wife*, 1141; *Riddell's Peerage and Consistorial Law*, 1002.

⁴ *Fraser on Husband and Wife*, 1176.

my opinion entirely as to whether a plea of condonation, which implies that the wife has been unfaithful, but that the husband has entered into a contract with her to overlook her fault, is a kind of plea which the public prosecutor, the public authority, ought to take up if the wife declines to pursue it. I do not think that tying the matrimonial knot anew under such circumstances is a matter which is of benefit to the public, nor do I see any real interest which the Lord Advocate could have to insist upon it. That is all I have to say about that matter.

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In the second place, on the question whether, condonation being pleaded, it is a good plea, I must own that I do not think it is, under the circumstances, well-founded upon the letters in question. This unfortunate sailor comes home and finds his wife very near her confinement of a child which is certainly not his. Well, he lives for eight days in the same house, the wife, of course, being unable to be removed, and he, very probably, having no other place to which he can conveniently go. He then sails upon another voyage, becomes apparently soft-hearted to his wife when he is away, and writes those letters, but writes them under the belief that the only act of misconduct was that which led to the birth of the child which he found she was going to be delivered of. He comes home. I suppose he hears of other things, for he does not go near her, and he never cohabits with her again, and has had no conjugal intercourse with her. And the question is, whether these letters will amount to such condonation as will prevent him from having his remedy for his wife's misconduct.

Now, my Lords, without going into the question whether cohabitation is essential,—on which there seems to be some difference of opinion in our law,—there is none in the law of England,—but whether cohabitation be essential or not the absence of cohabitation and the refusal to cohabit on the very first opportunity is a very material circumstance in shewing how far there was any concluded intention of overlooking this offence. But the conclusive matter here—and it admits, in my opinion, of no doubt whatever—is that when these letters were written he did not know his wife's conduct or the measure of it. He knew the case, but he did not know about the adultery with Langwell in 1877; and whether the proof of that would have been sufficient for a divorce or not it is quite plain that if he had known of that circumstance he never would have written the letters at all.

On the whole, I should have thought it a very feeble case of condonation, even if the adultery with Langwell had not taken place the year before. The Lord Ordinary has fallen into the mistake of supposing that Langwell was the father of the child, and that the pursuer did know everything before he came home. But that is not so, and on that ground I come to the opinion that as these letters were written in ignorance, the husband cannot be bound by them now that he has discovered the full measure of his wife's misconduct.

I am therefore of opinion that the Lord Ordinary's interlocutor should be altered, and decree of divorce should be given.

Lord Young.—I am entirely of the same opinion. I think the evidence does not shew any condonation, anything to bar the pursuer from having the remedy which he seeks by this action. It is clear upon the evidence that at the time these letters were written the pursuer knew nothing of the adultery which the Lord Ordinary here finds proved; for the particular adultery which he finds

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proved by his interlocutor is adultery with Langwell, which the Lord Ordinary by mistake puts in the month of October prior to the birth of the child. But the proof shews it really took place in the October of the year 1877, and so the child's birth did not result from that intercourse, though I agree with the Lord Ordinary that the adultery is very well proved; and, according to all the evidence which we have, the pursuer was ignorant of that adultery, so found to be proved, when he wrote these letters. Now, while he meant, so far as a man might by writing letters to his wife, to forgive the adultery which resulted in the birth of the child (which was not the adultery libelled), I am not of opinion that letters of that kind, without any cohabitation at all, will bar an action for divorce such as we have here; and even if they would have barred it, had the only adultery established been that which led to the birth of the child, I should be of opinion that the evidence of the adultery, of which the pursuer was ignorant, would entitle the writer of the letters to be free from any restraint which otherwise they would have put upon him. That he did not, when he wrote those letters, know or suspect his wife's conduct with Langwell in October 1877 is, I think, quite sufficient to entitle him to be free.

But I have the greatest possible doubt—though I agree with your Lordship that it is not necessary to decide it in this case—whether letters, especially letters written by a seaman who is abroad with his ship, expressing his feelings affectionately to his wife at home, will establish a condonation which will bar an action of divorce. There is no authority to that effect in Scotland up to this moment, and I am the furthest in the world from being prepared to make an authority here. But it is not expedient or necessary for us to decide that point, there being sufficient to shew that the pursuer here is under no restraint by writing those letters in the circumstances in which they have been written.

There is another matter on which I think it proper to say something, and that is the intervention of the Lord Advocate; and it will not be supposed for a single moment that I would do anything so unbecoming as to say one word of censure with respect to the course which the Lord Advocate has taken here. That would be entirely foreign to any purpose which I have. But we have been told, and no doubt truly, that there is no case in England of the intervention of the Attorney-General in order to demand the consideration of a plea of condonation (which is not maintained by the party), except on the ground that the party entitled to maintain it is abstaining from doing so collusively, and for some improper purpose. There is no case of that kind in England, where provision is made in terms very analogous to the provision which is made here by the Conjugal Rights Act, and the Dean of Faculty informs us it existed at common law before that provision of the Conjugal Rights Act, to protect the Court against pronouncing decree of divorce improperly arranged between the parties. It is certain there is no such case in England, and it is equally certain there is no such case here prior to the present; and when the first case occurs of anything of the importance which this has, it is incumbent on the Judges, before whom the matter comes, to indicate their views upon the subject, if, indeed, they have any: and I do happen to have some views here, and they concur entirely with what I understand to be your Lordship's.

Condonation is in its own nature very much a personal matter. It is personal forgiveness. If that personal forgiveness is followed up by the husband

taking back the guilty wife to live with him he should certainly not be at liberty thereafter to turn round upon her, and say, "You shall suffer for your misconduct just as if this had not happened," and so with the innocent wife taking back as her husband the husband who has transgressed. But that is very much a personal matter, because the binding nature of such forgiveness, from a moral point of view—and it is that which is at the bottom of it—depends upon the state of the forgiving party's knowledge and information as to the conduct of the other. Of course, what he remains ignorant of with respect to the other party, and does not act upon the knowledge of, is for legal purposes just as if it did not exist; but I am the furthest in the world from being prepared to sanction such a notion as this, that, if a generous and forgiving husband has written a letter of forgiveness to his erring wife, saying, "Well, I receive your confession and your tears and repentance, and I forgive you; I will not go back upon what you have done," she, knowing that her conduct has been infinitely worse than anything known to him when he wrote the letter, knowing of misconduct on her part which she has not communicated to him, is bound nevertheless to use that letter of forgiveness, and to prove those expressions of forgiveness as a defence to any action which he may raise. I think the wife or the husband—for the cases are the same—is perfectly entitled to say, and is only acting with propriety and according to morality and duty in saying, "Well, I will not avail myself of this, because I know that it was written upon a generous impulse, and without that knowledge with which I could not have expected it to be written, and I will not avail myself of it." Now, I am making the observation only to indicate my own opinion that this matter of condonation and forgiveness is very much of a personal affair between the parties, and that if the spouse entitled to plead the forgiveness does not desire to do so, that it is not a case in the absence of any special circumstances, ascertained upon a special investigation, for the Lord Advocate or the proper officer, whoever he may be—it happened to be the Lord Advocate here—to intervene and say, "No, but you shall; this has been done, and it is irrevocable; and if your wife, in whose favour you did it, does not choose to stand upon it, I, in the public interest, stand upon it, and insist that the Court shall give effect to it." I think, as no instance of that has occurred in the past, we ought not, by any observations of ours, to give any encouragement to the repetition of it in the future.

With these observations, I entirely concur in what your Lordship proposes, that the interlocutor of the Lord Ordinary should be altered, and decree of divorce granted.

LORD CRAIGHILL.—The case now before us is an action of divorce at the instance of a man named Ralston against his wife. The ground upon which divorce is sought is adultery; and in the condescendence the adultery is said to have been committed in 1876 with a person of the name of Newlands, in October 1877 with a person of the name of Langwell, and there are other cases with other men more indefinitely libelled, the names of those other men, as the pursuer says, being to the pursuer unknown. The defender appeared, and stated defences. She denied all the instances referable to persons stated in the condescendence, but she did admit there had been adultery, because she admitted that, her husband having been away for the period of twenty months, she immediately after his return gave birth to an illegitimate child; so that undoubtedly there was adultery on her part, though it does not appear from any

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No. 71. thing admitted by the defender or stated upon record that the act was one of those special cases libelled on by the pursuer. The defence, however, is no sooner stated than it is withdrawn, though the papers remain in process and are available for the information of all concerned, including the Lord Ordinary. After a proof had been allowed the Lord Ordinary, struck by the withdrawal of the defences, yet possessed of the information on which the defences had been made, and of the importance of one of the pleas which the defender had stated, viz., the blotting out of the acts libelled by condonation, appointed intimation of the cause to be made to the Lord Advocate, that he, if he thought fit in the circumstances, might appear and take the course which he thought the interests of justice required. The Lord Advocate did appear by those whom he sent to represent him. He took part in the examination of witnesses, and he took part in the discussion which followed on the close of the proof. The result of the whole matter was that the Lord Ordinary found that there had been adultery with a person named Langwell, and that this Langwell was the father of the child to which the defender had given birth on 29th April 1879. There is no doubt, according to my view of the matter, that the Lord Ordinary decided rightly when he found that there was proof of adultery with Langwell; but I am just as clear that the Lord Ordinary inadvertently had mistaken the proof with reference to the time when this adultery was committed. The adultery with Langwell occurred not in October 1878, as the Lord Ordinary has found, but in October 1877, and hence it is as plain as anything can be, that the adultery with Langwell was not the act of adultery to which the pregnancy is to be attributed. Apart from the defence which was urged first by the wife and afterwards taken up by the Lord Advocate, viz., the defence of condonation, the mere matter of time would have been comparatively unimportant; but with reference to that defence time goes deep into the case, and indeed so deep that it is with reference to the date of this particular occurrence that I think there is furnished an answer to be made to the plea of condonation.

Now, something has been said here with reference not so much to the right as to the expediency of the appearance of the Lord Advocate to take up and maintain such a defence as this. I confess that, supposing it were necessary for me to decide that matter, I should be disposed to think that the words of the eighth section of the Conjugal Rights Act of 1861 are so broad that the Lord Advocate might appear and take part in any action of divorce in Scotland. That being so, and this being an action of divorce, it appears to me that the Lord Advocate exercised his discretion, as he was entitled to exercise it, by appearing, and I do not think that the circumstance that there is here no evidence of collusion betwixt husband and wife ousts the right which otherwise he would possess. Because, whether there is collusion or not, no one is entitled to obtain a divorce if the ground on which the divorce is sought appears upon evidence which is furnished to the Court to be a ground which has been blotted out and cannot be made the ground of any such application. Now, it appears—I am not saying there is condonation here—that when the Lord Advocate appeared, he did not know the extent to which the proof would go. He was entitled to inquire into that matter, and he appears to have inquired to the extent which he thought necessary or expedient, and it is only in the end of the day, and after there has been inquiry, that the Lord Advocate is able to make up his mind, and say whether, according to his view of the facts, and according to his view of the law, it is his duty to take part in the discussion, and main-

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tain that the defence of condonation has been established, and that, therefore, No. 71.
the divorce should be refused.

Practically, however, as regards the decision of the case, it appears to me, in Jan. 18, 1881.
this action at any rate, to be utterly immaterial what is the view we ought to Ralston v. Ral-
take with reference to the Lord Advocate's appearance, because everything ston and Lord
that has been brought out here might have been brought out by the Lord Advocate.
Ordinary himself. He saw what was the plea that was stated by the de-
fender. He saw what was the ground in point of fact on which that plea was
brought forward. And the Lord Ordinary was entitled,—nay, more, I think he
was bound,—to see what was the truth of the matter, in so far, at any rate, as
that could be discovered from the witnesses who were adduced for the purpose
of proving the pursuer's case. Every question which was put in the course of
the pursuer's cross-examination the Lord Ordinary might have put and ought to
have put, and I suppose he would have put, supposing the Lord Advocate had
not been there. It is a very delicate and important duty which devolves upon the
Lord Ordinary when there is no appearance to defend, much more so than when
there has been an appearance, and when that appearance has been withdrawn; and
if, in any circumstances, condonation is to be looked upon as a plea by which
a right to divorce is barred, then he cannot tell at the beginning of the case
whether that plea can be supported or not; he can only know that at the end.
And hence it is not only his privilege but his duty, so far as opportunity is
afforded him, to ascertain what is the truth as to the facts upon which that plea
is put forward. It appears to me immaterial whether the thing is pleaded or
not. If it comes within his knowledge he is entitled to inquire into it, and give
his decision according to that which upon the proof is ascertained to be the con-
ditions on which the law is to be applied. And, therefore, the consideration
of the question whether the Lord Advocate ought at the beginning to have
intervened, or at the end to have put forward the plea of condonation, really
does not seem to me to be of materiality to the discussion of this case. That
plea has been put forward, and the Lord Ordinary has sustained it; and the
question comes to be whether or not in the circumstances that plea ought to be
sustained, as it has been by the Lord Ordinary, or whether it ought to be over-
ruled, and decree of divorce granted.

The counsel for the Lord Advocate says that, apart from this plea, the pur-
suer is not entitled to his divorce, because the acts of adultery libelled have not
been proved. As regards all of these, except the adultery with Langwell, I
think the contention maintained by the Lord Advocate is right, and the Lord
Ordinary has adopted the same view. But I am humbly of opinion that there
is abundance of evidence in the case to support the charge of adultery with
Langwell. The adultery was said in the condensation to have been com-
mitted in October 1877. The proof shews, I think, that adultery was com-
mitted at that time, and there is no allegation, much less is there any proof, of
adultery with Langwell at any other time. That being so, we then come to
consider what is the foundation of this plea of condonation. The pursuer
returned to this country from his twenty months' voyage in the year 1879. He
was joined by his wife, he having telegraphed to her his expected arrival, and
sent an invitation that she should meet him. She came, and then she told
him that she was within a short time of her delivery of an illegitimate child.
The pursuer says, as he well might say, that he was staggered at the notion;
but what is said by the defender—and what the Lord Ordinary apparently

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holds to be the language of the pursuer—was this, that he heard what the defender, with reference to this matter, had to say, and that he forgave her the wrong which she had done to him. And what this forgiveness was is evidenced, if the tenor of the letters which were written in the course of his subsequent voyage is to be looked upon as proof of condonation. Now, the question has been raised whether forgiveness and condonation are to be looked upon in the law of Scotland as one and the same thing. I think that to a large extent this is a controversy about words. Forgiveness, (if it means nothing more than forgiveness of the sin which has been committed, but without a renunciation of the right to avail himself of the protection which the law affords in severing the tie that binds him to his wife, would obviously not be a thing which would be equivalent to condonation, because I adopt entirely the view which has been presented by your Lordship, which is to this effect, that it is not the use of words by the husband towards the wife or by the wife towards the husband,—it is something which leads to a result on the part of both ; and unless that can be satisfactorily established I think it is in vain to contend that forgiveness can be dealt with as equivalent to condonation.

That being so, what we have to consider here is whether the letters are or are not evidence of forgiveness, not in the sense in which I have used the word, but of condonation, which alone would be a bar to the pursuer's right to divorce. Now, there is a great deal, undoubtedly, in the consideration, in ascertaining what presumably was the meaning of the pursuer in writing these letters, that, when he returned, and his wife unexpectedly came to him, she did not live with him ; but it is plain enough that he had altered his mind between the time these letters were written and the time his wife joined him on his arrival at Bremerhaven, for he refers in two passages of these letters—or in one passage, at any rate—to the meeting that is anticipated upon his return, and what he says is this,—“ Hoping to have a happier meeting next time—the best we ever had.” Now, I cannot but think there is evidence there to shew that the forgiveness which had been extended by him towards the defender was not a mere forgiveness to this extent, that “ I will say no more about it ; I am very sorry for it, and I pity you, and nothing more will be done by me ;” because I think it means this, it is a forgiveness to this extent, that they should meet as husband and wife, and that the happiness they had had before, and even greater happiness, would be the result of the meeting that is anticipated. Now, if that was the forgiveness extended by pursuer towards defender, I should not like to say in the meantime that that was not all that was required for the authorities in the law of Scotland. Cohabitation is undoubtedly the best and most pregnant proof that there has been condonation, but something short of cohabitation and intercourse between the spouses may be all that is required. While I express these opinions, it does not appear to me to be necessary in this particular case that I should definitively rest my judgment upon these, to the effect which has been indicated, because, even if it were to be taken as the defender desires it should be taken, viz., as forgiveness equivalent to condonation—nay, as condonation itself—it would not be a condonation applicable to that offence which has been proved. It is plain from that which is stated by the defender upon the record—it is even more plain from that which is stated by the pursuer in the letter dated 22d August—which may be taken as written in 1879—that the only offence he had forgiven was the intercourse to which the birth of the child was to be ascribed, because he says,—“ You have my full for-

giveness for what has happened." Now what had happened? The birth of the child, and the intercourse to which that birth was to be ascribed. There is nothing else there, and it is not said this particular letter had reference to anything else. But it turns out upon the evidence that a year before this child was begotten there had been intercourse with this man Langwell—that this was a thing of which the pursuer did not know at the time this letter was written, because he did not know of it till he returned to this country at the close of the voyage, and hence this act of adultery, which is a good ground of divorce by itself, is not a thing which was in his view when the forgiveness was given. Forgiveness of that was neither given nor accepted. The defender did not communicate it, the pursuer did not know of it, and hence that offence was not in the view of either party when that which is called forgiveness and condonation took place. Now, I think it plain that this forgiveness, or, if it be condonation, this condonation, is not broad enough to cover the case which has been established. There is an act of adultery proved, and that act is not covered by the forgiveness. If that be so, I see no reason why the pursuer is not entitled to divorce, and I am satisfied, from the way in which the matter is presented by the Lord Ordinary, that he would not have pronounced the interlocutor which has been brought here on this reclaiming note if there had not been a misapprehension in his mind with reference to the time when the intercourse occurred. I entirely concur in the judgment which your Lordships have given.

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LORD GIFFORD was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and granted decree of divorce.

J. WATSON JOHNS, L.A.—C. MORTON, W.S, Crown Agent—Agents.

SIR ARCHIBALD DOUGLAS STEWART, Pursuer.—*Asher—Mackay.*

GEORGE BULLOCH, Defender.—*Kinnear—C. S. Dickson.*

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Jan. 14, 1881.
Stewart v. Bulloch.

Superior and Vassal—Composition—Unlet shootings to be included in casualty—Stat. 1469, c. 36.—When shootings are of such value that they might bring a rent if let, their value must be taken into account in computing the "year's mail as the land is set for the time," payable as a composition on the entry of a vassal under the Act 1496, c. 36.

ON 28th January 1879 George Bulloch purchased from Lord Kinnaird and his son the lands of Ballinreoch and others, at the price of £45,000. Previous to that time Mr Bulloch had been tenant of the house and shootings at the annual rent of £700, and after he purchased the estate he continued his possession of the house and shootings.

1ST DIVISION.
Lord Rutherford Clark.
B.

The last entered vassal in the lands having died on 27th August 1879, the superior, Sir Archibald Douglas Stewart, brought an action against Mr Bulloch for payment of a year's rent as composition, the lands being in non-entry.

The defender offered to pay a composition of one year's rental of the lands as appearing on the valuation-roll. The shootings, being retained in the proprietor's own hands, did not enter the valuation-roll, and the defender refused to take them into account in computing the year's rent payable as casualty.

The defender pleaded;—(2) A superior, not being entitled to take into account the annual value of shootings in determining the amount of a casualty of composition due to him, the defender should be assoilzied. (3) *Separatim*, the shootings on the estate in question not being actually

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let to any one, and no rent being derived therefrom, the pursuer is not entitled to have them taken into account in determining the amount of a casualty of composition.

The Lord Ordinary pronounced this interlocutor:—"Finds that, in computing the composition payable by the defender, the shooting rent of the subjects libelled must be taken into account as well as the agricultural rent; and with this finding appoints the case to be enrolled for further procedure: Grants leave to the defender to reclaim."*

The defender reclaimed, and argued;—Shooting over land was a use of it unknown at the date of the Act 1469, and the Act could not have been intended to include the shooting rents. Practice was against the pursuer's demand.¹ The cases referred to by the Lord Ordinary had no application to the Act 1469, but occurred under the Entail Acts.²

Argued for the pursuer;—The right of the superior apart from the statute would be to refuse an entry to the vassal and himself to enter into possession of the land. The statute took away this right, and must therefore be construed as favourably for the superior as possible. The intention of the statute was that the measure of the casualty should be the real value of the subject to the vassal. A vassal might escape altogether from payment of a casualty if game rents were not included, as a great deal of land was let for deer forests and no agricultural rent was paid for it. Besides, the present question was ruled by the case of *Leith*.³

LORD PRESIDENT.—The question raised in this case is one of general importance, and, as the Lord Ordinary has observed, it is one which has not previously come before the Court for decision. For this reason we were very anxious to hear everything that could be stated against the Lord Ordinary's judgment, but having given every attention to the very able argument of Mr Kinnear, I am not inclined to differ from the Lord Ordinary.

The facts are very simple, but they are also important in the determi-

* "NOTE.—The question in this case is whether, in computing the composition payable by the defender as a singular successor, the shooting rent shall be taken into account. This question has never been decided, and it is said that the practice has varied.

"The composition payable by a singular successor is a year's rent, or, to use the words of the Act 1469, cap. 36, 'a year's mail as the land is set for the time.' It has, however, been determined that the right of the superior is not limited to the rent which is payable by actual tenants, but extends to the true yearly value of the lands, whether they be let or unlet.

"The question seems thus to be, whether the rent obtained or obtainable for shooting is a part of the rent of the land. The Lord Ordinary thinks that it is. It has been so regarded in a series of cases, of which *Leith*, 24 D. 1059, is the latest, and the rent payable for shooting has been considered as a consideration given for the use of the ground, and not as a delegation of a personal privilege. The true view seems to be that the ordinary return which is or may be obtained for the use of the lands for a year is the sum which is payable to the superior in name of composition."

¹ Bell's Conveyancing, 1137.

² Thomson v. Simson, Nov. 24, 1825, 4 S. 226; Allan's Trustees v. Duke of Hamilton, Jan. 12, 1878, *ante*, vol. v., p. 510; Sturrock v. Carruthers' Trustees, May 21, 1880, *ante*, vol. vii., p. 799; Duff on Deeds, 310.

³ Aitchison v. Hopkirk, Feb. 14, 1775, 2 Ross' Leading Cases, 183; Blantyre v. Dunn, July 1, 1858, 20 D. 1188, 30 Scot. Jur. 709; Hill v. Caledonian Railway Co., Dec. 21, 1877, *ante*, vol. v., p. 386; Crawford v. Stewart, June 6, 1861, 23 D. 965, 33 Scot. Jur. 498; Patrick v. Napier, March 28, 1867, 5 Macph. 683, 39 Scot. Jur. 346; Christie v. Christie, Dec. 10, 1878, *ante*, vol. vi., p. 301; Leith v. Leith, June 10, 1862, 24 D. 1059.

nation of the case. The defender purchased the estate at the price of No. 72. £45,000, and obtained a disposition dated 28th January 1879 from Lord Kin- Jan. 14, 1881. naird and his son, the proprietors. It appears that for some time previous to Stewart v. the purchase he had been tenant of the house and shootings under a lease Bulloch. obtained from these gentlemen, who were the vassals of the pursuer, and that he had paid a gross yearly rental of £700 for the house and shootings; but of course after he acquired the lands the lease came to an end, and since then he has possessed the shootings as proprietor. The lands fell into non-entry—if one may still use that expression—on the 21st August 1879, in consequence of the death of the person last infeft, and the superior has brought this action, which is a statutory action under the Act of 1874, for payment of a year's rent as his composition for the entry of the defender as his vassal; and the question is, whether in estimating the composition we are entitled to take into account that part of the rent which represents the value of the shootings on the estate?

Now, there may be estates in which the value of the shootings has not only never been tested by being made the subject of a lease, but may be so obviously insignificant in amount as not to be worth ascertaining at all. There are many such cases. On the other hand, there are numerous cases in which the shootings form no inconsiderable part of the total value of the estate. It is with a case of this last sort that we are dealing here. Mr Kinnear says that it does not matter what the comparative value of the shootings is, and that the judgment we are to pronounce will apply to every piece of land in Scotland. I hardly think so. If the shootings are of scarcely any appreciable value, I think that our judgment will be inapplicable, just because there is nothing capable of being let. But to every case in which the shootings are either let or capable of being made the subject of a lease our judgment will apply.

Now, it is not disputed that the superior's right to a composition depends entirely on the old statute 1469, chap. 36, and what he is entitled to require in name of composition is, in the words of the statute, "a year's mail as the land is set for the time." I quite agree with Mr Kinnear that there is no subsequent statute which in any way extends the measure of the superior's right, but, on the other hand, it is perfectly obvious that the words of the statute must be subject to construction, and in practice its words have been construed in a somewhat extended sense. Before, however, we come to consider how far the statute, as it has been construed, will include the present case, I think it advisable to treat the question as if the statute were understood literally, and to put the case on the assumption that the lease which the defender formerly held was still in existence, and that some one else as proprietor was seeking an entry with the superior. Now, in such a state of matters would the words "a year's mail as the land is set for the time" include the rent paid for the shootings? I think they would. If, indeed, it were the law that a right of shootings was a mere personal franchise—as at one time the Court appeared inclined to hold—there would be a great deal to be said against the application of the words of the statute to a lease of shootings; but I think it has now been laid down in a series of decisions that this is not the nature of a right of shootings, but that what the tenant receives under such a lease is a right of occupation of land, as much as in the case of an agricultural tenant. It is for a different purpose no doubt, but it is not the less a right of occupation. The sporting tenant goes on to the land for the purpose of shooting game, just as the agricultural tenant goes for the purpose of tilling the ground; and although the object is different the one

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case just as much as the other is an occupation of land under a contract, and I know no other species of contract which will include the present except the contract of lease. I speak of the result of a series of judgments which need not be referred to. Now, if that be so, it is very difficult to say that a year's mail does not comprehend the mails which are payable for the land as set to the sporting tenant, just as much as the mails payable by the agricultural tenant. If, therefore, we had been dealing here with a case of let shootings, I should without difficulty have come to the conclusion that such a case is included in the very words of the statute.

But the case we are dealing with is a case in which the shootings are not let. It is, however, also one in which the shootings have been let and are of an appreciable value; and the question is, whether the value of such unlet shootings can be brought within the words of the statute 1469? Now, if the superior could not under that statute obtain anything for the value of lands which are unlet to any agricultural tenant, and are cultivated by the owner, I should have very great difficulty in saying that the shooting value should be included any more than the agricultural value. But it is just here that this ancient statute has been subject to construction; and the mode in which the value has been estimated is explained by Lord Curriehill in *Blantyre v. Dunn*, 20 D. 1188, in which he thus summarises the result of the decisions—"According to the established construction of this enactment, the measure of the composition payable by such an entering vassal is the rent payable to him by his tenant in the lands at the time of the entry, if they be then set in lease to a tenant, or the sum for which they might then be let if they are in the possession of the vassal himself." I do not think it can now be disputed that the statute has received this construction, and that what Lord Curriehill gives as the rule is the result of a series of decisions. Now, if that be so, and if the shootings, had they been let, would have been included in the words "a year's mail as the land is set for the time," it appears to me that the shootings must equally be included when they are, as they are here, of clear appreciable value in the hands of the vassal. I therefore entirely concur in the judgment of the Lord Ordinary.

It has been said that the cases on the authority of which the Lord Ordinary proceeds did not occur under the Act of 1469, but under a very different statute. No doubt that is so. But do the words of the Act of 1469 differ in any essential particular from the words of the statute on which these cases were decided? Just let us see what are the words of the Aberdeen Act which were in question in those cases. What the wife of an heir of entail is entitled to have as provision is a liferent out of a certain proportion of the lands and estate, which is described as not to exceed "one-third part of the free yearly rent of the said lands and estate where the same shall be let, or of the free yearly value thereof where the same shall not be let." Now, it seems to me that in meaning and effect these words exactly correspond to the words of the statute 1469 as construed by Lord Curriehill in *Blantyre v. Dunn*, and consequently that the decisions on that section of the Aberdeen Act are authorities in the present question.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

THE COURT adhered.

DUNDAS & WILSON, C.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

ANDREW MILLER, Petitioner and Respondent.—*Asher—M'Kechnie.*

No. 73.

THOMAS MACKNIGHT CRAWFURD, Respondent and Appellant.—

Kinnear—J. P. B. Robertson.

Jan. 15, 1881.
Miller v.
Crawfurd.

Process—Appeal—Leave to Appeal—Act 50 Geo. III. c. 112, sec. 36—A. S. 12th Nov. 1825, c. 19, sec. 2.—The A. S. 12th Nov. 1825 contains this section,—"The liberty of advocating interlocutory sentences to the Court of Session, in the cases allowed by the Act 50 Geo. III. cap. 112, sec. 36, must be obtained upon an application by petition to the Sheriff. This petition must not contain any argument, but shall merely narrate the interlocutors to be advocated."

Held that the section merely regulates the mode of obtaining leave to appeal in cases where such leave is necessary.

ANDREW MILLER, Greenock, presented a petition against Thomas Macknight Crawfurd in the Dean of Guild Court of Greenock for warrant to alter certain buildings. The respondent pleaded, *inter alia*, that the case being a competition of heritable right the Dean of Guild had no jurisdiction to entertain it.

1st Division.
Dean of Guild
of Greenock.
C.

After a great deal of procedure the Dean of Guild allowed the petitioner a proof.

The respondent appealed to the Court of Session.

The petitioner objected to the competency of the appeal, on the ground that no leave had been granted to appeal, and maintained that the A. S. of 12th Nov. 1825, c. 19, sec. 2, required that leave should be obtained in all cases specified in the Act 50 Geo. III. c. 112, sec. 36, and not only in the cases specified under the third head of that section.¹

LORD PRESIDENT.—On the question of the competency of this appeal I do not entertain any doubt. It is an appeal from a judgment of the Dean of Guild of the burgh of Greenock, and is brought under the 36th section of the Act of 1810 (50 Geo. III. cap. 112) on the ground of defect of jurisdiction. The appellant says that the Dean of Guild cannot competently decide the questions raised in the record. Now, the 36th section of the Act provides that there may be advocacy on any of the following grounds:—"First, of incompetency, including defect of jurisdiction, personal objection to the Judge, and privilege of party; secondly, of contingency; thirdly, of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for partial payment, provided that in the cases specified under this third head leave is given by the inferior Judge." This appeal is not one of the cases specified under the third head, and therefore under the Act of Parliament the appellant required no leave from the inferior Judge to come here. But it is said that the A.S. of 12th November 1825, passed under the authority of a totally different Act of Parliament—that of 6 Geo. IV. cap. 120—makes it necessary to obtain leave from the inferior Judge before presenting an appeal in any of the cases specified in the 36th section of the Act of Geo. III. The provision of the Act of Sederunt is in these terms:—"The liberty of advocating interlocutory sentences to the Court of Session, in the cases allowed by the Act 50 Geo. III. cap. 112, sec. 36, must be obtained upon an application by petition to the Sheriff. This petition must not contain any argument, but shall merely narrate the interlocutors to be advocated."

Now, if the effect of this provision is to take away the absolute right of appeal

¹ *Rain v. Gibb*, May 19, 1877, *ante*, vol. iv., p. 732; *Hamilton v. Hamilton*, March 20, 1877, *ante*, vol. iv., p. 688.

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conferred by the 36th section of the Act of Geo. III. in regard to appeals on the ground of want of jurisdiction, it would certainly be a very serious interference with the right conferred by that statute. A Judge who exceeds his jurisdiction is not unlikely to refuse to grant leave to appeal. An objection to the jurisdiction of the Judge is just the right of all others which is most sacred. Therefore it would be very peculiar if the effect of the Act of Sederunt were to take away this right. Accordingly, I do not think that that is its meaning at all. I think the phrase "liberty of advocacy," though not a very happy one, is equivalent to the "leave" spoken of in the 36th section of the Act of Parliament. If that is the true construction, then what the Act of Sederunt does is to prescribe the form in which leave is to be obtained in those cases in which it is required; and the Act of Sederunt would read—"leave to advocate must be obtained upon an application by petition to the Court, which must not contain any argument, but shall merely narrate the interlocutors to be advocated." That is the prescribed form in which leave is to be obtained. I am quite satisfied that the Act of Sederunt was not intended to go any further.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

THE COURT repelled the objection to the competency of the appeal.

T. & R. B. RANKEN, W.S.—W. B. GLEN, S.S.C.—Agents.

No. 74.

Jan. 15, 1881.
Kinnes v.
Fleming.

J. & W. KINNES, Pursuers and Respondents.—*W. C. Smith.*
ALEXANDER G. FLEMING, Defender and Appellant.—*Rhind.*

Process—Appeal—Competency—Judicature Act, 1825, 6 Geo. IV., c. 120, s. 40—Act of Sederunt 11th July 1828, sec. 5.—A Sheriff-substitute allowed a proof on 2d September, and thereafter pronounced three interlocutors discharging the diets for taking the proof and fixing new ones, stating in a note to his last interlocutor that no further indulgence would be allowed to the defender. The defender appealed to the Sheriff-principal, who dismissed the appeal. The Sheriff-substitute, on 15th December, assigned as a new diet of proof the 20th December. The defender appealed to the Court of Session.

Appeal *dismissed* as not timeously presented, the interlocutor of 2d September requiring to be appealed against within fifteen days under the 40th section of the Judicature Act and the 5th section of the A. S. of 1828, and the interlocutor of 15th December not being an allowance of proof or the renewal of an allowance of proof.

1ST DIVISION.
Sheriff of
Forfarshire.
M.

J. & W. KINNES, Dundee, raised an action in the Sheriff Court of Forfarshire against Alexander G. Fleming.

On 2d September 1880 the Sheriff-substitute (Cheyne) allowed a proof, and assigned the 23d of September as a diet of proof.

On 23d September a joint minute was tabled, craving the Court to dismiss the action, but one of the pursuers having appeared, and stated that he had not given his authority to the joint minute, and that he wished the action to proceed, the Sheriff-substitute discharged the diet of proof for that day.

On 6th October the Sheriff-substitute assigned as a new diet of proof the 20th October.

On 15th October the Sheriff-substitute discharged the diet, and assigned as a new diet the 23d October.

On 23d October the Sheriff-substitute pronounced this interlocutor:—

"In respect it is stated by the defender that his former agent has ceased to act for him, and that he has not had time to instruct another agent, discharges the diet of proof fixed for to-day, and assigns as a new diet Monday the 1st day of November next, at half-past ten o'clock forenoon, within the Sheriff Court house here: Finds the defender liable in the expenses consequent upon this adjournment; modifies these," &c. The Sheriff-substitute added in a note,—“It is with some difficulty that I have allowed this adjournment, and the defender must understand distinctly that no further indulgence will be given him.”

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The defender appealed to the Sheriff (Maitland Heriot), who, on 30th November, dismissed the appeal.

The Sheriff-substitute then pronounced this interlocutor:—“15th December 1880.—The Sheriff-substitute, on pursuers' motion, assigns as a new diet of proof Monday the 20th day of December current, at eleven o'clock forenoon, within the Sheriff Court house, Dundee.”

The defender appealed to the Court of Session, and argued that the action could not proceed in respect of the joint minute by the parties.

In support of the competency of the appeal the appellant relied on the 40th section of the Judicature Act,* and the 5th section of the Act of Sederunt 11th July 1828 (quoted in the Lord President's opinion), and argued that the interlocutor of 15th December 1880 was one allowing a proof.¹

No appearance was made for the respondents.

At advising,—

LORD PRESIDENT.—This appeal is presented under the authority of the 40th section of the Judicature Act of 1825.

The last interlocutor pronounced in the cause is dated 15th December 1880, and in it “the Sheriff-substitute, on pursuers' motion, assigns as a new diet of proof Monday the 20th day of December current.” That is not an appealable interlocutor on the face of it. But it is said that the proof which was directed to proceed by that interlocutor was allowed by a previous interlocutor dated 2d September, and that if it be competent to bring under review the interlocutor of 2d September, then this appeal may be sustained. Strangely enough the Judicature Act does not assign a time within which interlocutors may be appealed for jury trial. It therefore becomes necessary to see if there is any other limit in point of time. The Act of Sederunt of 12th November 1825, which immediately followed the Judicature Act, regulates a good many things which were not regulated by the Judicature Act itself, and the Act of Sederunt of 11th July 1828 repeals a great many of the regulations of the Act of Sederunt of 1825. It is not necessary to refer to the terms of the older Act of Sederunt. The fifth section of the Act of Sederunt of 1828 is thus expressed,—“Whereas it is enacted by section 40 [of the Judicature Act] that in all cases originating in the inferior Courts in which the claim is in amount over £40, as soon as an order or interlocutor allowing proof shall be pronounced . . . it shall be competent to advocate such cause to the Court of Session, it is enacted and declared . . . that if . . . neither party within fifteen days in the ordinary

* “ . . . In all cases originating in the inferior Courts, in which the claim is above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts . . . it shall be competent to either of the parties who may conceive that the cause ought to be tried by a jury to remove the process into the Court of Session . . . ”

¹ Murphy v. M'Keand, Feb. 15, 1866, 4 Macph. 444.

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case, and in causes before the Courts of Orkney and Shetland within thirty days after the date of such interlocutor allowing a proof, shall intimate in the inferior Court the passing of a bill of advocacy, such proof may immediately thereafter effectually proceed in the inferior Court . . . and if within these periods respectively no intimation shall be made of any such bill of advocacy the proof shall then proceed, and the bill, if such have been presented, together with the passing thereof, shall be held to fall as if such bill had never been presented." Now, this regulation does not in so many words say that the bill of advocacy must be presented within fifteen days, but it implies it, because it says that failing such bill being presented the proof is to proceed in the inferior Court, and after this no application to remove the case from the inferior Court could be sustained.

All difficulty is set aside when we look at the cases which have been decided under the Act. In the case of *M'Farlane or Graham v. Duke of Montrose*, Nov. 24, 1826, 5 Shaw, 38, new ed. 36, it was held "that fifteen days having elapsed from the date of an interlocutor in the inferior Court allowing a proof before a bill of advocacy was presented, the bill was incompetent, although it was presented within fifteen days from the time a commission was granted for taking the proof; and (2d) that the limitation in point of time prescribed by the Act of Sederunt 12th November 1825 is not *ultra vires* of the Court." That case was in the First Division of the Court. In the same volume there is another case in the Second Division of the Court, viz., *Falconer v. Sheills & Co.*, July 10, 1827, 5 S. 919, new ed. 853. There it was held "that an advocacy under section 40 of the Judicature Act of a cause in which an interlocutor allowing a proof has been pronounced is incompetent, under the Act of Sederunt following on the Judicature Act, after the lapse of fifteen days from the date of the interlocutor; and (2) that it was not *ultra vires* of the Court to impose this limitation on the power of advocating, though given in the statute without limitation." That case occurred in the Second Division, and the Judges "entertaining great doubts of the judgment of the case of *M'Farlane*, ordered cases for the opinion of the whole Court. But the consulted Judges having returned a unanimous opinion that not only from the terms of the Act of Sederunt 12th November 1825, but from the particular circumstances of this case, the said interlocutor is right, and ought to be adhered to," the reclaiming note was refused accordingly. The interlocutor refuses the advocacy as incompetent, proceeding on the decision of the First Division in the case of *M'Farlane or Graham v. Montrose*, and it was thus settled by a judgment of the whole Court that fifteen days from the time when an interlocutor allowing a proof had been pronounced was the time within which advocacy was competent under the Act of Sederunt following the Judicature Act.

Advocation having been abolished by the Court of Session Act of 1868, I may refer to a case which occurred after the passing of that Act—*Ritchie v. Ritchie*, Oct. 22, 1870, 9 Macph. 43—which affords a direct authority to the effect that the appeal must be taken within fifteen days after the interlocutor allowing a proof.

Therefore the appellant, not having appealed in time against the interlocutor of 2d September, must fall back on the interlocutor of 15th December 1880; and the ground on which he maintains that he is entitled to bring it under review is that it is a new allowance of proof. Now, we must observe precisely what the procedure has been. After the original allowance of proof two

other diets were successively fixed by the Sheriff-substitute, and he thereafter pronounced this interlocutor :—" In respect it is stated by the defender that his former agent has ceased to act for him, and that he has not had time to instruct another agent, discharges the diet of proof fixed for to-day ; and assigns as a new diet Monday the 1st day of November next, at half-past ten o'clock forenoon, within the Sheriff Court house here : Finds the defender liable in the expenses consequent upon this adjournment ; modifies these," &c. In a note he says that he allowed the adjournment with some difficulty. The appellant appealed to the Sheriff, who did not pronounce an interlocutor till 30th November, when he dismissed the appeal. When the case came again before the Sheriff-substitute on 15th December he assigned a new diet of proof. This was merely a matter of course ; it was the right of the pursuer to have a proof. The defender had caused the delay. Mr Rhind referred to one case in support of his contention that this interlocutor of 15th December was a renewal of an order for proof. That was the case of *Murphy v. M'Keand*, 15th Feb. 1866, 4 Macph. 444. The question in that case was the competency of an appeal, not to this Court, but from the Sheriff-substitute to the Sheriff. The case was sought to be made an authority in the present case on the ground that the words of the Act there in question are identical with those of the 40th section of the Judicature Act. I am willing to assume that they are the same ; but what was the nature of the case of *Murphy* ? It was a case in which the petitioner sought to have an interdict which would have the effect of stopping a diligence. The petitioner had been allowed great indulgence, and had done nothing, and when the Sheriff-substitute pronounced the interlocutor appealed against the petitioner had lost his right to lead a proof. The interlocutor was a renewal of the proof previously granted, and that allowance was absolutely necessary. In my opinion I am reported to have used this expression—" I have no doubt that an interlocutor reviving allowance of proof is the same as one allowing a proof." To that expression I adhere. It is just because this interlocutor is not an allowance of proof or a renewal of an allowance of proof that I think the appeal is incompetent.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

After the advising the respondents appeared by counsel and asked expenses. The Court refused to give expenses.

THE COURT pronounced this interlocutor :—" Having considered the question of the competency of the appeal, and heard counsel for the appellant thereupon, refuse the appeal as incompetent, and decern."

ROBERT MENZIES, S.S.C.—RHIND, LINDSAY, & WALLACE, W.S.—Agents.

COMMISSIONERS OF INLAND REVENUE.—*D.-F. Fraser—Rutherford.*

LIQUIDATORS OF CITY OF GLASGOW BANK.—*Kinnear—J. C. Lorimer.*

Revenue—Stamp Act, 1870, 33 and 34 Vict. c. 97, sec. 73—Conveyance on sale—Subject to real burden—Ad valorem duty, how fixed.—Section 73 of the Stamp Act, 1870, enacts,—“ Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such

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1st Division.
 Exchequer
 Cause.
 B.

Where a heritable property was conveyed in consideration of a debt due by the disponent to the disponent, but subject to a bond over the property, *held* that the consideration on which *ad valorem* duty fell to be paid was the debt due by the disponent *plus* the amount of the burden.

IN the liquidation of the City of Glasgow Bank one of the partners, John Dove, residing in Glasgow, being unable to pay the calls in full, entered into a compromise with the liquidators. It was agreed that he should convey to the liquidators certain heritable subjects belonging to him, his interest in which, after deducting a bond over them for £2400, was valued at £2350. He executed a conveyance of the subjects accordingly, bearing that it was in extinction of his debt to the extent of £2350.

The Commissioners of Inland Revenue having been applied to to fix the stamp-duty, held “that, in terms of section 73 of ‘The Stamp Act, 1870,’* the instrument was a conveyance on sale. That the property was conveyed in consideration of the debt or liability of the grantor to the grantees to the extent of £2350, and subject to the payment of money, to wit, £2400, charged on the property, and that the said debt or liability and the said money they deemed the consideration in respect whereof the conveyance was chargeable with the *ad valorem* conveyance on sale duty.

. . . . The said liquidators declared themselves dissatisfied with the determination of the said Commissioners, on the ground that, upon a sound construction of the foresaid statute, stamp-duty is only exigible upon the sum of £2350. That sum is, and is stated in the said disposition to be, the value of the grantor’s interest in the subjects thereby conveyed; and the extinction of the grantor’s liability to the grantees to the extent of that sum was the consideration in respect of which the said disposition was granted. The only subject of the conveyance was the disponent’s reversionary interest in the property. The bondholders’ interest in the property was a separate estate, and was unaffected by the conveyance.”¹

At the request of the liquidators a case was stated by the Commissioners for the opinion of the Court.

At advising,—

LORD PRESIDENT.—This is a case stated by the Commissioners of Inland Revenue with regard to the proper stamp to be impressed upon a deed the terms of which are set forth in the case. By that deed a person of the name of William Dove, who is described as “heritable proprietor of the subjects hereinafter disposed,” sets out that he was a contributory in the liquidation of the City of Glasgow Bank, and that certain calls were made upon him which he was unable to meet; that a compromise had been arranged between him and the liquidators; and that as part of that compromise it was agreed that “I should disponent to the said bank the said subjects, my interest in which (after

* “Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.”

¹ Mortimore v. Commissioners of Inland Revenue, June 1, 1864, 33 L. J. Exch. 263.

deducting the principal sum contained in the bond and disposition in security (hereinafter mentioned) is valued in the declaration and relative schedule lodged by me with the said liquidators with reference to the said compromise, and that in extinction to that extent of my present and future liability to the said bank." Therefore he proceeds to dispoise the subjects in question in the usual form of a disposition, and the clause of warrandice is thus expressed,—“And I grant warrandice, but excepting therefrom a bond and disposition in security affecting the said subjects hereby disposed, for the sum of £2400 sterling,” granted by certain persons who are named, and dated in May 1865.

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Now, the Commissioners are of opinion that this was a conveyance on sale, and that the property was conveyed in consideration of the debt or liability of the grantor to the grantee to the extent of £2350, and subject to the payment of money, to wit, £2400, charged on the property, and that the said debt or liability and the said money they deemed the consideration in respect whereof the conveyance was chargeable with the *ad valorem* conveyance on sale duty.

The liquidators, on the other hand, at whose request this case has been stated, maintain that the *ad valorem* stamp with which the deed ought to be impressed is upon the sum of £2350, being the amount of the contributory's liability to them, the discharge of which they say is the proper and only consideration of the conveyance.

Now, the question which is raised depends upon the construction of the 73d section of the Stamp Act of 1870, being the existing Stamp Act. But a good deal of light may be thrown upon the construction of that section by the history of legislation upon this subject. There are two previous statutes in which this matter is dealt with ; and the first of these is the Act 55 Geo. III. cap. 184, in the schedule of which, under the title “Conveyance,” it is provided “that where any property is sold and conveyed subject to any debt or sum of money to be afterwards paid by the purchaser, the same shall be deemed to be purchase or consideration money in respect whereof the said *ad valorem* duty charged upon the sale and conveyance of property is to be paid.” Now, there is a plain distinction made there, or at least implied in that language, between a burden upon the property conveyed for the discharge of which the purchaser is personally bound, and one which constitutes a mere burden on the estate with no personal obligation against the purchaser. And it appears in the present case that the burden of £2400 upon the property in question is constituted by a bond and disposition in security granted by a previous owner of the estate, and unless there had been some mode of transferring the personal obligation against Mr Dove, the granter of the disposition, he of course is not personally bound for payment of that debt, although he would have a very sufficient interest to pay off the debt, because it constituted a burden upon what has now become his property. Under this statute, 55 Geo. III., it was, I think, very naturally held, in the case of the *Marquis of Chandos v. Commissioners of Inland Revenue*, 1851, 20 L. J. Exch. 269, by the English Court of Exchequer, that where there was no personal obligation upon the purchaser it was not intended by the Act that the amount of the burden should be taken as part of the consideration of the conveyance. It was in consequence of the judgment so pronounced that an enactment of a very different kind was introduced into the next Stamp Act, 16 and 17 Vict. cap. 59, by the 10th section of which, after reciting that portion of the 55 Geo. III. which I have already read, and proceeding upon this further consideration, “Whereas it has been held and determined that the said

No. 75. *ad valorem* duty is payable in respect of any such sum or debt only where the purchaser is personally liable or bound, or undertakes or agrees, to pay the same, or to indemnify the vendor against the same, and it is expedient to alter and amend the law in this respect," the statute proceeds to enact that "Where any lands or other property shall be held and conveyed subject to any mortgage, wadset, or bond, or other debt, or to any gross or entire sum of money, such sum of money or debt shall be deemed the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty shall be paid, notwithstanding that the purchaser shall not be or become personally liable, or shall not undertake or agree, to pay the same, or to indemnify the vendor or any person against the same, anything in any Act or otherwise to the contrary notwithstanding."

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Now, that is a very plain alteration of the previous enactment, and provides that the burden subject to which the estate is conveyed shall be deemed to be part of the purchase money, whether the vendee be personally liable to pay for it or not. If this case had occurred under that statute I do not understand the liquidators to contend that the determination of the Commissioners would be wrong. But they say that the provision of the 73d section of the existing Act is very different from this, and that its true construction leads to an opposite result. Now, the section in question is no doubt differently expressed from that which occurs in the Act 16 and 17 Vict. But the reason why it is so expressed, I apprehend, is this, that it is intended to state the matter more shortly, and, at the same time, in compliance with a rule which is now very generally observed in statutes which are intended to be applicable to the whole United Kingdom, and particularly statutes of this description,—Revenue Acts,—the language employed is not technical language either of the law of England or of the law of Scotland, but language of a popular character, equally intelligible in all parts of the United Kingdom.

Keeping that in view, let us see what is provided by the 73d section—"Where any property is conveyed to any person in consideration wholly or in part of any debt due to him"—that is, to the disponent—"or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty." Now, there is one part of this enactment about which there is no dispute as applicable to the present case. The property is conveyed in consideration partly of a debt due to the purchaser—that is to say, in consideration of that debt being discharged. The liquidators admit that to that extent they are liable in *ad valorem* duty. We shall therefore eliminate that part of this clause of the statute altogether in considering this matter, and see what are the further words of the enactment applicable to this burden of £2400, subject to which the conveyance is made—"Where any property is conveyed subject to the payment or transfer of any money, whether it be a charge upon the property or not, such money is to be deemed part of the consideration in respect whereof the conveyance is chargeable." These are the words of the clause applicable to the case we have to deal with. Now, is not the amount of this bond and disposition in security a sum of money subject to which this property is conveyed? I really cannot conceive anything more simple than the answer to that question. There cannot be the least doubt that the property in the hands of the purchasers, the

liquidators, is subject to this bond and disposition in security for £2400, and when they pay off that bond, if they think fit to do so, they will then be the unburdened proprietors of a subject the price and value of which is £4750. Therefore it seems most reasonable, if it is necessary to look at the reason of the thing at all, to hold that, as they can put themselves to-morrow in the position of being the unburdened proprietors of this estate, by paying in addition to the sum that they have already given the sum contained in this bond, they have obtained a conveyance to that estate of the value of £4750 by means of the deed which is now to be stamped.

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If any other rule were adopted, it is quite plain that the fair incidence of this tax would be altogether frustrated and defeated. A proprietor has an estate worth £20,000. There is a bond upon it for £10,000. He sells that estate, and the purchaser pays to him the difference between the amount of the bond and the value of the estate, so that the bond being for £10,000 he pays £10,000. The day after he obtains infestment he pays off the bond. Well, the practical result of that is that he has paid £20,000 as the purchase money of this estate, and he has obtained a conveyance with an *ad valorem* stamp of the value of £10,000. That is a simple defeating of the purpose and intention of the Legislature as expressed in this clause, and therefore I think, upon the plain meaning of this section, that there was no intention whatever to go back upon the enactment of the 16 and 17 Vict., and to restore the enactment of the 55 Geo. III., which is what the liquidators are contending for. On the contrary, it seems to me that the 73d section plainly intended to continue the provision of the statute 16 and 17 Vict., and therefore that the Commissioners of Inland Revenue are right.

LORD MURE.—I have come to the conclusion that the Commissioners have taken a right view of this section of the statute. There can be no doubt of this, that when under the Act 16 and 17 Vict. cap. 59, sec. 10, a property was sold subject to a mortgage or subject to a bond the value or amount of that mortgage or bond was to be taken into consideration in fixing the *ad valorem* duty. That is the express provision of the section which your Lordship has read, and which proceeds upon a preamble of the older Act of 55 Geo. III. having made somewhat different and more limited provision. But in this 10th section, as I read it, I do not find the words which occur in the 73d section of the later Act, viz., “where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him”—that is, due to the party to whom it is conveyed. And when the argument was proceeding it appeared to me, having regard to the peculiar terms of the phraseology of the 73d section of the Act of 1870, that there might be a point raised as to whether the debt due to the purchaser was not put alternatively as something separate from the payment of money chargeable against the property, and was to be taken as the consideration only when there was no money so chargeable. But on further consideration I am satisfied that that construction is not a sound one; for it appears to me that the intention of the 73d section was unquestionably to bring within the provisions of the Revenue Act as a consideration a debt due to the purchaser, while there is at the same time nothing to shew that it was intended by that section to put an end to the provisions of the 16 and 17 Vict. by which in a sale of property subject to a mortgage a value was to be put upon that mortgage. The words of the 73d section are, I think, broad enough to cover both. The debt due to the purchaser,

No. 75. if the property is not subject to a mortgage or money payment, will be the consideration ; but if the property is subject to a mortgage or money payment at the time when it is conveyed for a debt due to the purchaser then both are to be taken as making up the consideration. That, I think, is the fair construction of the statute, and I agree with your Lordship that the Commissioners are right.

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LORD SHAND.—If the Court had to decide this question on the terms of the Stamp Act of 1870, without the light of the previous legislation on the subject, I should have felt it to be attended with very great difficulty, because I think there is much room for the argument maintained on behalf of the liquidators of the bank that the word “payment” in sec. 73 of the statute, occurring in the clause, “subject either certainly or contingently to the payment of any money or stock,” ought to be limited to a case in which there was a personal obligation to pay money, and would not include the case where the money or stock was a burden merely upon land without a personal obligation. But I think the difficulty is entirely removed when the previous legislation is regarded. By the statute 16 and 17 Vict. cap. 59, passed in 1853, which amended the law as it had previously existed under the Act 55 Geo. III., it was substantially provided that where a person purchased property for a valuable consideration, subject to any mortgage or pecuniary burden, the amount of the debt or mortgage should be deemed to be a part of the consideration. The result of that statute, I think, was this, that in such a case—a case in which there was, in the first place, so much money paid or a debt extinguished, and, in the next place, the property was conveyed subject to a burden—the stamp-duty payable was to be paid upon the value of the property which the purchaser acquired ; and the mode of ascertaining that value was to take the sum which he was paying ; the amount of the debt which he was discharging, and in addition the amount of the burden upon the property as fixed by the mortgage. The including of the amount of the mortgage in the consideration was very deliberately done by the Legislature in 1853, in consequence of the decision to which your Lordship has referred, and for a period of seventeen years so stood the law. But in 1870 the statute was passed which we have now to construe, and it is to be observed that while there is no doubt that to a considerable extent additional duties were given to the Crown by its provisions, the main purpose of the statute was really to consolidate the legislation in regard to stamp-duties with a view to the repeal of the then existing Acts, which were numerous and somewhat confusing, and which were repealed accordingly in the same session of Parliament. Now, having that in view, that this was substantially a consolidation statute, and that there is no declaration in the statute, either directly or which can be inferred from its terms, that there was any intention to go back upon that which had been done deliberately in 1853, I think, keeping that in view, there is no difficulty in the construction of the language of sec. 73. Your Lordship has fully gone over the terms of that section, and I do not mean to go over it in detail, but it appears to me, keeping in view what the existing law was, that it was intended by the section in briefer terms to preserve the law upon the same footing. The enactment is, that where the consideration is partly the discharge of a debt and partly a payment of money or stock, whether constituting a charge upon the property or not, the amount of that charge shall be a part of the consideration, and I think the word “payment” there is intended to cover the case

in which the party is under an obligation to meet the burden, or, it may be, to give stock in return, while the words "constituting a charge or incumbrance upon the property" are intended to cover the case where that is the only way in which the burden is mentioned, and although there be no obligation to pay. On the whole matter, therefore, I agree with your Lordship in thinking that the Commissioners have come to a right decision.

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LORD DEAS was absent.

THE COURT confirmed the assessment.

SOLICITOR OF INLAND REVENUE—DAVIDSON & SYME, W.S.—Agents.

JAMES GRAHAME, Pursuer.—*Kinnear—McKechnie.*

No. 76.

PATRICK DON SWAN AND OTHERS (Magistrates and Police Commissioners of the Burgh of Kirkcaldy), Defenders.—*Trayner—A. Gibson.*

Jan. 19, 1881.
Grahame v.
Magistrates of
Kirkcaldy.

Interdict—Enforcing interdict against buildings erected pendente lite—Nobile officium—Equitable compensation for legal rights—Burgh—Administration of burgh property.—An inhabitant of a burgh was successful in interdicting the magistrates from erecting municipal stables on a piece of ground held by them for behoof of the inhabitants of the burgh as a bleaching-green and place of recreation. At the date when the process of interdict was commenced the magistrates had already entered into contracts for the buildings, and the works had been begun. Interim interdict was refused, and the stables were completed at an expense of £2000 before interdict was granted. In an action at the instance of the interdictor to have the buildings removed and the ground restored to its former state the magistrates offered to make over to the community a piece of ground near the ground in dispute and of double the size. *Held (rev. judgment of Lord Adam)* (1) that the Court had power to allow equitable compensation to be made in lieu of ordaining the removal of the buildings; and (2) that it was for the interest of the community that the offer of the magistrates should be accepted, and that the magistrates should be assoilized on lodging in process a conveyance of the subjects in terms of their offer.

(SEQUEL to *Grahame v. Magistrates of Kirkcaldy*, June 19, 1879, ante, 2D DIVISION. vol. vi. p. 1066.)

Lord Adam.
I.

Grahame having, on 19th June 1879, obtained an interdict against the Magistrates and Police Commissioners of the burgh of Kirkcaldy prohibiting them from erecting stables or other buildings upon a small portion of what was formerly the south links of Kirkcaldy, called the Volunteers' Green, raised on 6th March 1880 an action against the Magistrates and Police Commissioners in which he concluded for declarator (1) that the portion of the south links referred to was vested in the Magistrates in perpetuity for the use and enjoyment of the inhabitants; (2) that this portion of the south links had always been open to the inhabitants for bleaching clothes and other purposes and for recreation; (3) that the Magistrates and Police Commissioners had no right to erect buildings on this ground; (4) that the erection of buildings was illegal, unauthorised, unwarranted, and to the prejudice of the interests of the inhabitants of the burgh; and decree of declarator having been pronounced in terms of the above conclusions, that the Magistrates and Police Commissioners should be ordained to take down the stables and buildings they had erected on the ground, and restore the ground to its former state and condition. In the condescendence Grahame narrated the procedure in the action of suspension and interdict, and also in a former action in the Sheriff Court of Fifeshire in 1854, when a similar question had been tried and decided against the Magistrates. He further stated that at the date when the

No. 76. interdict was applied for, 6th May 1878, the buildings had only been commenced, and if the Magistrates had stopped building then little or no expense would have been incurred, but instead of doing so, they had, in the face of that proceeding, continued their operations, and the buildings were now completed.

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The Magistrates in their answers stated,—“At the time when the interdict was applied for the defenders were not only under heavy contracts, but had a considerable portion of the work actually executed, and neither the pursuer nor any others had up to that time intimated the least intention of interfering. Interim interdict was not granted, and the defenders, therefore, looking to the extent to which they were entangled by engagements already contracted, and to the urgent necessity of the buildings, completed the work during the progress of the action. The total cost of the building is £1889, 10s. 5d., including £290, 13s., the price paid for the site.” They also added,—“The inhabitants have not used the said piece of ground as an ordinary bleaching green for upwards of forty years, but the defenders are nevertheless willing to provide another piece of ground for the purposes of bleaching and recreation, of greater size and in a more convenient situation. A plan shewing the situation of the ground in question is herewith produced—its extent is .569 acres. The extent of the ground in dispute is only .256. The defenders have already endeavoured to satisfy the pursuer in this.”

Grahame pleaded, *inter alia* ;—(5) The question of the pursuer's right, being now *res judicata* he is entitled to have the said buildings removed, and to have the ground restored to its former state, as concluded for.

The Magistrates pleaded ;—(1) The pursuer, having permitted the defenders to proceed with their operations without objection, is now barred from insisting on the removal of the buildings. (2) The defenders having acted *in bona fide*, and having offered a full compensation for the ground in dispute, the pursuer is not entitled to decree as concluded for.

The Lord Ordinary, on 23d June 1880, pronounced an interlocutor in terms of the conclusions of the summons.*

The Magistrates reclaimed, and argued ;—The Magistrates at the time the interdict was raised had entered into all the contracts for the erection of the stables, and if they had thrown up these contracts in the face of

* “NOTE.—This case is the sequel of a former case between the same parties, decided by the Court on 19th June 1879, and reported 6 Ret., 1066.

“It is with regret that the Lord Ordinary has pronounced the preceding interlocutor, but he does not think that any other alternative is open to him.

“It is not a case in which the proceedings of the defenders, which have been found to be illegal, can be met by any pecuniary compensation to the pursuer. The compensation, accordingly, which the defenders offer to give, is to provide another piece of ground of greater size, and in a more convenient situation than that of which they have wrongously taken possession. In other words, they propose to give another ‘green’ in place of this one, in another though not so distant part of the town. The ‘green’ proposed to be substituted may probably be in a more convenient situation for many of the inhabitants of the town, but it would not appear to be so for the pursuer and the other inhabitants who live in the vicinity of the present one. It appears to the Lord Ordinary that such inhabitants have reasonable grounds for objecting to the proposal, and that they are entitled to insist that matters shall remain in that respect *in statu quo*. The proposal now made by the defenders seems to be similar to that which they recently endeavoured to obtain authority to carry into effect by Act of Parliament, but which the Legislature refused to authorise.

“The Lord Ordinary was referred to the case of *Cooper and M^r Leod v. The Edinburgh Improvement Trustees*, 18th July 1876, 3 Ret., 1106, but he does not think that it applies to the present case.”

that action a large sum of money would have been lost to the community. They were in the *bona fide* belief that in acting as they did they were doing their best for the inhabitants of the burgh, and were within their rights. The Court had not granted interim interdict, and the buildings had therefore been proceeded with to completion. If they were now taken down the loss would be very great to the funds of the burgh, much greater than any corresponding advantage which would be gained by the inhabitants in having the ground restored to its original state. Moreover, the Magistrates were prepared to give to the inhabitants a piece of ground in close proximity to the ground in question, and of much greater size. The Court had more than once indicated and held that in such a case where *restitutio in integrum* was impossible, or only possible at an extravagant loss, the substitution of an equivalent would satisfy the equity of the case.¹

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Argued for Grahame;—The removal of the buildings was the logical result of the previous judgment of the Court.² The Magistrates had had sufficient notice of opposition, and should not have gone on with the buildings in the face of it.

LORD GIFFORD.—This case the Lord Ordinary very properly calls a sequel to a former case between the same parties, having reference to the same piece of ground—a part of what is known as the Volunteers' Green—at Kirkcaldy, of which the inhabitants of that town have hitherto had full and unrestricted use. Both cases have been raised at the instance of the respondent Grahame, who comes forward as a member of the community to prevent the Magistrates encroaching upon the ground in question. In the former case the respondent succeeded in having it decided that the Magistrates were not entitled to encroach upon it so as to deprive the community from getting the use of it as a bleaching-green and to apply it to some other purpose, even although that other purpose was one in which the community were interested. That has been the decision of this Court.

But then Grahame comes with this action, asking the Court to remove, or order to be removed, from that ground a stable, or a set of stables, of considerable extent, erected by the Magistrates as the town's stables at considerable cost; and the question is, whether the Court are to accede to this motion or not—the motion, namely, to order the removal of these stables from the Volunteers' Green, at whatever risk or cost.

Now, this is a case in which the pursuer is founding and insisting on his strict legal rights. He says that it is for the interest of the community, of which he is a member, that this piece of ground, which has hitherto been put to all sorts of common purposes, should and must, at all hazards and at whatever cost, be kept clear of all erections. He cannot, and he does not, aver that the community are so interested in it that the expense of the removal will not virtually cost the community more than it is worth; but he says the Court are bound, without considering questions of expediency, or, generally, the interest of the community at all, to order the removal of the buildings as the logical sequence of their former judgment. Now, I cannot but record my dissent from that proposition. I do not think it follows that because a party is successful in a declaratory action—an action declaring that a certain piece of ground shall not

¹ Jack v. Begg, Oct. 26, 1875, *ante*, vol. iii. 35; Cooper and M'Leod v. The Edinburgh Improvement Trustees, July 18, 1876, *ante*, vol. iii. 1106.

² Grahame v. Magistrates of Kirkcaldy, June 19, 1879, *ante*, vol. vi. 1066.

No. 76. be put to any except certain uses—any buildings that may have been put upon it are simply to be removed. Cases have been referred to by counsel for the appellants, and I think there are a great many others which have not been referred to, where, encroachments having been made in excusable circumstances, the Court declined to order the demolition of the buildings, as that would not be doing substantial justice between the parties where their interests could otherwise be sufficiently protected.

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Now, the question in this case is, what is the fair construction of the respondent's rights as a member of the community in the circumstances which have arisen? In neither of the actions is anything of the nature of a servitude claimed. In the declaratory action it was sought to be declared that the ground in question is vested in the Magistrates and Council on the condition that the same should be kept in perpetuity for the use and enjoyment of the inhabitants of Kirkcaldy for the purposes of bleaching clothes, recreation, and other similar purposes; that the defenders have no right or title to dig foundations in, or in any way to trench or cut up for building purposes, the said lands, nor to erect stables or any other buildings or erections of any kind thereon, or on any part thereof, and so on. We heard nothing, and we have heard nothing yet, of rights of servitude of view, or right of seeing over this disputed ground. That was not the case at all; if that had been the case its complexion would possibly have been considerably changed. That would have been a right—a special right—of certain uses in this ground. The claim was and is that this ground is held under titles for behoof of the community of Kirkcaldy, who seem to have used it chiefly, if not solely, for a bleaching-green. It may have been put to other common purposes, but substantially it was a bleaching-green. Men may have played at quoits over it, or other games, and children may have tumbled about upon it; but these were all accessory to its use as a piece of open grass-covered ground.

Dealing with it, therefore, as substantially a bleaching-green, the question comes to be, part of it having been illegally and improperly taken away by the Magistrates, what is to be done to remedy the error they committed?

The Magistrates say, and I think say very reasonably—"We are very sorry about this. We have taken a piece of this ground,"—something less than an acre I think it is—"and so far encroached on the bleaching privileges of the community. But we are quite willing to restore what we have taken, not quite fourfold, but to the extent of twice as much as has been taken away; and although the ground we will thus substitute will be in another place, it will be equally applicable to the purposes of walking or breathing the air, and it will also be a bleaching-green." No doubt this substituted ground is not in the same neighbourhood; it is a quarter of a mile away or something of that kind. But it so happens that the ground which has been improperly abstracted for bleaching purposes was adjacent to the existing bleaching-green; and nobody who considers the position of the two greens for a moment can doubt that the new green which is proposed will relieve the pressure on the old bleaching-green, coloured yellow on the plan. This will make the new bleaching-green as good as if it were beside the old, because the inhabitants who adjoin the new bleaching-green—coloured green on the plan—will no longer resort to the "yellow" green, which will thereby be substantially enlarged for those in the immediate vicinity.

Now, it does appear to me that this is a fair and reasonable proposal; and unless there is an absolute law compelling me to order the buildings to be taken down and the ground to be restored to its former condition—not a very good or

sweet condition even at the best—I am disposed to give effect to the offer the Magistrates have made, and to find that in respect of that offer the Magistrates are not bound to demolish the buildings which have been erected on this vacant piece of ground.

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But it is further said that these buildings have been put up by the Magistrates, not in any ignorance of the claims of the respondent, but in the face of an interdict which was applied for. Now, I think it sufficiently appears—it was even so stated by Grahame's counsel—that there was a great deal done before the interdict was sought. The walls were up to the height of six feet. Substantially the whole of the contracts had been entered into, although the wright's was not signed until, I think, the 8th of May. The mason's contract had, at all events, been signed some time previously, and the work, as we all now know, was being proceeded with. I think we have enough to prove—it came out incidentally, to say the least, in the former case—that several hundreds of pounds were expended. That, I think, was substantially carrying on the contract; and if the same question had been raised at that time it would have been a fair answer to have said—"Oh! no; don't let us lose these £700 or so that have been expended. We will give you another piece of ground, which will be more than an equivalent."

I am disposed, therefore, on the whole matter, to sustain the defence of the Magistrates so far as it is covered by the second plea stated for them, and to say that although they have done wrong they are not now to be compelled to demolish the buildings which they have erected in error, which would be to lose absolutely every sixpence which has been expended on the ground; but that they have made offer of a fair equivalent to the community—for it is the community we are dealing with—by tendering the substituted bleaching-green. I think the result thus arrived at will be the fair one. Indeed, I have no doubt as to the equity of the case at all.

LORD YOUNG.—Such cases are always cases of circumstances, and of more or less nicety, according to the facts on which they stand. It appeared to me from the time I understood this case, and it appears to me now, that the true consideration is, what is the interest of the community itself?—not that we are to enter upon nice questions on that head, but that if there be strong and preponderating interest one way or another, it appears to me that we are at liberty in regard to it, and being at liberty are reasonably bound to give effect to that which appears to be the strong preponderating interest of the community. The Magistrates of Kirkcaldy are proprietors of the ground in question, called the Volunteers' Green, for behoof of the community. As matter of title, I suppose they hold it upon royal grant, as part of the common good. Now, it is very important that open spaces should be preserved in towns, and especially in growing towns like Kirkcaldy, for air and recreation, and such useful purposes as are consistent with these things, and drying clothes too, which is all that is meant by bleaching here—putting out things to dry after a washing; and the Magistrates, as proprietors for behoof of the community, and the guardians of the interest of the community, are not at liberty to change the use of pieces of ground which have from time immemorial been kept as open spaces for air and light and exercise, drying clothes, and so forth. If they propose to interfere with that very wholesome and beneficial use, any of the members of the community may have a remedy by resorting to this Court. That is my view of the

No. 76. law of such cases, and I assume that it was upon that view of the law that the Court proceeded in that application for interdict at the instance of the present pursuer against the Magistrates, of which we have heard so much. Grahame said—"You, as the proprietors of this piece of ground for behoof of the community, and the guardians of the interest of the public in the matter, are not entitled to divert this piece of ground from its established wholesome use, in the continuance of which the community is interested." The Court granted interdict in the interest of the community.

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Now, I have observed in the course of the argument here what appears to me to be according to the law of the matter, that if no one interfered, or called the conduct of the Magistrates in question in dealing with community property, or proposing to deal with it in a manner inconsistent with the public interest in it, their title is abundantly sufficient to give them a right to build houses. Why, Scotland in all its considerable towns is covered with illustrations of the law being to that effect; for there is scarcely a piece of ground—an open space of ground—dedicated to the use of the community for air and recreation that has not been diminished in size by being encroached upon by buildings erected under titles granted by the Magistrates. They have been diminished all of them, and some of them very notably so. In Edinburgh we have several instances of it. There is no question about the title of the Magistrates to do that; and no question about the right of this Court, on a complaint of any of the community, to hinder the Magistrates from so acting as to interfere with the legitimate interests of the community or to preserve the *status quo*.

Here it so happens that when the Court was appealed to for that purpose they refused to restrain the Magistrates, they being under contracts to erect these stables, and having proceeded a certain length with the erection of them. In the result they took the view that it was in the interests of the community that the space should be kept open, but before that was determined the buildings were completely up, and the present application is to have them demolished. It so happens that they can be demolished at a cost to the community of about £2000; but the demand of the respondent would, no doubt, have been the same if the cost of the demolition had been £10,000 or £20,000—any sum you choose to instance. Mr Kinnear said you might figure an instance in which the interest would be so large against granting an order for the removal of buildings which ought not to have been erected that the Court in the exercise of its reasonable discretion would refuse to direct their removal. Now, that is the very test we have to apply in this case. The building may have been of such a kind or of such an extent that we might not have hesitated to order its removal. On the other hand, the building might be such that it would really not be acting according to the reasonable discretion committed to us, in the interests of the very public in whose interest the action bears to be brought, to order the removal of the buildings. And I think that is the present case. It is only £2000, to be sure; but that is a considerable sum, taken in connection with a little bit of ground with such a history as this has—not the Volunteers' Green, be it remembered, but a little bit of it—which, according to the evidence about it—and I am taking the *précis* of it as given in the report of the former case—has been kept in a very nasty manner.

In these circumstances, and seeing that the erection of these buildings was entered upon not contumaciously, but *bona fide* in the interests of the community, I am not prepared to say we should order them to be removed at that

cost. And the cost would be not merely the pecuniary loss—for I give the Magistrates credit for being reasonable and intelligent guardians of the interests of the community, and they have determined, I suppose with the approbation of the councillors elected by the public themselves, that this is the most convenient place for the municipal stables. Therefore the pursuer here does not ask us merely to demolish the buildings. We are not merely to order their removal, and destroy the labour and material to the extent of £2000—utterly destroy it—but we are to disappoint the community itself in the convenience which has been accomplished—a convenience which the Magistrates say is a convenience for them. In such circumstances I am not prepared to order the removal of these buildings, and I would not be prepared to order their removal even if there were more of them. I suppose the ground is under a quarter of an acre in size. It is a very little bit of ground altogether, and there is a large space of vacant ground adjoining on the opposite side of the street, which appears always to have been used in a more respectable manner than this part in question has been. It would be a stronger case of the kind if the ground had been less, only some square yards perhaps; but it would only have been stronger for proceeding on such grounds as I have been indicating; the principle would have been the same. Therefore, if there were any more buildings, I should not have ordered their removal.

But we have more than that here, and I attach great importance to it, although in my view of it it is a subsidiary and not the primary part of the case. The primary part of the defence in my view is that which I have been stating. But the further and subsidiary matter is nevertheless also of importance. It is this, that the Magistrates and Council, who are the intelligent and reasonable guardians of a community's interests, have shewn us on this record—and it is not substantially disputed—that they are prepared to provide another piece of ground for the purpose of bleaching and recreation, of greater size and more convenient situation. I take it that they will do that; and I think it should be put in the judgment as a condition of the buildings being allowed to remain that they will provide another piece of ground. It seems to be according to Lord Gifford's opinion, in which I concur, that the Magistrates and Council shall do that. It is their own undertaking, and I think they will do it. They have indicated the position of that substituted piece of ground by marking it on the plan before us, and they promise upon their responsibility as Magistrates, and the guardians of the community's interest, to provide another piece of ground for the purpose of bleaching and recreation, of greater size, and in a more convenient situation.

For these reasons, I entirely concur in sustaining the second plea in law which is here put forward in defence, and in refusing the conclusion of this action.

LORD JUSTICE-CLERK.—I entirely concur in the result at which your Lordships have arrived. The position of the case is this: The community, through one of their number, bring this proceeding for interdict against the administrators of the common good—the Magistrates—on the ground that the Magistrates have been making a use of the property of the burgh which is beyond their right, beyond their trust, and beyond their power. We have found that that is so, and we have interdicted them from building or erecting buildings upon this ground, or in any way interfering with it so as to prevent the public purposes

76. which we have held it was substantially intended to serve. It indeed turned out that there had been a much larger piece dedicated to those purposes at one time, and it had been, it was alleged, improperly diminished ; but length of time had prevented any question, to say nothing of Parliamentary interference.

In this case, before the interdict was granted, a certain part of the buildings complained of were in course of erection, and they were indeed erected before judgment was pronounced. The question is, whether to carry out that judgment it is essential that those buildings should now be removed ? It is said they can only be removed at a cost of a couple of thousand pounds to the community, or to those who illegally put them up, but that that is no matter, and that they must be removed at whatever cost. In my opinion, there is only one ground upon which the contention in the negative can rest, and that is, that although any benefit which the community might have derived from the buildings could not for a moment protect them in law, yet that as the Magistrates are in a position to offer a fair and reasonable equivalent, seeing that *restitutio in integrum* was not reasonably possible, that offer should be accepted instead of *restitutio in integrum*, and instead of specific implement of the findings of the interlocutor.

But I think we are entitled to consider the question further. It is not a matter of whether the existing buildings will be more convenient for the community than if they were removed to another place. The question is, whether or not the offer of ground to fulfil the specific purpose to which the ground was originally dedicated should come in place of specific implement of the findings referred to. I must confess I should have expected a citation of authorities on this matter ; but it seems to me to be within the equitable powers of the Court—where we are satisfied on the one hand that no interest will be endangered, and on the other hand that great loss will be incurred—to authorise a party to accept an equivalent for a right of this kind. I am much mistaken if there are not a great many instances to be obtained of public rights to the use of open spaces, of public rights to wells, and other rights of that kind, being dealt with in that way—an equivalent equally convenient, and much less burdensome to the party involved, being given.

I am inclined to dispose of the case solely on that ground. I do not find in this record, nor do I hear it from counsel, that if the suggestion of the parties here as a mode of settling the case were adopted, the rights of the community would not be effectually protected and preserved.

Therefore we shall sustain the second plea in law stated for the Magistrates, and the defenders in respect thereof shall be assoilzied, on condition that the ground offered as an equivalent, and coloured green on the plan, be given.

The Magistrates accordingly lodged in process a feu-charter granted by the Raith Trustees in their favour of the piece of ground referred to in the defences to be held by them for the community and inhabitants of the burgh as a public washing and bleaching-green and recreation ground.

THE COURT, on 19th January 1881, pronounced the following interlocutor :—“ In respect of the offer made by the defenders to substitute for the ground in question the ground specified in the feu-contract, No. 13 of process, recall the said interlocutor : Sustain the second plea in law stated in defence : Assoilzie the defenders from the conclusions of the action, and decern,” &c.

JAMES MONTGOMERY, Pursuer.—*Trayner*—*A. J. Young*.

MARGARET EDMONSTONE OR MONTGOMERY, Defender.—*Asher*—*Ure*.

Husband and Wife—Paternity of Child—Presumption pater est quem nuptiæ demonstrant.—In the case of a wife separated from her husband the presumption *pater est quem nuptiæ demonstrant* may be overcome by direct or circumstantial evidence.

Process—Expenses—Husband and Wife—Wife's expenses of Reclaiming Note refused.—Circumstances in which a wife reclaiming against a decree of divorce was refused the expenses of the reclaiming note.

THIS was an action of divorce, on the ground of adultery, by James 1st Dr Montgomery, feuar, Airdrie, against his wife, Margaret Edmonstone or Lord A Montgomery.

After a proof the Lord Ordinary pronounced decree of divorce.
The defender reclaimed.

LORD MURE.—We have now before us a case of divorce at the instance of a husband, who has been living separate from his wife, the defender, for several years. It appears from the evidence that there had been frequent disagreements between the parties during their married life, followed by short separations; but in the latter part of 1877 there was a more formal separation, followed by a regular deed of separation, which was executed in February and March 1878. Under that deed it was arranged that the younger children were to live with their mother, in whose favour provisions were made for the support of herself and the children; and it was also provided that the pursuer should have access to his children when he wished to see them.

On this separation being effected the pursuer went to live in Glasgow, where he has ever since resided. The defender, on the other hand, continued to reside at Glenmavis, a village in the neighbourhood of Airdrie, and about twelve miles from Glasgow, where the parties were resident at the time of the separation. The pursuer had some property in or near this village, of which he took the charge, and which he required occasionally to visit, and, in point of fact, did visit from time to time after the separation. The defender remained at Glenmavis for a short time after the separation. She then removed to Dechmont, where she resided with her mother, and ultimately she took a house at Burnfoot, a small hamlet about a mile from Glenmavis, for which John More, the co-defender, was the factor, and where she went to reside in June 1878.

At this house the defender was delivered of a child in April 1879, a year and a half after the separation, so that the question now to be disposed of relates not only to the alleged adultery of the defender, but involves indirectly the paternity and legitimacy of the child; and the delicate and important question as to the amount of evidence which is necessary and sufficient to rebut the presumption founded on the rule "*Pater est quem nuptiæ demonstrant*," in a case where the parties, though separated, did not live at a great distance from each other, and may have met and had sexual intercourse. Because, whatever difficulty there may have been some years ago in laying down the law relative to the application of that rule in circumstances such as those which here occur, it may, I apprehend, be held as now authoritatively settled, both in this country and in England, that the rule may be met by direct, or even circumstantial evidence, sufficient to negative the presumption, and that in dealing with such a case the question to be disposed of is one of fact, viz., whether the circumstances

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The law was so laid down in this Court in the case of *Patterson*, Nov. 29, 1872, 11 Macph. p. 142, to which we were referred in the course of this argument, and in England, in the case of *Morris v. Davies*, first by Lord Lyndhurst when sitting in the Court of Chancery, and afterwards by Lord Cottenham in the House of Lords on appeal in 1837, 5 Clark and Fin., p. 242. In the present case the Lord Ordinary has held that the evidence is sufficient to overcome the presumption, and that the defender committed adultery with one or other of the parties with whom she is alleged so to have conducted herself, or with some other person ; and after careful consideration of the evidence I have come to the same conclusion.

In dealing with the case the main question for consideration is whether there is evidence to shew that the pursuer, as alleged by the defender, came to her house at Burnfoot one night in July 1878, and there had connection with her, and that her child was the result of that connection. If the evidence is not sufficient to instruct this allegation of the defender, the inference seems irresistible that the defender committed adultery with one or other of the parties mentioned in the record, who were both in the habit of visiting the defender, or with some other person unknown to the pursuer, as the Lord Ordinary has decided.

[His Lordship here entered upon an examination of the evidence and leading circumstances of the case to shew that the view taken by the Lord Ordinary of the import and effect of the evidence was correct, and that his interlocutor ought to be adhered to.]

The LORD PRESIDENT and LORD SHAND concurred.

LORD DEAS was absent.

The defender then moved for expenses, and argued ;—As long as a wife had a probable ground of defence she was entitled to defend herself at her husband's expense. The fact that the case was heard out and taken to avizandum shewed that the wife was justified in reclaiming.¹

Argued for the pursuer ;—The defender had not shewn a probable cause. It was not a case where there was a conflict of evidence, but a case of evidence fabricated by the wife and her friends. To allow expenses would be an encouragement to vexatious litigation.²

LORD PRESIDENT.—The special ground for Mr Asher's motion that his client should get the expenses of this reclaiming note is that the case was fully heard out by the Court, and he says that the only cases in which a wife who has defended such an action and reclaimed has been found not entitled to her expenses have been where the Court adhered to the interlocutor under review without calling on the respondent's counsel. I should be sorry to lay it down as a rule that expenses are never to be refused except in that case, for I can conceive cases where the Court, though quite clearly of opinion against the claimer, might yet think fit to call on the respondent's counsel. Nay, I will go

¹ *Fraser on Husband and Wife*, 1235 ; *Kirk v. Kirk*, Nov. 12, 1875, *ante*, vol. iii. 128.

² *Dalglish v. Dalglish*, Feb. 1, 1878, *ante*, vol. v. 679.

a step further, and say that that description applies to the present case. It was less in the interest of the parties than in that of the law that we heard the argument to the end ; and I concur in a remark made by Lord Shand in giving judgment, to the effect that he was clearly against the reclamer at the conclusion of her counsel's opening speech. That shews how inexpedient it would be to adopt such a rule as was suggested ; it may be a consideration, but it is certainly not a conclusive one. I think no expenses should be awarded to the defender for this reclaiming note ; the case was a very bad one as regards her, and we were all of opinion that the whole story of the defence was trumped up and false.

LORD MURE and LORD SHAND concurred.

THE COURT adhered.

ALEX. MORISON, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

WILLIAM GALBRAITH & OTHERS (Walker's Trustees), Pursuers.—*Asher*
—*J. Campbell Lorimer.*

THE CALEDONIAN RAILWAY COMPANY, Defenders.—*Sol.-Gen. Balfour*
—*R. Johnstone—Keir.*

Railway—Compensation—Injury to access by shutting public street—Lands injuriously affected—Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict.), cap. 33, sec. 6.—A railway company in the exercise of their statutory powers closed two public streets. *Held* that the owner of subjects in the neighbourhood (no part of which had been taken), whose access to a leading thoroughfare had been thereby materially injured, was entitled to compensation under section 6 of the Lands Clauses Act, on the ground that his property had been injuriously affected.

Railway—Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict.), cap. 33, sec. 6—Lands injuriously affected—Benefits from Railway.—*Held* that in determining the extent to which lands have been “injuriously affected” in the sense of section 6 of the Railway Clauses Act, compensatory benefit arising from the formation of the railway is not to be taken into account.

WILLIAM GALBRAITH AND OTHERS, as testamentary trustees of the late Mr Walker, were proprietors of an area of ground situated about 90 yards west from Eglinton Street—one of the principal thoroughfares in Glasgow on the south side of the River Clyde. This area of ground extended to 6153 square yards or thereby, and was covered with buildings. A spinning mill occupied three-fourths of the ground, and dwelling-houses and stables the rest. On the north the subjects were bounded by a street 60 feet in breadth called Canal Street, and on the south by another street of the same breadth called Victoria Street. These streets ran parallel to each other, and into Eglinton Street on the east. The eastern boundary was a street called Francis Street, which connected Canal Street and Victoria Street. Francis Street was parallel to Eglinton Street, which lay further east.

In 1873 the Caledonian Railway Company promoted a bill in Parliament in connection with their line, the effect of which, *inter alia*, was to interpose a line of railway between the property of Walker's trustees and Eglinton Street, and to cut off their access to that street by Canal Street and Victoria Street. Walker's trustees, and other proprietors in the neighbourhood, petitioned against the bill after it had passed the House of Commons and had reached the House of Lords. This petition was, however, withdrawn on the railway company granting a written undertaking in the following terms :—

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The law was so laid down in this Court in the case of *Patterson*, Nov. 29, 1872, 11 Macph. p. 142, to which we were referred in the course of this argument, and in England, in the case of *Morris v. Davies*, first by Lord Lyndhurst when sitting in the Court of Chancery, and afterwards by Lord Cottenham in the House of Lords on appeal in 1837, 5 Clark and Fin., p. 242. In the present case the Lord Ordinary has held that the evidence is sufficient to overcome the presumption, and that the defender committed adultery with one or other of the parties with whom she is alleged so to have conducted herself, or with some other person ; and after careful consideration of the evidence I have come to the same conclusion.

In dealing with the case the main question for consideration is whether there is evidence to shew that the pursuer, as alleged by the defender, came to her house at Burnfoot one night in July 1878, and there had connection with her, and that her child was the result of that connection. If the evidence is not sufficient to instruct this allegation of the defender, the inference seems irresistible that the defender committed adultery with one or other of the parties mentioned in the record, who were both in the habit of visiting the defender, or with some other person unknown to the pursuer, as the Lord Ordinary has decided.

[His Lordship here entered upon an examination of the evidence and leading circumstances of the case to shew that the view taken by the Lord Ordinary of the import and effect of the evidence was correct, and that his interlocutor ought to be adhered to.]

The LORD PRESIDENT and LORD SHAND concurred.

LORD DEAS was absent.

The defender then moved for expenses, and argued ;—As long as a wife had a probable ground of defence she was entitled to defend herself at her husband's expense. The fact that the case was heard out and taken to avizandum shewed that the wife was justified in reclaiming.¹

Argued for the pursuer ;—The defender had not shewn a probable cause. It was not a case where there was a conflict of evidence, but a case of evidence fabricated by the wife and her friends. To allow expenses would be an encouragement to vexatious litigation.²

LORD PRESIDENT.—The special ground for Mr Asher's motion that his client should get the expenses of this reclaiming note is that the case was fully heard out by the Court, and he says that the only cases in which a wife who has defended such an action and reclaimed has been found not entitled to her expenses have been where the Court adhered to the interlocutor under review without calling on the respondent's counsel. I should be sorry to lay it down as a rule that expenses are never to be refused except in that case, for I can conceive cases where the Court, though quite clearly of opinion against the claimer, might yet think fit to call on the respondent's counsel. Nay, I will go

¹ Fraser on Husband and Wife, 1235 ; Kirk v. Kirk, Nov. 12, 1875, *ante*, vol. iii. 128.

² Dalgleish v. Dalgleish, Feb. 1, 1878, *ante*, vol. v. 679.

a step further, and say that that description applies to the present case. It was less in the interest of the parties than in that of the law that we heard the argument to the end ; and I concur in a remark made by Lord Shand in giving judgment, to the effect that he was clearly against the reclamer at the conclusion of her counsel's opening speech. That shews how inexpedient it would be to adopt such a rule as was suggested ; it may be a consideration, but it is certainly not a conclusive one. I think no expenses should be awarded to the defender for this reclaiming note ; the case was a very bad one as regards her, and we were all of opinion that the whole story of the defence was trumped up and false.

LORD MURE and LORD SHAND concurred.

THE COURT adhered.

ALEX. MORISON, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

WILLIAM GALBRAITH & OTHERS (Walker's Trustees), Pursuers.—*Asher*
—*J. Campbell Lorimer.*

THE CALEDONIAN RAILWAY COMPANY, Defenders.—*Sol.-Gen. Balfour*
—*R. Johnstone—Keir.*

Railway—Compensation—Injury to access by shutting public street—Lands injuriously affected—Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict.), cap. 33, sec. 6.—A railway company in the exercise of their statutory powers closed two public streets. *Held* that the owner of subjects in the neighbourhood (no part of which had been taken), whose access to a leading thoroughfare had been thereby materially injured, was entitled to compensation under section 6 of the Lands Clauses Act, on the ground that his property had been injuriously affected.

Railway—Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict.), cap. 33, sec. 6—Lands injuriously affected—Benefits from Railway.—*Held* that in determining the extent to which lands have been “injuriously affected” in the sense of section 6 of the Railway Clauses Act, compensatory benefit arising from the formation of the railway is not to be taken into account.

WILLIAM GALBRAITH AND OTHERS, as testamentary trustees of the late Mr Walker, were proprietors of an area of ground situated about 90 yards west from Eglinton Street—one of the principal thoroughfares in Glasgow on the south side of the River Clyde. This area of ground extended to 6153 square yards or thereby, and was covered with buildings. A spinning mill occupied three-fourths of the ground, and dwelling-houses and stables the rest. On the north the subjects were bounded by a street 60 feet in breadth called Canal Street, and on the south by another street of the same breadth called Victoria Street. These streets ran parallel to each other, and into Eglinton Street on the east. The eastern boundary was a street called Francis Street, which connected Canal Street and Victoria Street. Francis Street was parallel to Eglinton Street, which lay further east.

In 1873 the Caledonian Railway Company promoted a bill in Parliament in connection with their line, the effect of which, *inter alia*, was to interpose a line of railway between the property of Walker's trustees and Eglinton Street, and to cut off their access to that street by Canal Street and Victoria Street. Walker's trustees, and other proprietors in the neighbourhood, petitioned against the bill after it had passed the House of Commons and had reached the House of Lords. This petition was, however, withdrawn on the railway company granting a written undertaking in the following terms :—

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" Caledonian Railway (Glasgow Central Station, &c.) Bill.

" GENTLEMEN,—In consideration of your withdrawing all further opposition to this bill, we, the Caledonian Railway Company, do hereby undertake that if and so far as you or any of you are, in the judgment of the arbiters or oversman or jury to be appointed under the Lands Clauses Consolidation (Scotland) Act, 1845, as aftermentioned, injuriously affected by the construction of any of the works authorised by this bill, your claim for compensation shall not be barred by reason of our not taking any part of your respective lands ; and the amount of such compensation (if any), if not agreed upon, shall be determined in the manner provided by the Lands Clauses Consolidation (Scotland) Act, 1845, for the determination of cases of disputed compensation, but without prejudice to all claims competent to you or any of you, under and by virtue of the said Act and of any other Acts regulating the construction of railways, in all cases where the lands of you or any of you, or any part thereof, may be taken by us for the purposes of this Act."

The bill thereafter passed, and the company proceeded to execute their works. The access to Eglinton Street, which they substituted for those by Canal Street and Victoria Street, was by a road or street called Salkeld Street, which ran south for some distance parallel to Eglinton Street from a point 40 yards west from that street in Cook Street, a street considerably to the north of Canal Street, and running parallel to it. Salkeld Street crossed the new line of railway by means of a bridge and finally joined Eglinton Street at a point some distance to the south of Victoria Street. The accesses to Eglinton Street by Canal Street and Victoria Street had been perfectly level and straight, but the effect of the company's operations was to cause a considerable detour in going from Walker's trustees' property to Eglinton Street, and to change the gradients of the streets from level to 1 in 20.

On the completion of the works in January 1879 Walker's trustees served a statutory notice and claim on the railway company, in which they set forth that their property had been injuriously affected by their works, in so far as their accesses had been injured both in respect of detour and gradients. They claimed £7500 as compensation, and in event of that sum not being paid they called on the company to settle the same with them by arbitration in terms of the Lands Clauses Act, 1845. The railway company refused to entertain the claim, and Walker's trustees, on 11th February 1879, nominated George Bell, architect in Glasgow, as arbiter on their part. The railway company, on 24th February, under protest, nominated Thomas Binnie, valuator, Glasgow, as arbiter on their part. These gentlemen accepted of the office of arbiter on 12th and 14th March 1879, and appointed Mr M'Jannet, writer, Glasgow, to be oversman.

On 19th March 1879 the railway company presented a note of suspension and interdict, praying to have the arbiters and oversman interdicted from acting in the arbitration, and Walker's trustees interdicted from taking any steps of procedure under the arbitration or in any other way. They pleaded ;—(1) The property of the respondents, trustees foresaid, not having sustained any permanent physical injury, nor been injuriously affected in the sense of the special Act, or of any of the Acts incorporated therewith, by the complainers' operations, the complainers are entitled to the interdict craved.

Walker's trustees lodged answers, and pleaded ;—(1) The complainers having, as a condition of the respondents withdrawing their opposition to their Gordon Street Station Bill, given the undertaking of 4th July 1873,

they are not entitled to suspend and interdict the proceedings under the arbitration provided for therein. (2) The complainers having, by the said undertaking, renounced any right they might have to refuse compensation on account of the respondents' land not being taken under the statutes, they are bound to proceed with the arbitration. (3) The complainers having by the said undertaking constituted arbiters the sole judges whether, and to what extent, the respondents' property is injuriously affected by the construction of the complainers' works, they are bound to adhere to the said arrangement, and to proceed with the arbitration. (4) The respondents' property having been injuriously affected within the meaning of the special Act and the Acts therewith incorporated, the respondents are entitled to compensation, and to have the same assessed in terms of the Lands Clauses Acts.

On 16th June 1879, the Lord Ordinary (Curriehill) refused the suspension and interdict.*

* "NOTE.—The respondents, Walker's trustees, are owners of certain subjects in the neighbourhood of Eglinton Street, Glasgow, and they claim from the complainers, the Caledonian Railway Company, compensation in respect of their said property having been injuriously affected by and through the execution of certain works by the complainers, in virtue of the powers conferred on them by 'the Caledonian Railway (Gordon Street, Glasgow, Station) Act, 1873.' For the purpose of settling the amount of compensation by arbitration, in terms of 'The Lands Clauses Consolidation (Scotland) Act, 1845,' the respondents nominated Mr George Bell, architect, Glasgow, to be arbiter on their part, and the complainers nominated Mr Thomas Binnie as arbiter on their part, but under protest that the respondents, Walker's trustees, had no right to any compensation, and that no dispute had arisen between the parties entitling the respondents to insist in the arbitration. Mr Bell and Mr Binnie accepted the office of arbiter, and appointed as oversman in the reference Mr William M'Jannet, writer in Glasgow, who accepted the office on 14th March 1879. The complainers, on 19th March, presented this note of suspension and interdict in the Bill-Chamber, for the purpose of having the respondents, Walker's trustees, and the arbiters and oversman, interdicted from proceeding with the arbitration. Interim interdict was granted on that day by Lord Adam, and was continued by Lord Gifford on 28th March 1879, on which day the note was passed for the trial of the questions upon which the parties are at issue. The record having been closed, and the cause having been very fully and ably argued in the procedure-roll, I have come to be of opinion that the Court ought not to interfere to prevent the arbiters from proceeding with the reference.

"The facts of the case, in so far as admitted, are as follows:—The respondents' property is at present occupied as a cotton mill, and is bounded upon the north by Canal Street, on the east by Francis Street, and on the south by Victoria Street. The east front of their premises is parallel to, and about ninety yards distant from, Eglinton Street, which is one of the main thoroughfares of the portion of Glasgow on the south side of the Clyde. Canal Street and Victoria Street are public highways, and were, until the operations of the complainers aftermentioned, level streets intersecting Eglinton Street at right angles, and affording direct and easy access between that street and the north and south sides of the respondents' property. At a considerable distance north of Canal Street there was, and still is, another street named Cook Street, running westwards from Eglinton Street and parallel to Canal Street, but there was no communication between Canal Street and Cook Street except by Eglinton Street. In 1873 the complainers applied to Parliament for powers to make a new line of railway on the site of part of the west side of Eglinton Street. It appeared to the respondents that if the proposed operations were sanctioned by Parliament, Canal Street and Victoria Street, and the access to Eglinton Street, would be so much interfered with that their property would be seriously injured, and they accordingly joined certain other owners of property in the neighbour-

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The railway company reclaimed, and on 2d December 1879 the Second Division adhered to the Lord Ordinary's interlocutor. In pronouncing

hood in petitioning Parliament against the complainers' bill. While the bill was in dependence in the House of Lords, the committee of the House refused to hear the petitioners on the preamble, but intimated that they would be heard in support of clauses for the protection of their interests. Before any such clauses came to be discussed, the complainers (through their agents, Messrs Grahames & Wardlaw), prepared and offered to the petitioners the undertaking afterwards quoted, provided they would withdraw their petition. And the petitioners (including the present respondents) in respect of said undertaking, agreed to withdraw, and did withdraw their opposition to the bill—which thereafter was passed into law as 'The Caledonian Railway (Gordon Street, Glasgow, Station) Act, 1873.'

"In virtue of the powers contained in that Act the complainers have performed the following operations:—

"(1) They have converted into a line of railway, and otherwise applied to railway purposes, the whole of the west side of Eglinton Street between Canal Street and Victoria Street, and for a considerable distance to the north of Canal Street and to the south of Victoria Street, and they have thereby entirely blocked up the ends of these two streets, which formerly opened directly and on the level into Eglinton Street.

"(2) They have formed a new street called Salkeld Street, leading southward from Cook Street, and nearly parallel to Eglinton Street, until it reaches a point between Francis Street and Eglinton Street, where it crosses the complainers' new line of railway by means of a bridge, and it then bends in a south-easterly direction towards Eglinton Street, which it joins a short distance to the south of the former end of Victoria Street.

"(3) Both Canal Street and Victoria Street are thus connected with Salkeld Street, which now forms the respondents' only access to Eglinton Street. Instead of having two short, straight, and level accesses to that street, they have virtually only one, and that is not only circuitous, but steep. The gradient of Salkeld Street from the end of Canal Street to the top of the bridge is 1 in 27, —the gradient of Victoria Street from the respondents' premises to the top of the bridge in Salkeld Street is 1 in 19, and the gradient of Salkeld Street from Eglinton Street to the top of the bridge is correspondingly steep. The gradient of Canal Street itself, so far as it still exists, has not been altered, and Victoria Street, so far as it is *ex adverso* of the respondents' property, is still on the level. Access may now be had from the respondents' property to the north end of Eglinton Street by means of Salkeld Street and Cook Street; but that route is very circuitous.

"(4) No part of the respondents' property has been taken by the complainers, and none of these operations have been carried on *ex adverso* of that property.

"The respondents allege that their property has been injuriously affected by these operations of the complainers, in respect that 'they have demolished the houses and shops and other buildings forming the west side of Eglinton Street at this place, and substituted therefor a railway, thereby permanently taking away the thoroughfare from that part of the street. They have also shut up Canal Street, and diverted Victoria Street to the south, thereby causing a detour to all traffic entering or leaving the claimants' property, of 1032½ feet on the north and 150 feet on the south entrance, and they have further injured the gradients of these accesses from 1 in 712 to 1 in 19 on the south entrance, and from 1 in 158 to 1 in 34 on the north entrance. They have also obliged the claimants, in place of their former level entrances into Eglinton Street, to enter a narrow street or road called Salkeld Street, which neither has, nor ever can have, shops or buildings or thoroughfare, and by these operations they have greatly diminished the value of the claimants' property.' This quotation is taken from the formal claim and notice lodged by the respondents with the complainers, in which they demand, 'as compensation for the injury, loss, and damage to the said property, the sum of £7500 sterling.' In their record the

judgment their Lordships confined their remarks to the effect of the undertaking granted by the railway company, which they held bound the

respondents further aver that they have a special interest in these streets, which had been formed and maintained by them and their predecessors, and which formed the special, and indeed the only accesses to their property, and that the construction of railway works 'across the line of the foresaid streets, cuts off the access between the respondents' property and Eglinton Street, the leading thoroughfare of the district, and necessitates a long detour for all carts, carriages, and passengers coming to or leaving the respondents' works. The direct access which the respondents formerly had by the said street to Eglinton Street rendered their property more valuable, and by the construction of the complainers' said works it has been permanently damaged, and its value greatly diminished.'

"The complainers' answer to the case made by the respondents is substantially this, that the respondents' property 'has sustained no permanent or peculiar physical injury, and although the respondents, in using Victoria Street as altered, have to use at some distance from their property a somewhat steeper gradient than before, they have to do this in common with all the members of the public who require to use the said streets;' and they maintain that the injury which the respondents allege has been caused to their property is not such as can be made a ground of compensation under any of the statutes. In the present process of suspension they ask the Court to interdict the arbiter from proceeding with the statutory arbitration into which the respondents are desirous to force them.

"The respondents maintain that by the arrangement already referred to, which was made between them and the complainers while their bill was passing through Parliament, the complainers became absolutely bound to submit to arbitration the claim of the respondents. It is necessary therefore to examine with care the undertaking which was given to the respondents and the other petitioners while the bill was in the House of Lords. The letter, which is dated 4th July 1873, and which is addressed to the claimants, sealed with the common seal of the railway company, and signed by the secretary of the company, is in the following terms:—'Gentlemen,—In consideration of your withdrawing all further opposition to this bill, we, the Caledonian Railway Company, do hereby undertake that, if and so far as you are, in the judgment of the arbiters or oversman, or jury to be appointed under the Lands Clauses Consolidation (Scotland) Act, 1845, as aftermentioned, injuriously affected by the construction of any of the works authorised by this bill, your claim for compensation shall not be barred by reason of our not taking any part of your respective lands, and the amount of such compensation, if any, if not agreed upon, shall be determined in the manner provided by the Lands Clauses Consolidation (Scotland) Act, 1845, for the determination of cases of disputed compensation; but without prejudice to all claims competent to you, or any of you, under and by virtue of the said Act and of any other Acts regulating the construction of railways, and in all cases where the lands of you, or any of you, or any part thereof, may be taken by us for the purpose of this Act.' I am inclined to think that that letter does not amount to an absolute undertaking to submit to arbitration whatever claim for compensation the respondents might bring forward on the ground that their property was 'injuriously affected.' I think that the true meaning of the undertaking was this, that although no part of the respondents' lands was taken by the railway company for the purposes of their Act, they were nevertheless to be entitled to insist before arbiters or a jury upon all claims, on the ground of their lands being injuriously affected, which would have been competent to them had any part of their lands been taken. I do not think that the letter, when fairly construed, binds, or was intended to bind the railway company to submit to arbitration any claim by the respondents for compensation, unless they should be in a position to allege that their lands were 'injuriously affected' within the meaning of the various Consolidation Statutes regulating such claims.

"This being so, the next question is, how far, in claiming compensation, the

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No. 78. company to enter into the arbitration. Upon the relevancy of the grounds of damage set forth in the claim their Lordships reserved judgment.

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respondents are to be dealt with as landowners, part of whose lands have been taken by the complainers? It appears to me that any claim for compensation which the respondents may have in respect of their lands being 'injuriously affected' by the operations of the company may now be insisted in by them (irrespective altogether of the undertaking by the complainers in their letter) under section 6 of the Railway Clauses Consolidation (Scotland) Act, 1845, which entitles an owner of land to compensation for lands 'taken or used for the purposes of the railway, or injuriously affected by the construction thereof.' There are some kinds of damage, such as injury to amenity, for which compensation is not, in the general case, allowed, unless injury is caused to the rest of the estate by the operations of the company upon some part of the lands taken from the proprietor; and had the respondents been able to state a case of damage of that kind the complainers would have been barred by their letter from objecting that no part of the respondents' lands had been taken. But that is not the kind of case which is stated by the respondents. Compensation however is, by the Railway Clauses Act, allowed to all landowners whose lands are 'injuriously affected' by the construction of the works, whether any part of their lands has been taken by the company or not. And the 6th section provides that the amount of such compensation is to be ascertained and determined in the manner provided by the Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof,—that is to say, by arbitration or by the verdict of a jury. The 6th section of the Railway Clauses Act deals with two distinct classes of landowners—(1) with owners, part of whose land is taken by a railway company, and (2) with owners whose lands, though not taken or used, are 'injuriously affected' by the construction of the works. Owners of the first class are to get compensation, not only for the value of the lands actually taken, but for severance, loss of amenity, and for everything which shall be held injuriously to affect the portion of the estate not taken by the company; while owners of the second class are to be entitled to compensation if their lands, though not taken or used, are 'injuriously affected' by the construction of the work. This distinction was very clearly pointed out by Lord Colonsay in his judgment in *Hammersmith Railway Company v. Brand*, 1869 (L. R., E. and I. Apps., vol. iv. 211). So that, unless the respondents' claim for compensation can be shewn to be one competent only to a landowner, part of whose lands has been taken by the railway company, they can really take no benefit from the undertaking given by the company in July 1873, because, if their lands are 'injuriously affected,' they have, under the 6th section of the Railways Clauses Consolidation Act, a statutory right to compensation.

"The next and the truly important question in this case is, whether the averments of injury to their lands made by the respondents are such as, if proved to the satisfaction of arbiters or of a jury, would in law entitle them to compensation. Questions of this kind are always attended with more or less difficulty, and there have been numerous decisions, both in this country and in England—several of them judgments of the House of Lords—all of which, however, it is not very easy at first sight to reconcile. But I think, on a careful study of these cases, it will be found that the principle which runs through them all is this:—That in order to found a claim for compensation in respect of railway works 'injuriously affecting' land, the injury must be a real injury—that is, it must physically injure, or otherwise permanently diminish the value of the lands. Personal inconvenience to the proprietor, which he shares with the rest of the public, will not ground a claim for compensation. There must be some special or peculiar damage done to the lands by reason of the construction of the works, and the damage, as I have said, must be of a permanent and not a temporary character. It will depend very much upon the facts ascertained by the arbiters or the jury whether, or to what extent, the claim for compensation is well founded. Whenever, therefore, a claim for compensation is granted upon alle-

The proceedings in the arbitration having been gone on with, the arbiters differed, and on 4th March 1880 the arbitration devolved upon

gations of permanent and particular injury to land, I think the proprietor is entitled to have his claim for compensation determined in the manner prescribed by the Lands Clauses Consolidation Act. Of course if the claim is founded upon allegations which, on a fair construction, do not amount to averments of real or permanent injury to land, the Court will not force the railway company into a discussion of the question of compensation before arbiters or a jury; but where a relevant statement is made in support of the claim, the Court will not interfere to prevent its determination. The question then is—Have the respondents here made relevant averments in support of their claim? I am humbly of opinion that they have, and that the arbitration into which the parties have provisionally entered should be allowed to take its course.

“The main authority relied on by the complainers is the case of the *Caledonian Railway Company v. Ogilvy* (2 Macq. App. 229). What the landowner there complained of was the inconvenience caused by the railway crossing on the level a public road forming the access between his lodge and gate and the public highway. The House of Lords, reversing the judgment of the Court of Session, held that that was not damage to the estate entitling the owner to compensation, but was merely a personal inconvenience to which everybody using the road was subjected, the proprietor no doubt being more frequently subjected to it than others, for in the language of the Lord Chancellor (Cranworth)—‘All attempts at arguing that this is a damage to the estate is a mere play upon words. It is no damage at all to the estate, except that the owner of that estate would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it.’ That case, which is a leading one, and is referred to as an authority in all subsequent cases, and has been commented on and explained by eminent Judges who took part in subsequent decisions, has always been treated as a case decided on the ground that a claim for personal inconvenience was not a ground for statutory compensation in respect of the injurious affecting of lands. And if in the present case the complainers, instead of blocking up the entrance to Canal Street and Victoria Street, where these formerly entered Eglinton Street, had placed level crossings there, it is possible that the case of the *Caledonian Railway Company v. Ogilvy* might have gone far to support their views, although it is not impossible that a different rule might have been applied to a level crossing in the centre of a crowded commercial district from that applied to a similar crossing in a thinly inhabited rural district.

“But in the present case there are positive averments of injury to the respondents’ property by the actual shutting up of two direct accesses to Eglinton Street, by the substitution of a deviation road upon steep gradients instead of practically level roads, and by the deviation road being so constructed that the access to Eglinton Street is now long and circuitous, in place of being short and direct, and is moreover made in the form of a mean and narrow street, in which there would be little thoroughfare and few shops of any consequence. In short, it is averred that the operations of the railway company have ‘injuri-ously affected’ the respondents’ lands by impairing the accesses to them, and thereby diminishing their value as commercial subjects. Whether or not these allegations are true in point of fact, or to what extent they are true, it is not the province of this Court to determine. It is for the arbiters or the jury to ascertain the matters of fact. It may be that the statements of the respondents are unfounded in fact, and that the property has not been diminished in value; but I humbly think that the averments of real and particular damage to their property are not, as they were in *Ogilvy’s* case, a mere play upon words, but are relevant and plausible averments of real substantial damage.

“The case appears to me very closely to resemble the case of *Chamberlain v. The West End of London and Crystal Palace Railway Company* (1862) 2 B. and S., 605 and 617. There a railway company was authorised to take part of a highway, and make a deviation road, and to bridge over the highway, thereby

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No. 78. the oversman, Mr M'Jannet. On 13th April proposed findings were issued, and after both parties had been heard upon them the decree—
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blocking up the highway at a distance of seventy yards from Chamberlain's houses, with the effect of placing them in a sunk lane, so that his access to the highway by the deviation road was both circuitous and steep. None of his property appears to have been taken by the railway company. Chamberlain claimed compensation, in respect that by these operations his property had been injuriously affected, and the matter was referred, in terms of the English Consolidation Statutes, to arbitration. The arbiter's award was in the following terms:—'I find that by reason of the obstruction of the highroad leading from London to Wandsworth, and the obstruction of the said railway across the same . . . the access to the said several houses, &c., notwithstanding the substitution of the said deviation road as indicated and described in the said plan, is rendered less convenient for the occupiers thereof and all other persons, than it was, and would have been, but for such obstruction, and by reason of the said obstruction very many persons who, but for the same, would have passed the said several houses, buildings, tenements, and premises of the said Benjamin Chamberlain, have been, and will be, by reason of the said obstruction, prevented from passing the same, and the number of persons who, but for the obstruction, would have passed the said several houses, &c., has been, by reason of the said obstruction, greatly diminished, and the said several houses, &c., have thereby been rendered less suitable for the purposes of being used and occupied as shops, and by reason of the premises, the value of the said houses, &c., has been greatly diminished: And I find that, by reason of the premises, the said several houses, &c., have been injuriously affected by the execution of the works of the said company: And I find and assess the amount of compensation to be paid to the said Benjamin Chamberlain by the said company, in respect of such injurious affecting, at £1050.' Chamberlain brought an action in the Court of Queen's Bench to enforce the award, and that Court decided in favour of the plaintiff, and the judgment was affirmed by the Court of Exchequer Chambers, Erle, C. J., saying:—'I take the principle which governs these cases to be correctly laid down in the note to *Ashley v. White*, 1 Smith's Leading Cases, 252, 5th ed. There are indeed certain cases in which an act may be in law an injury, and may produce damage to an individual, and yet in which the law affords no remedy, or at least no immediate one. These are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. In such a case the mode of punishing the wrongdoer is by indictment, and by indictment only—L Coke's Inst. 56a. Still, if any person have sustained a particular damage therefrom beyond that of his fellow-citizens, he may maintain an action in respect of that particular damnification. I think that the fact found by the umpire, that the plaintiff's houses have been injuriously affected, is a finding that he has suffered particular damnification, and he finds specially how that injurious affecting would be occasioned, viz., that by the obstruction to the thoroughfare the number of persons passing by the plaintiff's houses would be diminished, and consequently the prospect of customers to the occupiers of the houses in respect of any branches of industry carried on in them would be injured. Therefore I am of opinion that particular damage to the plaintiff by the obstruction of the highway is made out. . . . Mr Clarke relied upon the *Caledonian Railway Company v. Ogilvy*, where the defendant was held not entitled to compensation by reason of the railway crossing the highway on a level near the lodge to his mansion. That looks like a judgment in favour of the defendants, but the principle of that judgment was that the respondent was claiming compensation for personal inconvenience or annoyance, and not for injury to his property.'

"In the case of *Beckett v. The Midland Railway Company* (1867), L. R., 3 C. P. 82, the whole question was very fully considered. There the plaintiff was possessed of a house fronting to a public highway, on part of which the defendants, the railway company, under the powers of their special Act, erected an embankment opposite the plaintiff's house, thereby narrowing the road from fifty

arbitral was pronounced on 3d June. In this decree, after a finding No. 78
descriptive of the property of Walker's trustees, the oversman proceeded:

to thirty-three feet, thus, according to the evidence, materially diminishing the value of the house for selling or letting, the access of light and air being also obstructed. There was no question as to the relevancy of the claim for the deprivation of light and air; the question which had to be decided by the Court was whether the interference with the highway was a permanent injury to the plaintiff's property, entitling him to compensation under the Consolidation Statutes. The Court held that it was such permanent injury. In giving judgment, Bovill, C. J., said,—‘If the claimant's right of access from or to the highway was taken away, nobody would doubt that he would be entitled to compensation. These are injuries to the particular individual quite apart from any that may be sustained by the public at large. If the entire obstruction to the claimant's access by raising, or lowering, or diverting the road, gives a cause of action or a right of compensation, I am at a loss to understand upon what principle it can be contended that the obstruction of a substantial part of it does not give the same right of action and compensation. In the one case the premises would be of no value, in the other their value would be substantially diminished. It is only a question of degree. A very slight detraction from the width of a road, like a slight obstruction of light and air, might occasion no damage or injury. This, as it seems to me, is quite in accordance with the law as laid down by the Court of Queen's Bench in *Reg. v. Eastern Counties Railway Company*, and in *Chamberlain v. Crystal Palace Railway Company*, and also with the view of Erle, C. J., in delivering the judgment of the Exchequer Chamber in *Rickett v. Metropolitan Railway Company*, May 16, 1867, L. R., 2 H. L. 175, and the decision of the House of Lords in the same case. The case of *Caledonian Railway Company v. Ogilvy* has been much pressed upon our attention, and must, it is said, govern our decision here. It was there held that an interference with a public road by crossing it on the level gave a private individual no claim against the company. The obstruction there was one which occasioned a general inconvenience to all Her Majesty's subjects. The facts do not very clearly appear in the report, but the decision evidently proceeded on the ground that no particular damage or inconvenience was sustained by the claimant beyond that which was suffered by the general public. At p. 250 of the report, Lord St Leonards says,—“I can see nothing by which this gentleman would sustain damage beyond what everybody else sustained. His estate is not injured.” In the present case the plaintiff's estate was found by the jury to have sustained damage, &c. The damages are assessed, not by reason of any matter merely personal to the plaintiff, but the house itself was damaged. The opinion expressed by the Lord Chancellor (Lord Cranworth) is pretty much to the same effect. This case is, therefore, clearly distinguishable from *Ogilvy's* case. I think the plaintiff is entitled to retain the verdict.’ And, in the same case, Keating, J., referring to *Chamberlain's* case, says,—‘Now, what was it that injuriously affected the land in *Chamberlain's* case, so as to bring the case within the Act of Parliament? It was the partial obstruction of the old road and the substitution of a new one, and so rendering the access to the plaintiff's premises less convenient. Both roads were public highways, and yet it was held in *Chamberlain's* case that the property was injuriously affected within the Act.’

“Then, in the case of the *Metropolitan Board of Works v. M'Carthy* (1874), L. R., 7 E. and I. Apps., p. 243, the matter was again fully considered in the Court of Common Pleas, and, on appeal, in the Exchequer Chamber, whose judgment was affirmed in the House of Lords. The circumstances in that case were as follows:—M'Carthy was lessee or occupier of a house in close proximity to a draw-dock which opened into the Thames. He had no right in any way to the use of the dock, except as one of the public, but, his premises being in close proximity to it, his use of it for the purposes of his business was very constant. It appeared that the distance between his house and the head of the dock was only twenty feet, and that the ground between his house and the dock was a public highway. The dock was entirely destroyed by the works of the Thames Embankment, and the case submitted to the Court set forth, as matter of fact,

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No. 78. —“(Second) that the rent of the mill portion was £1000 per annum, under a lease which terminated in 1874, but the occupancy has since

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that, by reason of the destruction of the dock, and the destruction thereby of the access to and from the Thames, the plaintiff's premises became, and were as premises either to sell or occupy, in their then condition, and with reference to the uses which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value. M'Carthy claimed, and was found entitled to, compensation, on the ground that a special value was attached to the premises by reason of their proximity to, or relative position with, the Thames, which was there a public highway, and that this special value had been injured by the obstruction. In that case Lord Chelmsford (p. 254) comments thus on *Chamberlain's* case:—‘I may now say that, the umpire having found that by the construction of the railway across the highroad the access to the houses of Chamberlain was rendered less convenient, and, by reason of the premises, their value had been greatly diminished, I do not see how the Court could well come to any other conclusion than that the houses were injuriously affected. Part of the damage in this case of *Chamberlain* was stated to have arisen from the obstruction having prevented many persons who would otherwise have passed the houses from doing so. This in itself would have been no ground for compensation, but without it sufficient remained in the statement of the interference with the access to the houses, and the consequent diminution of their value, to bring the case within the compensation clause in the Railways Clauses Consolidation Act.’ And then, in dealing with the facts of *M'Carthy's* case, Lord Chelmsford goes on to say,—‘The question, therefore, is, whether the respondent, as the owner of premises which were in close proximity to the public draw-dock, has, by its destruction, suffered an injury and damage differing in kind from that of the public in general? It is to be observed that in the *Caledonian Railway Company v. Ogilvy* there was no complaint of any interference with the access to the house, but the injury alleged was an interruption of the access to the highroad by a cause which was not in any way connected with the house, but which subjected the plaintiff and his family to personal inconvenience, more frequently experienced, indeed, but not differing from that which was felt by every individual of the public desirous of using the highroad. Now, it is stated as a fact in the special case here, that by the access given by the dock to and from the River Thames, the respondent's premises were rendered more valuable as premises to sell or to occupy with reference to the uses to which any owner might put them—in other words, that the access to and from the Thames by means of the dock was a valuable appendage to the respondent's premises, and that by the stopping up and destruction of the dock the premises became, and were, permanently damaged and diminished in value. Is not this an injury and damage to the respondent, distinct from what would be sustained by the public generally, though probably shared in by the other occupiers of premises in the neighbourhood of the dock? And what conclusion could fairly be drawn from the statement but that the respondent's house was injuriously affected?’ And Lord Penzance, in deciding *M'Carthy's* case, says (page 263),—‘The immediate contiguity to a highway commonly called frontage is a well-known and powerful element in the value of all lands in populous districts. Where frontage to a highway does not exist, propinquity and easy access to a highroad are equally undoubted elements of value in such districts, distinguishing lands which have them from those which have them not. If, then, the lands have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect of those lands beyond that suffered by the general public, if the benefits of that proximity are withdrawn by the highway being obstructed. And, if so, the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the road interfered with is a public one. It was asked in argument,—Where are the claims to compensation to stop if the rule be so applied? The answer, I think, is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbiter that a special value attached to the premises in

been continued on tacit relocation at the same rent; and the rent of the remainder is £108, 10s. per annum. (Third) That the claimants have sustained no loss or damage, in respect of diminution or reduction of rents since the time the respondents' operations began. (Fourth) That during the respondents' operations and since their completion the claimants' property has not by reason of these operations sustained any physical injury in its structure as buildings, or in respect of drainage, light, or air. (Fifth) That prior to the respondent's operations the claimants had direct, straight, and practically level access to and from their property, from and to Eglinton Street on the east (first) by Canal Street and (second) by Victoria Street, Eglinton Street then forming (as it does still) a leading thoroughfare from the centre of Glasgow to the south. (Sixth) That since the respondents' works were executed, and by reason of their execution, the following results have happened:—(First) Canal Street has been shut up as a direct access to Eglinton Street, and in place of that direct access the respondents have formed as a substitute therefor Salkeld Street, a public but a back street of 50 feet wide, running nearly parallel to, and to the west of, Eglinton Street; (second) Salkeld Street is not direct or straight, but slightly curved in its formation, and is steeper in its gradients than Eglinton Street, for the corresponding distance between Canal Street and Cook Street, the steepest gradient being 1 in 34 as compared with Eglinton Street, the steepest gradient in which within the same distance being 1 in 59; (third) for the purpose of traffic carried or going to or from the claimants' property to Glasgow on the north, the detour caused

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question by reason of this proximity to a relative position with the highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction. If this limit be thought a wide one, and the number of claims under it likely to be numerous, that is only the misfortune of the undertaking, for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish, as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicted and proved that the value of the lands depends upon the position relatively to the highway which they occupy. This view of the law on this subject, and its application, is, I think, entirely supported by the decision of the Exchequer Chamber in the case of *Chamberlain v. The Crystal Palace Company*, and, believing that case to be rightly decided, I humbly advise your Lordships to affirm this judgment.'

"I have quoted at length these passages from the opinions of Lord Chelmsford and Lord Penzance, because it appears to me that they are in every sentence applicable to the present case. The averment of the respondent is that the direct and level access, which they had by means of the highways called Canal Street and Victoria Street to the great public thoroughfare called Eglinton Street, was a valuable accessory to their property, and that the obstruction of that direct access, and the substitution of a circuitous deviation road of greater length, of steep gradients, and passing through a new and mean street, has permanently diminished the value of the property. These averments, if true, appear to me to be as relevant to found a claim for compensation under the Railways Clauses Act as the corresponding averments in the cases of *Chamberlain*, *Beckett*, and *M'Carthy*. It will, of course, be the duty of the arbiters to determine upon the evidence laid before them to what extent, if any, the respondents' premises have in point of fact been permanently injured and diminished in value. It may be that they are situated at such a distance from Eglinton Street that a direct access to it by means of Canal Street and Victoria Street was of little or no value; but that is a matter, as I have said, for the arbiters, and not for the Court to determine. I am therefore of opinion that the arbitration must proceed, and that the present suspension ought to be refused, with expenses."

No. 78. by this substituted street is immaterial; but taking the west end of Cumberland Street as a common point by Eglinton Street and by Salkeld Street from Canal Street the detour or extra distance caused by the respondents' works extends to about 1485 feet, and now applies to all traffic from the claimants' property carried or going eastward along Cumberland Street; (fourth) that Victoria Street has not been shut up, but has been slightly diverted with no appreciable detour, as an access to the claimants' property to or from Eglinton Street and the south, but with a detour or extra distance caused by the respondents' works of about 265 feet, which now applies to all traffic carried or going by Eglinton Street to the north; and the diversion of Victoria Street, and the building of a bridge over their railway by the respondents, have had the effect of altering the gradient of a street formerly almost level, to 1 in 20 for a space of about 116 feet, and 1 in 34·7 for a space of about 197 feet. (Seventh) That the new substituted access by Salkeld Street forms, in conjunction with Canal Street, Cook Street, and Victoria Street, the principal access to Eglinton Street for the claimants' property and the other properties situated in the same locality, including the Joint Line Railway station and the canal basin. (Eighth) That, in these circumstances, and having regard to the facts and circumstances proved, the claimants' property is in my opinion injuriously affected by the construction of the respondents' works; and on the assumption that the claimants are legally entitled to be compensated by the respondents for the injury so caused, I fix and assess the pecuniary amount of this compensation at the sum of £1500 sterling, whereof I allocate the sum of £1200 as applicable to compensation for damage by detour; and the sum of £300 to compensation for damages by change of gradients: And accordingly, on said assumption, I find the claimants entitled to said sum of £1500 (made up as aforesaid), with interest thereon, at 5 per cent per annum, from 13th April 1880, till payment."

The railway company having refused to pay the compensation decerned for, Walker's trustees, on 22d September 1880, raised an action in the Court of Session, concluding for the amount in the decree-arbitral, with the expenses decerned for.

The railway company defended the action, and based their defence, first, on the following passage in the oversman's notes of proposed findings, of date April 13:—"And I explain that in fixing the compensation I have not given effect to any compensatory elements arising from (1) the respondents taking and so withdrawing feuing ground from the market; or (2) the fact of their having placed a passenger station in the immediate neighbourhood."

They maintained that if effect had been given to these considerations no compensation would have been found due. Their second ground of defence was that Walker's trustees "had no special or exclusive right of property or otherwise in the streets, parts of which have been taken. . . . The said streets are public streets, and the pursuers had no right to use the same other than as members of the public. . . . Neither as regards detour nor the use of steeper gradients have the pursuers suffered any peculiar injury or damage different from the rest of the public requiring to use the streets in question."

The railway company pleaded;—(1) The property of the pursuers not having sustained any permanent or peculiar physical injury, nor been injuriously affected in the sense of the special Act, or any of the Acts incorporated therewith, by the defenders' operations, the defenders are entitled to absolvitor. (2) The pursuers not being entitled to compensation either in respect of the undertaking of the defenders, or any of the

Acts of Parliament before-mentioned, the defenders are entitled to absolver. (3) In determining the question whether or not the pursuers' property was injuriously affected by the defenders' operations, the oversman ought to have considered the whole effect of these operations, and to have given effect to any compensatory elements arising therefrom benefiting the pursuers' property, as well as those injuriously affecting the same. No. 7
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On 10th November 1880 the Lord Ordinary repelled the third plea in law for the railway company, and decerned against them in terms of the conclusions of the summons.*

The railway company reclaimed, and argued;—The effect of the written undertaking was truly that the proprietors were to be treated with as if some portion of their lands had been taken. But that being so, they were not entitled to compensation arising from the construction of the railway to which they would not have been entitled at common law.¹ Injuries to accesses by public streets were injuries shared in common with the rest of the public, and conferred no common law right to compensation from the company.² The sort of injuries here attempted to be made out were of a totally different kind from those contemplated when the undertaking was granted, and which had been sustained as relevant to infer compensation.³ The access cases, as a rule, were where the access was *ex adverso* of the property, and not, as here, at a distance from it, or not such as structurally to affect it.⁴ In order to be successful in such a claim it must be proved that what is suffered is not merely inconvenience by the proprietor, but actual injury to the property.²

Argued for Walker's trustees;—The undertaking was given to buy off opposition, and under it the company became bound to enter into an arbitration. The oversman had now found that injury had been suffered by the property, and the company had no option but to pay, any objec-

* "NOTE.—The defenders object to the oversman's award, on the ground that he does not give any effect to compensatory claims arising (1st) from the defenders withdrawing feuing-ground from public competition, and so rendering the complainer's ground more valuable for that purpose; (2d) From the establishment of a passenger station in the neighbourhood. I am of opinion that the oversman would have erred had he taken these elements into consideration. The pursuers have suffered direct injury by the access to their property being rendered more steep and circuitous than before, and by the consequent increased cost of cartage, tear and wear of horses, &c. They were content with their property as it stood before the railway company interfered with it; they did not desire to feu their ground; and they had no wish to have a passenger station forced upon them. All these things, I think, must be assumed in their favour. The question, and the sole question, for the oversman, was the amount of damage to the pursuers' accesses actually caused by the company's works; and it is not relevant in such an inquiry to discuss whether in other respects unconnected with access these works may be expected to benefit the pursuer. The cases of *Senior v. The Metropolitan Railway Company*, 32 L. J., Exch., 225, and *Eagle v. The Charing Cross Railway Company*, L. R. 2 C. P., 638, seem to be authorities very much in point. I have therefore sustained the oversman's award, and decerned for the amount thereof, with expenses."

¹ *City of Glasgow Union Railway Co. v. Hunter*, June 30, 1870, 8 Macph., H. L., 157, 42 Scot. Jur. 430.

² *Caledonian Railway Co. v. Ogilvy*, March 30, 1856, 2 Macq. 229, 27 Scot. Jur. 351.

³ *Chamberlain v. West End of London, &c. Railway Co.*, Feb. 2, 1862, 2 Best and Smith, 605; *Beckett v. Midland Railway Co.*, Nov. 13, 1867, L. R. 3 C. P. 82.

⁴ *Ricket v. Metropolitan Railway Co.*, May 16, 1867, L. R. 2 E. and I. App. 175.

No. 78. tion on the ground of no land having been taken having been expressly waived. The course of decision was perfectly distinct, that if the property was injured then compensation was due.¹ The oversman had found that the property was injuriously affected, and therefore the argument based on *Ogilvy's* case did not apply. What was claimed was compensation for injury to property, not to comfort or convenience of owner. At advising,—

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LORD JUSTICE-CLERK.—Divested of details, the state of facts under which the claims of the respondents arise is the following :—They are proprietors in trust of a block of ground lying to the west of Eglinton Street, in Glasgow, which is one of the great thoroughfares of the city. This block of ground, which is used for a spinning-mill and the relative buildings, extends to over 6000 square yards. It lies about 130 yards from Eglinton Street, and is flanked on the north and south sides by two streets of 60 feet in width, both of which are contiguous to the premises, and are parallel to each other, there being a distance of 100 yards, or rather less, between them. Before the operations of the railway these two streets afforded a straight and level access from either side of the premises to Eglinton Street, which they both joined at right angles. The effect of the railway operations is substantially to destroy both these accesses as they stood. The railway works are so constructed as to interpose a new street called Salkeld Street, running parallel to Eglinton Street, between the premises and Eglinton Street, cutting off entirely the end of Canal Street, so that access can only be had to Eglinton Street from the works by a considerable detour on the north, and a less but still a considerable detour on the south. The gradients of Victoria Street have been altered from a level to 1 in 27, and the other gradients are materially altered for the worse.

Such being an outline of the alleged causes of damage, the respondents opposed the company's bill in Parliament, on a narrative in their petition of the special grounds of damage which I have generally indicated. In the end they consented to withdraw their opposition, on a formal undertaking by the company in the following terms :—[*reads ut supra*, p. 406.]

On the bill passing, the respondents gave the usual notices to have the amount of their claim fixed by arbitration, nominated their arbiter, and called on the company to nominate theirs. This the company did, but at the same time presented a note of suspension and interdict praying to have the arbiters and parties interdicted from proceeding, on the ground that the claim of the respondents presented no case in law on which they could demand compensation. The Lord Ordinary refused the interdict on its merits, and added a long and very careful exposition of his views. We adhered to his judgment refusing the interdict, but reserved our opinion on the question of relevancy until the facts should be found by the arbiter. The oversman in the arbitration has now pronounced his award, and in a detailed decree-arbitral, explaining fully the grounds of his decision, he has found the respondents entitled to a sum of £1500 in name of compensation for injury to the premises, allocating £1200 in respect of detour in the accesses, and £300 in respect of gradients. The company then challenged the award before the Lord Ordinary, who has sustained it, and the whole matter is now before us in this reclaiming note.

¹ Metropolitan Board of Works v. M'Carthy, June 22, 1874, L. R. 7 E. and L. App. 243; The Queen v. Metropolitan Board of Works, April 24, 1869, L. R. 4 Q. B. 358.

If I were obliged to decide this case solely on the terms of the written agreement, the inclination of my opinion would be to construe those terms as an admission of liability, if the arbiters should find in point of fact that the premises were injuriously affected by the company's operations. The agreement must be construed according to the subject-matter to which it related. Injury to the premises by reason of alteration of access was the thing complained of in the petition, and the agreement was the consideration given for its withdrawal. The assumption of the agreement seems to be that whatever question there might have been as to the facts alleged in the petition as the ground of a claim for compensation under the 6th section of the Railway Clauses Act there could have been none under the 17th and following sections of the Lands Clauses Act, had the operations of the company been executed partly on land taken from the petitioners; such was the law laid down in the cases of the *Duke of Buccleuch*, L. R. 5 E. and I. App. 418, and that of the *Hammersmith Company*, L. R. 4 E. and I. App. 171, by the House of Lords. The good faith and true import of the agreement was, that as the injuries to the accesses alleged would have formed a good element of damage if pleaded as an incident or accessory to a claim for land taken for the operations complained of, the present claim should be allowed to stand on the same footing; and therefore the agreement left no question over but the fact of injury and the amount of damage payable in respect of it. This has been decided by the oversman, and there, I think, the dispute was intended to terminate.

I have, however, after the full argument which we heard, come to be very clearly of opinion that had there been no agreement between the parties, and had this claim stood exclusively on the 6th section of the Railway Clauses Act, the award of the oversman ought to be sustained.

I have said that the two contiguous accesses by which these premises communicated with Eglinton Street are substantially destroyed by these operations. Whether sufficient substitutes have been provided is another question, but these special accesses no longer exist by reason of the works complained of. I think the only question of relevancy raised here is conclusively settled by the case of *The Metropolitan Board of Works v. M'Carthy*, *supra*, p. 418, n. 1. In that case certain premises had two accesses—one by a road and another by water—both being public highways, and not in any degree private property. The embankment works destroyed one of these accesses, and it was found that the Board of Works were bound to make compensation. Here both accesses are taken away, and unless the railway company can shew that they have substituted accesses which are fully equivalent—which was a matter for the oversman—the right of compensation is clear.

Of course the theoretical difficulty which attends a claim for injury done to an access over a public road or street is, that as, according to the proverb, all roads lead to Rome, a claim might be preferred for damage done to a public road at a considerable distance. But the question must be solved reasonably, and the opinions of the noble and learned Lords in the case referred to indicate the true solution. The injury alleged must be such as attaches specially to the premises in question, not exclusively, but specially. In this case no difficulty can arise on that head, because these two accesses by Canal Street and Victoria Street specially subserved these particular premises, and, indeed, did so almost exclusively. They certainly were of much greater consequence to them than to any other premises.

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It is said, no doubt, that other accesses were provided. But the oversman has found—and it was for him to decide that matter—that these accesses so provided are insufficient by reason of detour and gradients; and he has estimated the value of the insufficiency at the sum in the award. I have no doubt of his power to do so, and have no right to question the conclusion he came to.

This short view makes it unnecessary for me to canvass at length either the decisions or the opinions in the numerous and not very consistent cases by which this branch of the law is encumbered. If I may say so without presumption, I think there has been a tendency throughout the series to run these questions into subtle generalisations, or ingenious but hazardous definitions, when the application of ordinary practical rules of everyday life would suffice for their decision. I am not prepared to affirm, in its generality, the proposition that the measure or test of such a claim as this is the right which the claimant would have had against any one who had performed the same operations without Parliamentary authority. This is a claim founded on and given by statute, and it cannot be the same, I should have thought, as any common law right, and the considerations which would have affected any proceeding at common law must be other than and different from those applicable to the statutory claim. Neither do I think it sound to lay it down as a general proposition that it is any answer to such a claim that to sustain it would leave the claimant in a better position than if the works complained of had never been executed. So far, in my opinion, is that from being at variance with the policy of these statutes, that it is a result which lies at the foundation of them. The statutory powers are given in order that the community may profit by their execution. But those of the community who profit by them are of course a limited class, and of that limited class some profit more than others. But that consideration cannot enter into a question of compensation for injury done to property, which only implies an obligation on the railway company to place the party injured in the same position as that which he would have held if his property had not been injured.

I do not think it is sound to say, as has been argued on the authority of the case of *Ogilvy*, that an injury which is shared by the public cannot support a claim for compensation. It is more sound to say that if the injury be specific and proved it is of no moment how many other premises are also injured. "The public" is merely a generic term for persons who are entitled to use, and do use, the access; and in proportion to the use they make of it may be the injury suffered by their premises by the operations on it. When the use made by one or more of the public is so far special and peculiar the injury becomes individual. When the injury is shared by many it of course loses its individual character. It may be difficult to define the line in words, it is a question of degree, but practically presents little real perplexity in any given case.

The case of *Ogilvy* itself (although we may doubt whether, with the further elucidation these questions have received, all the *dicta* to be found in the judgments would have been delivered) illustrates what I have said. There was no evidence there of any damage other than would have been equally occasioned if the level crossing had been an inch off, and the amount of injury to the premises was in itself hardly inappreciable.

LORD YOUNG.—Three questions are presented, and were fully argued.

I. The first is, Whether upon the facts found by the arbiter, and which are

not disputed, the respondents' property has been injuriously affected by the operations of the complainers (the railway company) so as to entitle them to compensation irrespective of the special undertaking in the complainers' letter, which forms the subject of the second question? On the one hand, it is clear that when a portion of any property is so taken that the residue is thereby injured (*i.e.*, depreciated in value), this is an injury for which compensation is due. This may perhaps in all cases be called severance damage, although that term is usually applied, though it may not be confined, to the case where a property is divided, portions of it being left on either side of the part taken, which severs them from each other. But although such severance may not be occasioned, and is not when the extremity of a property is taken at any end or side, it is, I apprehend, not doubtful that if the effect of taking a part is to deprive the residue of a frontage or of a valuable entrance and egress which the whole had before, this is an injury for which compensation is due, and whether it be called severance or by another name is plainly immaterial. On the other hand, it is clear, at least in the sense of having been authoritatively decided, that where the only injury complained of is that a public road has been rendered less commodious to the public, as by a level crossing, a proprietor of land in the neighbourhood is not distinguishable from the rest of the public and entitled to compensation because the road is frequently used by him as an access to his property, and so the inconvenience of the level crossing is frequently experienced by him. It was so decided in the case of the *Caledonian Railway Company v. Ogilvy*, the decision being put on the ground that the claim was truly for personal inconvenience suffered in common with the public at large, and that "all attempt at arguing that this is a damage to the estate is a mere play upon words." The question has since been a good deal considered, and been illustrated by several decisions. These decisions (subsequent to *Ogilvy*) are so fully and clearly noticed by the Lord Ordinary in his note of 16th June 1879 that I shall content myself with stating the result of them as I collect it. It is, that wherever property is in fact injuriously affected by the operations of a railway company compensation is due to the proprietor, notwithstanding that the operations by which the property is injuriously affected are on public streets or roads, and may, and in fact do, cause inconvenience to the public at large. The first part of this proposition is just the enactment of the general Act, and the materiality and value of it is in the latter part, which is the correction of an erroneous conclusion which had for a short while been drawn, perhaps excusably, from the case of *Ogilvy*. In that case there were apparently plausible grounds for contending that the proprietor had represented, and the valuation jury approved, that his property was injuriously affected by the level crossing within a few yards of the principal entrance gate; and on that assumption the only objection to the claim was, or might reasonably be represented to be, the fact that the crossing which damaged the claimant's property was also an inconvenience to the public. But the noble and learned Lords certainly negatived this contention, and decided the case on the footing that the property was not injuriously affected, and it is very noticeable that the decision is so explained and accounted for in the subsequent cases. As thus explained, the decision is authority for no larger proposition than this, that a man cannot have compensation for the personal inconvenience of a level crossing on a public road in the vicinity of his property which is not in fact injuriously affected thereby. I do not suppose that it was intended to be decided as matter

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of law that no property whatever could be damaged, *i.e.*, the value of it substantially deteriorated, by any level crossing on an adjoining public road, and I do not find this view of the judgment suggested in any of the subsequent cases.

But leaving aside level crossings, which may perhaps in deference to the case of *Ogilvy* stand as a class apart, and reverting to the general question exclusive of that class, I am prepared to assent to the proposition that when property is in fact damaged in the sense of being deteriorated in value by the works of a railway company, the proprietor is entitled to compensation, and that it is immaterial that the works causing the damage are on a public road or street (or what was so) which has been taken or used therefor. When such damage is alleged on the one hand, and denied on the other, I think the issue raised is *prima facie* one of fact only, and is to be tried as directed by the statute. It has been so tried between the parties before us, and decided in favour of the respondents. The decision is that the respondents' property is injuriously affected by the complainers' works to the amount of £1500, and I find no reason in law why this decision should not have been made, or why, having been made, it shall not have effect. It is said that the injury to property to be compensated for must be physical. This is obscure language. If it means that the injury must be caused by works or operations on the property, the proposition is condemned by all the recent cases, and I cannot therefore attach this meaning to it. That the injury alleged is too remote to be taken account of is another matter. If the arbiter or jury think so, they may act on that opinion; and there may be cases in which the remoteness of the damage is so apparent that the Court would interpose either to prevent an idle trial, or after trial to refuse effect to an award or verdict. I do not pursue this topic or illustrate it by fanciful suppositions, for I am of opinion that there is here no good objection to the claim or to the award on it on the ground of the remoteness of the damage.

II. The opinion which I entertain, irrespective of the complainers undertaking that the respondents' claim, if affirmed by an arbiter or jury, should not be barred "by reason of our not taking part of your respective lands," renders it unnecessary that I should express any opinion on the effect of that undertaking, which was the second question argued before us.

III. The third question regards the contention of the complainers that they are entitled to set the benefits which they have conferred on the respondents' property against the damage which they have done to that property of a character entitling them to compensation under the statute. This contention is admittedly novel, and I content myself with saying that it is in my opinion inadmissible. There may be, and probably are, cases in which the damage done to a landed estate by the formation of a railway through it exceeds the benefit, but the common and familiar case is no doubt otherwise. There is usually, almost universally (in the case of estates in the country), a large balance of benefit. It has never, however, been doubted, so far as I know, that the railway company must pay compensation for the damage they do, and look to their traffic receipts for remuneration for the benefits they confer. This is according to the invariable practice of about forty years, and I can give no countenance to the present attempt to invert it.

LORD CRAIGHILL was not present at the hearing, and so delivered no opinion.

THE COURT adhered.

RONALD & RITCHIE, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

THE NORTH OF SCOTLAND BANKING COMPANY, Pursuers.—*Trayner—Jameson.*

BEHN, MÖLLER, & Co., Defenders.—*R. Johnstone—Asher—Macfarlane.*

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North of Scotland Bank Co. v Behn Möller, & Co.

Agent and Principal—Bill of Exchange—Acceptance “per pro.”—Liability of principal.—B., M., & Co., a firm of merchants in Hamburg, in 1869 opened a branch of their business in Dundee under the charge of an agent H, in whose favour they executed a power of attorney authorising him to sign letters, deeds, bills, &c., “per procuration” of the firm. The power of attorney was lodged with the A bank, where the firm kept its account, and where the bills of the firm were domiciled. On 1st September 1879 the firm put an end to the agency, and arranged that thereafter goods purchased by H should be bought on his own account, and sold by him to the firm. Subsequently the B bank, in the knowledge of these facts, discounted bills drawn after 1st September 1879 by a firm of which H was known to be a partner, and bearing H’s signature as acceptor *per pro.* of B., M., & Co.

In an action for payment brought by the B bank against B., M., & Co., it was proved that since the termination of the agency the power of attorney had remained in the hands of the A bank, and that H had been allowed to endorse by his own signature, *per pro.* of B., M., & Co., foreign bills payable to B., M., & Co. which they had forwarded unendorsed in payment of his accounts, and that on three occasions he had been allowed to draw cheques *per pro.* of B., M., & Co., upon their account in London. It was also proved that the bills sued on were not granted with B., M., & Co.’s authority or for their behoof.

Held that the B bank having discounted the bills in the knowledge that the agency had ceased, had proceeded at their own risk, and that B., M., & Co. were not liable to pay the amount of the bills.

Opinions as to the duty devolving on a person discounting bills signed *per pro.* to inquire into the extent of the agent’s mandate.

Question, whether a bill signed *per pro.* by an agent, authorised to do so, is binding upon the principal where signed fraudulently. *Opinion per Lord Rutherford Clark* that it is binding.

MESSRS BEHN, MÖLLER, & Co., merchants in Hamburg, in January 1869 established a branch of their business in Dundee under the management of an agent, Mr Julius Heyde, to whom they granted a power of attorney, dated 7th January 1869, whereby he was, *inter alia*, given “full power and authority (*procura.*) to sign all letters, deeds, assignments, acts, indentures, and bills of exchange with our firm, adding to it the words ‘*per procura.*’ and his name, to oblige our firm in that way, and in every wise to sell and to transfer real property, shares, and mortgages, and to extinguish the latter, to ask, demand, sue for, recover, and receive every sum and any object due to us, to compound with any person, to give good and sufficient releases and discharges, to appear and to plead before every inland or foreign Judge and Court of justice whatsoever, and to prosecute such actions and suits to judgment and execution, to seize, sequester, and arrest merchandises, claims, or other objects whatsoever, giving, and hereby granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as we might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that our said attorney or his substitutes shall lawfully do or cause to be done by virtue hereof.”

This power of attorney was delivered to the Commercial Bank, Dundee, with whom Behn, Möller, & Co.’s account was kept.

On 1st September 1879, Behn, Möller, & Co. closed their Dundee branch, and put an end to Heyde’s agency.

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No. 79. On 27th September 1879, William Dewar, of the firm of William Dewar & Co., manufacturers, Lochee, of which firm Heyde was a partner, drew a bill for £89, 4s. 5d. on Behn, Möller, & Co., and bearing to be accepted by them *per procurationem* of Julius Heyde, payable three months after date. On 30th September, 11th October, and 18th October, all of the same year, bills were drawn and accepted in a similar way, the bills being for £164, 9s. 2d., £195, 16s. 5d., and £242, 13s. 4d. respectively.

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These several bills were discounted by the North of Scotland Banking Company, and endorsed to them, and were duly presented for payment when they fell due, but were dishonoured by the acceptors, Behn, Möller, & Co., and protested for non-payment.

In these circumstances the banking company raised an action in the Court of Session against Messrs Behn, Möller, & Co., concluding for payment of the amount of the said four bills.

The defenders pleaded ;—2. The said Julius Heyde having accepted the said several bills *per procurationem* of the defenders without authority to do so, the defenders are not liable for the amounts of the said bills. 3. The said Julius Heyde having ceased to represent, and having ceased to have authority to bind the defenders as their agent or otherwise prior to the dates of the said acceptances, the defenders are entitled to absolvitor.

Proof was led in the case, the import of which is fully given in the opinion of Lord Shand.

On 10th July 1880 the Lord Ordinary assoilzied the defenders.*

* “NOTE.—The bills sued on are accepted by Julius Heyde per procuration of the defenders. The Lord Ordinary is satisfied on the evidence that they were not honestly accepted in virtue of the procuration which, for a certain time at least, Heyde held from the defenders. He thinks that they were accepted for the accommodation of Heyde and his partner Dewar. On the evidence of Dewar the Lord Ordinary can place no reliance.

“The defenders contended that this fact was sufficient to entitle them to absolvitor, on the ground that they could not be liable for any bills accepted by Heyde in violation of his mandate. The Lord Ordinary cannot assent to this view. He thinks that when a person acts within the sphere of his mandate his acts are, in a question with third parties, binding on his principal, even though they are fraudulent. It was maintained that, as the bills bore to be signed per procuration, they disclosed that the person who accepted them was acting under a mandate, and therefore that the pursuers were bound to satisfy themselves that the mandatory truly held the power which he proposed to exercise. So far this is quite true. The procuration must exist, or the alleged granters of it cannot be bound. But if it does exist, the granters must, it is thought, be responsible for all acts which are apparently within the mandate. To hold otherwise would be to hold that no bank would be safe in discounting a bill signed ‘*per pro.*’ without making inquiry at the principal whether his agent was entitled to draw or accept that particular bill.

“But the defenders maintain a further defence, which, in the opinion of the Lord Ordinary, is well founded. Heyde was the agent for the defenders, and it was in that capacity that he held a procuration to draw and accept bills. This agency terminated on 1st September 1879. The pursuers knew that Heyde held the defenders’ procuration as agent, and they knew of the termination of the agency, which by implication terminated that procuration. When bills bearing to be signed ‘*per pro.*’ of the defenders were presented for discount, the manager of the pursuers asked Heyde for an explanation, and was satisfied with the statement that, though the agency was terminated, the transactions in connection with it had not been closed. But the bills presented for discount increased to an unusual amount, and the pursuers knew that Dewar who drew

The pursuers reclaimed, and argued;—The defenders had not given No. 7
due notice of the withdrawal of the powers which they had con- Jan. 21, 1
ferred on Heyde. It was within the powers of Heyde under the North of
mandate which he held to sign bills *per pro.* of the firm, and they land Ban
were not bound to inquire further than to ascertain the fact that he Co. v. Be
had such a mandate.¹ The defenders must suffer for their agent's fraud, Möller, &
as they placed him in such a position as to enable him to commit it.

Argued for the defender;—In the circumstances, there was a duty of inquiry imposed on the pursuers.² A man taking a bill signed *per pro.* does so at his own risk.³ The duty of inquiry here was imperative, as the bank knew of the termination of the agency before these bills were accepted.

At advising,—

LORD SHAND.—This is an action at the instance of the North of Scotland Banking Company against Messrs Behn, Möller, & Co., who, although designed as merchants in Dundee, are really merchants in Hamburg, but who carried on business in Dundee for a time; and the claim is one for payment of four bills, which, together, amount to about £700.

These bills were drawn by Messrs William Dewar & Co., manufacturers in Dundee, on Messrs Behn, Möller, & Co. in September and October 1879, and Behn, Möller, & Co. are sued as acceptors, the bank having discounted the bills on the request of William Dewar & Co. The bills are not accepted by Behn, Möller, & Co., but by Julius Heyde, per procuration of them, and, having been discounted by the bank, the proceeds were placed to the credit of the account of Dewar & Co. It was explained, and I think it appears from the evidence, that besides the four bills which are the subject of this case there are several others of subsequent dates—I think, extending into November and December 1879—which are all in the same position, and the fate of all of these will be determined by the result of this action.

It appears that in January 1869 Messrs Behn, Möller, & Co., being desirous of carrying on business through an agency in this country, entered into an agreement with Mr Heyde, by which they arranged that he should act on their behalf in Dundee, taking the management of the agency house, which they were then about to open, and that for the purposes of that agency they gave him a procuration to sign documents on their behalf. Of the same date as the agreement the firm executed a power of attorney, giving very large powers to Heyde, as their agent, to bind the firm. That power of attorney authorised Heyde to sign letters, deeds, assignments, and bills of exchange, but that not by adding the firm of Behn, Möller, & Co., which he had no authority

them was a partner of Heyde, who accepted them. The Lord Ordinary thinks that the circumstances were such as to give rise to grave suspicion of the honesty of Heyde, and to throw on the pursuers the duty of making inquiry. They failed to discharge this duty, and they must, it is thought, suffer the consequences of their failure."

¹ Swire v. Francis, 1877, 3 L. R., App. Ca., 106; Story on Agency, sec. 73.

² Alexander v. Mackenzie, 1848, 18 L. J. (C. P.) 94; Stagg v. Elliot, 1862, 31 L. J. (C. P.) 260; Smith's Mercantile Law (9th ed.), 255.

³ Hamilton v. Dixon, Oct. 29, 1873, *ante*, vol. i. 72; Colvin v. Dixon, March 15, 1867, 5 Macph. 603, 39 Scot. Jur. 302; Union Bank v. Makin, March 7, 1873, 11 Macph. 499; Sinclair, Moorhead, & Co. v. Wallace & Co., June 4, 1880, *ante*, vol. vii. 874; Grant v. Norway, 20 L. J. (C. P.), 93.

No. 79. to do, but only by signing per procuration of that firm. And this power of attorney was limited by the stipulation, that it was only in the affairs of the firm of Behn, Möller, & Co., and in transactions on their behalf, that he was authorised to sign in that way. This power of attorney was delivered to the Commercial Bank, who were from the date of its being granted apparently the bankers of Behn, Möller, & Co. in their ordinary banking transactions. In that bank the firm kept their cash-account, and in that bank also it appears that all drafts on the firm were domiciled. The power of attorney appears never to have been out of the hands of the Commercial Bank, and it is not alleged in this case that it was seen, or that its terms were specially known by the pursuers. Following on that agreement, in January 1869, there appear to have been a large number of transactions extending over a period of nearly ten years,—down to, I think, 1st September 1879. These consisted of the purchase of goods of considerable amount from manufacturers in Dundee and elsewhere in Scotland, in the name of Behn, Möller, & Co., and invoiced to Behn, Möller, & Co., and the mode in which these goods were paid for was by acceptances granted by Behn, Möller, & Co., the signature being adhibited by Julius Heyde invariably by procuration of that firm. As I have already explained, these bills were domiciled at the Commercial Bank, and Behn, Möller, & Co. provided the funds from time to time as they fell due and were payable at that bank. By September 1879, however, Messrs Behn, Möller, & Co. seem to have become dissatisfied with Heyde's actings. They were apparently largely in advance to him, and they resolved to terminate their agency, and all parties are agreed that the agency was terminated at 1st September 1879, which, it will be observed, was before the date of the bills now in question. The result of the termination of the agency was that Heyde was no longer authorised to buy goods in name of Behn, Möller, & Co. He therefore had no longer authority to sign acceptances for goods to be supplied to Behn, Möller, & Co., the arrangement after this time being that Behn, Möller, & Co. purchased goods from Heyde, and that Heyde was to take his own means of acquiring the goods which he was to sell to them. From that date it farther appears that in point of fact no goods were ever ordered in the name of Behn, Möller, & Co., either from Dewar & Co. or any other merchants they had been in use to deal with in the name of their firm. Heyde also altered the order form which had been in use in the name of Behn, Möller, & Co., and all goods were thereafter purchased by him in his own name, invoiced by the manufacturers to him, and, in so far as the defenders became purchasers of these goods, they were invoiced by Heyde to them. The bills in question were granted substantially as the price of goods in that position,—I mean goods which Heyde had ordered in his own name, and for which he was the debtor, but which it appears were sold by Heyde and forwarded to the defenders, and invoiced by him to them.

It is clear, indeed I think was not disputed on behalf of the bank, that in a question between Heyde and Behn, Möller, & Co., Heyde had certainly no authority to sign these bills per procuration of Behn, Möller, & Co., and I think it is clear also on the evidence that Dewar & Co., the drawers of these bills, could not have recovered as against Behn, Möller, & Co. the price of these goods as for goods sold to the defenders, and could not have demanded acceptances for the price. The evidence plainly shews that although Dewar & Co. understood that the ultimate destination of these goods might, and probably would, be to Behn, Möller, & Co., yet they were selling to Heyde, and to Heyde only,

and that Heyde alone was responsible to them. I observe that in the evidence of Mr Dewar, of the firm of William Dewar & Co., he says—"Previous to 1st September all the goods ordered were ordered in name of Behn, Möller, & Co. Subsequent to 1st September every written order we received, save one, was from Heyde & Co. The goods which were ordered by the old firm of Behn, Möller, & Co. were invoiced by us to Heyde & Co. (Shewn Nos. 673-679 inclusive)—These are orders we received from Heyde & Co. Some of them are on new forms printed with Heyde & Co's. name, and others on the old forms with Behn, Möller, & Co. altered. All the goods sent to Heyde & Co. after 1st September were invoiced by us to Behn, Möller, & Co." And there is the witness Blair, who succeeded Heyde as agent or representative of Behn, Möller, & Co. in Dundee, whose evidence is very clearly to the same effect.

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But although Heyde was not entitled to accept these bills per procuration of Behn, Möller, & Co., and although Dewar & Co. were not entitled to obtain acceptances, or to require Behn, Möller, & Co. to pay the prices of these goods, the question still remains whether, looking to what had occurred before these bills were presented for discount, the bank were entitled to discount the bills on the faith of Heyde's signature per procuration as binding the defenders. On that question, besides what occurred after September 1879, the material facts relied on by the pursuers appear to be these: In the first place, the existence of the procuratory or power of attorney, to which I have already referred, which had never been formally recalled; in the next place, the extensive actings which followed upon that procuratory, large transactions by way of purchases of goods, and a very large number of bills which had passed through the Commercial Bank, having been discounted by the sellers of these goods, and having the signatures of "p. p. Behn, Möller, & Co., Julius Heyde;" and third, no special notice in Dundee that the agency had terminated, and that Heyde no longer had power to sign bills. A question has been raised by the defenders as to their legal obligation under a signature by Heyde per procuration as to whether it would be binding on them even if the mandate authorising him to accept bills had been admittedly subsisting, seeing that the signature he was authorised to affix was per procuration only, and not the signature of the firm. It has been maintained that with such a mandate and a signature of this description, the defenders would not be bound in any transaction which did not fall within the terms of the mandate, but could only be bound in transactions on their behalf, which this plainly was not. We were referred to authority in English cases to support the view that with such a mandate as this, in which an agent is authorised only to bind his constituents for transactions entered into on their behalf, and by signing per procuration of their firm, a party discounting such a bill must satisfy himself that the particular transaction falls within the mandate—that it was a transaction for behoof of the party granting the mandate—and that he must take the risk of this upon himself making his own inquiries. The Lord Ordinary has expressed an opinion adverse to that view. It appears to me to be unnecessary to decide that question, and I do not mean to express a final opinion on it. I shall only say that the cases which have been referred to, and which have probably governed mercantile transactions in England for a number of years, must receive very serious consideration in any case raising that question for the decision of the Court. In the present case I think there is enough in the facts disclosed in this proof to prevent the pursuers from found-

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ing successfully on the mandate which authorised Heyde to sign acceptances per procuracion of his firm. The facts which appear to me to be sufficient to show that the pursuers are not entitled to succeed are these,—In the first place, and mainly, that on the 1st of September 1879, before these bills were granted, the agency of Heyde on behalf of Behn, Möller, & Co. had not only been recalled, but that the bank knew that that was so. There is no doubt about this. The agent for the bank at Dundee expressly admits it, and we find the subject referred to in letters to the head office two or three weeks before the agency in point of fact terminated. In the next place, it appears that the bank, through its agent, was also aware that Heyde had no longer authority to buy goods in the name of Behn, Möller, & Co. for which they were to be responsible, and that, in pursuance of an agreement to that effect, Heyde was to buy goods in his own name, and to supply them to Behn, Möller, & Co., he being himself the debtor to the manufacturers. And beyond this the banking transactions between Heyde and the North of Scotland Banking Company were changed in their character. A material change occurred after 1st September, for while Heyde had all along an account with the North of Scotland Banking Company in his own name, which was of the nature of a wages account, into which small amounts were deposited from time to time, and on which he made drafts for the wages of his workers, after that date the character of this account was entirely changed. It was no longer a wages account, but an account of very much larger transactions. Heyde was still connected with Behn, Möller, & Co., and was in the way of supplying them with goods, and it is not to be thrown out of view that all the bills previous to September 1879, as I have already mentioned, had been domiciled at the Commercial Bank,—the bank where Behn, Möller, & Co. had their account, and where these bills were made payable,—whilst the bills now in question were not so domiciled. Now, taking all these circumstances together, with the fact that Heyde had no authority to sign the name of the firm in a question between him and those who were formerly his constituents, it appears to me that the bank must fail in this action. The termination of the power to purchase goods on behalf of Behn, Möller, & Co., and in their name, necessarily terminated the right to grant acceptances as for goods, and the bank knew that, and yet these are acceptances as for goods. The bank-agent explains that, in the knowledge of the circumstances I have now mentioned, he made some inquiry,—that is, inquiry at Dewar & Co. and at Heyde,—as to what was the consideration for which these bills had been granted, and all that can be said is that these persons misled him in answer to these inquiries. The bank-agent explains that Heyde told him that these bills had some connection with transactions of Behn, Möller, & Co. which had not been wound up, and he thought fit to take these explanations as sufficient. If he did so, it appears to me that the bank must take the consequences. They were misled, but I think that in the circumstances in which they were placed—with distinct knowledge of the termination of the agency, clear knowledge that Heyde was no longer entitled to bind Behn, Möller, & Co. for goods purchased by way of acceptances—they themselves took the risk of discounting such acceptances as were presented. And there is another circumstance that is material upon this branch of the case,—I mean as to whether the bank had been misled by the defenders in this matter. It appears that Dewar & Heyde were, in the knowledge of the bank, themselves partners in another business, a calendering business, which had gone on for some time. They were upon the closest

relations, and nothing was more likely than that they should grant accommodation bills to each other, as in point of fact they did. Taking all these facts into account, I agree with the Lord Ordinary in thinking that in the circumstances in which Dewar & Heyde were placed the pursuers were not entitled to rely upon the signature of Heyde as sufficient, and that the insufficient inquiries they made have been the cause of the loss, which I think they must sustain.

Counsel for the pursuers very properly brought under the notice of the Court some circumstances to which I have not as yet adverted, but which I must notice in order to shew that they have received due consideration. It was said that although the agency was terminated there were two classes of documents that Heyde had been allowed to sign per procuration of Behn, Möller, & Co. The first of these were bills purchased by Behn, Möller, & Co. abroad, and sent home as remittances to account of their obligations to Heyde & Co. in this country. These bills were purchased in name of Behn, Möller, & Co., and in place of Behn, Möller, & Co. endorsing them before sending them to this country they sent them unendorsed, and allowed Heyde to sign per procuration of their firm and thus collect the money. It perhaps was, and I do not say it was not, a loose way of doing business to allow that system to continue, but it must be observed that these bills were in a totally different position from the bills now sued on, in this respect, that the only purpose for which Heyde's signature of the firm was required was to enable him to collect the money—that is, to cash the documents so as to make the money available for the payment of Behn, Möller, & Co.'s obligations. It was quite unlike an acceptance of a bill creating a new obligation. It was simply an indorsation like an indorsation on the back of a letter of credit or on the back of an order to enable a person to receive the money, and I do not think that documents of that class are material in this question, or that it can be said that Heyde, who was no longer the agent for Behn, Möller, & Co. to purchase goods and grant acceptances for them, might not still be allowed to sign documents of that kind as he had been in use to do.

The other circumstance referred to by counsel for the pursuers was that certain cheques which Heyde was allowed to draw upon the defenders' bankers in London after the termination of the agency on 1st September 1879 had been honoured by the defenders. These were not numerous, being, I think, three in number altogether. Whether there was any special arrangement about these or not I cannot tell. There appears to have been some special authority however, because in the evidence of Blair he speaks to special authority to sign cheques, or it may be that the defenders might have disputed their liability for these cheques.

But this circumstance, even taken with the fact that these cheques had been honoured, is not, I think, sufficient to take off the broad effect of the agency having terminated, and that Heyde had no longer power to purchase goods for Behn, Möller, & Co., and to bind them for the prices thereof.

In the whole circumstances, while I cannot help saying that there was some neglect on the part of Behn, Möller, & Co. in not giving more general notice that the powers held by Heyde had ceased, still I agree with the Lord Ordinary in thinking that the pursuers cannot succeed. The absence of notice is supplied by the fact admitted by the bank-agent, that he really knew all that Heyde knew as to the termination of the agency, and the position in which Heyde was placed after 1st September 1879, and I therefore recommend to your

No. 79. Lordships to pronounce judgment adhering to the interlocutor of the Lord Ordinary.

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LORD MURE.—I concur with the Lord Ordinary, and with the judgment pronounced by Lord Shand. There are two questions in this case, as the Lord Ordinary has explained in his note, the first, as to the terms of the authority granted to Heyde, and the law relative thereto, which it is not necessary to dispose of in the view which the Lord Ordinary and Lord Shand take of the case, but, for my own part, I confess I am inclined to be of the Lord Ordinary's opinion upon it. On the second question also, after anxious consideration of the evidence, I come to the same conclusion as Lord Shand and the Lord Ordinary. The transactions were undoubtedly somewhat loose from a business point of view; but still it is clear on the evidence that the bank were well aware by the 1st September, and even before that, as is proved by the terms of their own letters dated prior to that day, that the agency was to come to an end, and Heyde was to do business on his own account from that date. Inquiry was no doubt necessitated. By the terms of the power of attorney, as shewn in the translation before us, it is plain that the power to sign per procuracion of their firm was given by Behn, Möller, & Co. to Heyde, as their agent in a certain concern, for in the first head of the agreement, as we have it translated in English, they confer on him the "management of the branch house which they are to open on the 15th January of this year in Dundee, under the same firm, and at the same time give him procuracion," procuracion, that is, in regard to the management of the branch house. The procuracion was clearly given to Heyde *qua* agent in that concern. If the bank had asked then to see that document, and had made the inquiries which they ought to have made, they would have ascertained that the nature of the business to be carried on by Heyde after the 1st September would not warrant him in accepting bills per procuracion of the firm. As they did not make that inquiry it is plain on the evidence that they are not warranted in the demand they now make. It was quite well known that Heyde had had such a power from Behn, Möller, & Co., and it was equally notorious in Dundee that his agency ceased as from 1st September. I am clearly of opinion that the bank did not take such action as they ought to have done, and are therefore not entitled to recover the amount of their loss from the defenders.

LORD PRESIDENT.—The facts of this case have been so fully and accurately stated by Lord Shand that it is quite unnecessary to go over them again. I think the case may be decided upon a fair view of the evidence, without the necessity of deciding any new or delicate questions of law. The bills which are sued on by the pursuers were drawn by Dewar & Co., and were accepted by Heyde, per procuracion of Behn, Möller, & Co. The acceptance was certainly not honestly made, nor was it made in the service of Behn, Möller, & Co., but was really an acceptance given for the joint accommodation of Dewar & Co. and Heyde, and therefore, in a question with Dewar & Co. or Heyde and the defenders, there can be no doubt that these bills cannot be enforced. But they were discounted with the pursuers' banking establishment, and the question is whether they were justified in discounting them in reliance on the procuracion of Heyde for Behn, Möller, & Co. That the power of accepting bills, per procuracion of Behn, Möller, & Co., was at one time held by Heyde there can be no doubt. In January 1869 the defenders opened a branch of their business in

Dundee, and they granted a very full power of attorney to Heyde as their agent, and, at the same time, they entered into an agreement specifying the conditions upon which he was to transact their business. The procuration or power of attorney was lodged with the Commercial Bank, and the whole of the legitimate business of the agency was transacted through that bank. In 1879 the agency came to an end, the precise date at which it expired being 1st September of that year, and it was quite well known that the agency was brought to an end, or was to be brought to an end, at that date, and, among others, it was quite well known to the pursuers. Any power of attorney containing this power to draw and accept bills, per procuration of the defenders, was granted exclusively in connection with the branch business or agency which the defenders had established, and, of course, the proper inference that anybody would draw was that when the agency came to an end the power to draw and accept bills per procuration of the defenders came to an end also, the object of granting that procuration having then terminated. If the matter stopped there the conclusion would be inevitable that the North of Scotland Banking Co. became aware that Heyde's representation of the defenders had come to an end, and that he was no longer entitled to act for them as their agent, and, that being so, they were clearly not justified in relying upon the procuration, which had been granted only for the purposes of that agency. But they say that, while Heyde informed them that the agency had come to an end, he told them at the same time that he would continue to accept bills per procuration of the defenders for the purpose of winding up transactions connected with the agency, and they chose to rely upon that representation. Were they justified in doing so? I think clearly not. There had been no business of this kind transacted with their banking establishment previously. The banking business of the defenders had been done with the Commercial Bank, in whose hands the power of attorney was lodged; and the very first bills that were negotiated at the pursuers' bank were the bills that are now sought to be enforced. It seems to me that, upon these facts, they were not entitled to rely upon the procuration, or to hold that the acceptance of Heyde would be binding upon the defenders after he had ceased to be their agent, and upon that single ground I think it is clear that they are not entitled to enforce payment of these bills against the defenders. The circumstances relied upon by the pursuers as creating a kind of specialty that this power of signing per procuration still existed have been sufficiently noticed by Lord Shand, and I do not think they are sufficient to remove the general impression created by the evidence, that the pursuers had no right to rely upon this procuration as an existing procuration. I therefore agree with your Lordships that the interlocutor of the Lord Ordinary ought to be adhered to.

LORD DEAS was absent.

THE COURT adhered.

CARMENT, WEDDERBURN, & WATSON, W.S.— J. SMITH CLARK, S.S.C.—Agents.

No. 79.

Jan. 21, 1881.
North of Scot-
land Banking
Co. v. Behn,
Möller, & Co.

No. 80.

Jan. 22, 1881.
Whyte v. Millar & Young,
&c.

JAMES WHYTE, Pursuer and Respondent.—*Lang.*
MILLAR & YOUNG, Defenders and Appellants.—*Jameson.*
DEVAUX FRERES & CIE. AND MANDATORIES, Defenders.

Deposit—Locatio operarum—Deposit of goods for hire without stipulation as to duration of contract.—Where goods are warehoused for hire without a stipulation as to the duration of the contract, the depositary is not entitled to insist upon their being removed at his pleasure without shewing reasonable cause therefor.

Circumstances in which it was held that no such reasonable cause had been shewn.

1st Division.
Sheriff of
Lanarkshire.
M.

MILLAR & YOUNG, yarn merchants, Glasgow, got from Devaux Frères & Cie., manufacturers in Belgium, certain yarns, which, on arrival, were considered disconform to order, and were accordingly, upon 24th August 1880, stored by Millar & Young with James Whyte, storeman, Glasgow, in name of Devaux Frères & Cie. Millar & Young afterwards raised an action against Devaux Frères & Cie., and arrested the yarns in the hands of Whyte upon 25th and 31st August. Whyte, being desirous of getting the goods removed, and failing to get payment of the store rent, thereupon presented this petition in the Sheriff Court of Lanarkshire against Millar & Young and Devaux Frères & Cie. and mandatories, for warrant to sell the yarn, amounting to 13,021 pounds, the proceeds (under deduction of warehouse rent, and other claims incurred in respect of the goods) to be consigned in the hands of the Clerk of Court.

Millar & Young stated that they would not object to the goods being removed to another store, there to lie in the pursuer's name, under orders of Court.

Devaux Frères & Cie. stated that they had no interest in the goods, which they had sold to Millar & Young, but had no objection to their being removed.

The pursuer pleaded ;—The defenders having refused to remove their goods from his premises, the pursuer is entitled to decree of sale.

Millar & Young pleaded ;—(1) The pursuer having knowingly received the yarn into store, he is not entitled now to force a sale thereof. (2) In the circumstances stated, the defenders Millar & Young are not liable for the costs of this petition.

Devaux Frères & Cie. pleaded ;—The defenders Devaux Frères & Cie., having no interest in the yarns in question, this application, so far as they are concerned, is unnecessary, and they cannot be prejudiced by it.

The Sheriff-substitute (Erskine Murray), on 3d December 1880, pronounced an interlocutor in which he found in fact as above, stating also that the inflammable nature of the goods in question and the consequent action of the insurers had given rise to the pursuer's action, and further found "on the whole case and in law that, in the circumstances, pursuer is not bound to retain the yarns, or to remove them at his expense and keep them in another store in his own name, and that he is entitled to warrant of sale as craved."

Millar & Young appealed to the Sheriff (Clark), who, on 18th December 1880, adhered.*

* "NOTE.—The question here is, is the pursuer bound to keep the goods for any time longer than he chooses to do so? I do not think he is. He has not undertaken to keep them for any specified period, and apparently for good reasons he now wishes to be relieved of their custody, and to be paid his claim for storage. With this view he has required the defenders to take away their goods. This they have refused to do—in point of fact, they refused to do any—

Millar & Young appealed to the Court of Session, and argued ;—The contract with the warehouseman was that he should keep the goods in safe custody so long as the rent was paid. He was not entitled to thrust the goods into the street as he proposed to do, and such a step had never hitherto been suggested in such a case. No. 80.
Jan. 22, 1881.
Whyte v. Millar & Young,
&c.

Argued for the pursuer ;—A contract of deposit without any stipulation as to time could be terminated at the pleasure of the party with whom the goods were deposited. There was no averment of usage to the contrary. Supposing the warehouseman was only a tenant and his lease came to an end, could it be said that he must provide storage nevertheless ?

LORD PRESIDENT.—This is a very novel proceeding on the part of this warehouseman, who, having received certain goods for the purpose of safe deposit and custody, proposes, at his own hand and without any particular reason, to insist on the person who has deposited these goods removing them. If the law laid down by the Sheriff were sound, it would certainly be attended with very startling consequences. If a warehouseman may at any time, and without assigning any reason, insist on a depositary removing his goods, that would to a great extent put an end to the object and the usefulness of such warehouses. The goods were deposited in August last. They consisted of yarns, and though there is something in the Sheriff-substitute's interlocutor about the danger arising from the inflammable nature of such goods, there is nothing in the record to justify such a suggestion. It is a very common subject of deposit. In the month of October the warehouseman insisted that the defenders should remove the goods, and the question is, whether he is entitled to have that demand executed.

I do not think that the question is whether he is entitled to have the goods sold, because that question arises only when the defenders refuse to remove them ; and whether they are bound to do so or not depends on the nature of the contract between the parties. If the defenders were not bound to remove the goods, then any pretence that the warehouseman is entitled to sell them is at an end.

Now, it may be observed, in the first place, that this is not a pure contract of deposit, because that is a gratuitous contract, and this is one for hire. As Mr Erskine says (iii. 1, 26),—"Deposition is a gratuitous contract on the part of the depositary. If any consideration is to be given him for his pains in keeping it, the contract resolves into *locatio operarum*." This is the nature of the contract we are dealing with here. In the ordinary case there can be no doubt that it is for the interest of the warehouseman that the goods should lie in his warehouse as long as possible, that he may thereby get as large a rent as possible ; on the other hand, it is for the interest of the owner of the goods to turn over his goods as rapidly as possible, and to make his money out of them, and therefore to pay as little rent as he can. Accordingly, such a case as the present is very unlikely to arise.

But when a warehouseman has received goods for custody it must be obvious that very important legal consequences follow, bearing on the rights of third parties, and not merely of the parties to the contract. The goods by being de-

thing. The pursuer has accordingly asked the Court to have the goods sold—the only alternative that remained to him. He seems fully entitled to this remedy . . . I do not see that the Sheriff-substitute could well have pronounced any other interlocutor than he has done."

No. 80. Jan. 22, 1881.
Whyte v. Mil-
lar & Young,
&c. posited become liable to certain diligences to which they are not open when they are in the hands of their owner. They may be the subject of sale without actual delivery. That contract may in such circumstances be made real by constructive delivery, which would not have been the case if the goods had continued in the possession of the owner. Now, to say that the warehouseman may thrust the goods out at once and without any reason, so as to defeat all the legal consequences which flow from the deposit, would be a very strong thing. I should be very slow to give any sanction to such a doctrine. In the present case the pursuer has been unable to shew any justification for the course he proposes to follow. There is no ground for it upon the record. In the cases suggested by Mr Lang I can very easily understand that the defenders may be entitled to be relieved of their contract. If their title to the warehouse come to an end, they may no longer be bound to perform the contract, because it has become impossible for them to do so. And there may be other cases in which there may be a reasonable and therefore a valid ground for the contract coming to an end, but there is no such case here. The goods are yarns. One sees their nature. They may be inflammable, and may create risks and dangers, but the pursuer knew that when he received them. There is nothing which he did not know then which he has since come to know. There was no reason in October for removing the goods which did not exist in August. I am very clear, therefore, that the view taken in the inferior Court is unsound, and that the Sheriff's interlocutor ought to be reversed.

LORD MURE.—The statements in this record are of the most meagre description. The ground on which the Sheriffs have given effect to this application is that the pursuer is not bound to keep the goods any longer than he pleases. I cannot say this is a good ground in law. I cannot say that the goods can be so removed unless there has been a stipulation as to time. Neither can I concur in the view of the law contended for by Mr Jameson—that the defender is bound to keep the goods as long as the owner pays the hire and thinks fit to leave them there.

Here diligence has been used upon the goods within a month of the time when they were deposited. I do not very well see how the pursuer is to get rid of them. The Sheriff-substitute proceeds on the ground, that they are of an inflammable nature. This is not averred on the record, but if it had been averred, and were distinctly proved, I am not prepared to say that it would not have affected my view of the case.

LORD CURRIEHILL concurred.

LORD DEAS and LORD SHAND were absent.

THIS interlocutor was pronounced:—"Recall the interlocutors of the Sheriff and Sheriff-substitute, dated respectively 18th and 3d December 1880: Refuse the prayer of the petition, and decern: Find the appellants entitled to expenses both in this Court and in the inferior Court: Allow," &c.

DOVE & LOCKHART, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

FARQUHAR MATHESON M'LARTY, Pursuer.—*Trayner—Mackintosh.*
DAVID SCOTT STEELE, Defender.—*Asher—Millie.*

No. 81.

Jan. 22, 1881.
M'Larty v. Steele.

Reparation—Oral slander—Issues—Counter issue of Law of Foreign State.—

In an action of damages for oral slander between two domiciled Scotchmen the slander was alleged to have been uttered in Penang. The defender proposed this counter issue, "whether, according to the law of Penang, no reparation is due for verbal slander unless special damage is proved." Counter issue *disallowed*.

Opinions that the case fall to be tried as if the slander had been uttered in Scotland.

On 28th June 1880 M'Larty, an engineer, then residing in Greenock, raised an action of damages for verbal slander against Steele, another engineer, and at that time also residing in Greenock. The verbal slander complained of was alleged to have been uttered in November and December 1879 and April 1880, on several occasions condescended on, in Penang and Singapore, and was averred to have consisted of statements that M'Larty had "done" and "cheated" Steele and others in connection with a partnership which had at one time subsisted amongst them in Penang.

2D DIVISION.
Ld. Curriehill.
I.

M'Larty had left Penang before the alleged slander had been uttered, but at the date of the action both M'Larty and Steele, who were Scotch by origin, were resident in Greenock. M'Larty averred that in consequence of the alleged slander his prospects of business from Penang and the Straits Settlements had been much injured.

Steele denied the slander, and added,—“Further averred, that the alleged statements, even though they had been made, would form no competent ground of action against the defender according to the laws of Penang and Singapore, the places where they are alleged to have been uttered, in respect that no special damage is alleged to have been sustained by or through said utterances. According to the law of Penang and Singapore, as according to the law of England, no reparation is due for verbal slander, unless where special damage is alleged and proved to have been sustained.”

He pleaded, *inter alia* ;—(1) The action, being for alleged oral slander in Penang, is incompetent.

The Lord Ordinary appointed a day for the adjustment of issues.*

Steele then proposed the following counter issue :—“Whether, according to the laws of Penang and Singapore, no reparation is due for verbal slander unless special damage is proved to have been sustained through said verbal slander?”

On 14th January the Lord Ordinary disallowed Steele's counter issue, and approved of M'Larty's issues.

Steele reclaimed, and argued ;—No doubt, if a thing is wrong in the place where it is done, and also in the place where the action for reparation is raised, and the defender is subject to the jurisdiction of the Courts

* “NOTE.—This is an action of damages in respect of verbal slander alleged to have been uttered by the defender of and concerning the pursuer in Penang. Damages are claimed as solatium for injured feelings, and in respect of injury to the pursuer's character and reputation as a merchant, and to his business. The defence is that by the law of Penang verbal slander is not actionable, unless it is alleged and proved that it has caused special damage. The law of Penang is merely one of the facts in the case which must be proved at the trial, and it will then be soon enough to determine whether or not damages can competently be allowed for anything beyond the special damage which may be proved. The proper course seems to be at present simply to order issues to be adjusted.”

No. 81.
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there, then the action will lie. But it is not enough that the thing done shall be morally wrong; it must confer a legal remedy in the place where it is done. Here the words used were used lawfully at the place where they were used, and the person using them cannot be made liable for them in a different place where the use of them is unlawful, merely by the fact of an action being raised there. The counter issue should be allowed, as the law of Penang must be affirmed as a fact by the jury. This being a separate and distinct defence, is properly made the subject of a counter issue. This was a different case from the cases of injury, &c., as in all these cases a remedy of some sort existed, both in the *lex loci* and *lex fori*.¹

LORD JUSTICE-CLERK.—My opinion on the whole matter is that this proposed counter issue is entirely outside the case.

The verbal slander of the pursuer is said to have been uttered in Penang, after he had left that place, and this action is now brought against the defender, who uttered it, and who is now also resident in Scotland. The defender maintains that when he was in Penang he was under the law of England, according to which he avers that he was entitled to utter verbal slander without incurring any civil penalty, unless special damage is proved to have followed on the slander. It was assumed in the argument submitted to us that the law of England was that to utter verbal slander was not an offence unless special damage were averred and proved. It may be the case that by English law redress will not be given for verbal slander unless special damage be proved, but it is certainly not the case that therefore verbal slander is lawful. We have thus here an admitted wrong, which is a wrong both by the law of the place where it was committed and of the country where the action for redress is raised. I am clearly of opinion that a jury should have an opportunity of saying whether damage has been suffered from the wrong or not, and, if it has, to what extent.

LORD YOUNG.—I am entirely of the same opinion, and have really nothing to add except that I am not, as at present advised, prepared to hold that evidence as to what the law of Penang on the subject of verbal slander is, is at all pertinent to the case. I think if the facts be proved that verbal slander was uttered, and that the pursuer suffered patrimonial loss, it would not be pertinent to this case, raised and tried in Scotch Courts, to show that according to the law of Penang special damage must be proved to entitle him to damages. I think it necessary to say this, because the Lord Ordinary has indicated that that point would be open at the trial. I am inclined to say that such evidence would not be pertinent. The case must be tried according to the law of Scotland, and if there be sufficient evidence to entitle the pursuer to damages under the law of Scotland that is enough, and it would not be relevant to prove that something more is necessary according to the law of Penang.

LORD RUTHERFURD CLARK.—I am of the same opinion as both your Lordships. I think this case should be tried as if the slander had been uttered in Scotland.

¹ Scott v. Seymour, Dec. 2, 1862, 32 L. J. Exch. 61; Phillips v. Eyre, Jan. 29, 1869, L. R. 4 Q. B. 225, and June 23, 1870, L. R. 6 Q. B. 1; Mostyn v. Fabrigas, 1 Smith's L. C. 652; Horn v. North British Railway Co., July 13, 1878, ante, vol. v. p. 1055.

LORD JUSTICE-CLERK.—I may remark that I intended to say in my opinion No. 81. what Lord Young has very properly added to it.

THE COURT adhered.

MURRAY, BEITH, & MURRAY, W.S.—ADAM SHIELL, S.S.C.—Agents.

Jan. 22, 1881.
M'Larty v.
Steele.

JOHNSON & REAY, Pursuers.—*Macdonald—J. A. Reid.*
NICOLL & SON, Defenders.—*D.-F. Fraser—Asher—W. C. Smith.*

No. 82.

Sale—Right of iron manufacturer to fulfil contract with iron not from his own works.—A firm of iron-merchants purchased a quantity of iron from a Reay v. Nicoll manufacturer, the quality being defined to be "Crown," to pass Lloyds' survey, & Son. The contract-note was written on paper of the manufacturer's, bearing a "crown" stamped on it, and "Brand, Moor," along with the manufacturer's name as manufacturer. Before all the iron was supplied the manufacturer closed his works owing to want of business. He then wrote to the buyers asking them to specify for the rest of the iron, and stating that he had arranged with another manufacturer to supply them. The buyers refused to do this, and declined to take any iron but the manufacturer's iron, alleging that that was what they had bought. In an action at the instance of the manufacturer for damages for breach of contract, held (following *West Stockton Iron Co. v. Nielson & Maxwell*, July 3, 1880, ante, vol. vii. p. 1055), that the iron tendered being of equal value with that contracted for, and the buyers having failed to make out that they had any special make in view, they were liable in damages.

Jan. 25, 1881.
Johnson &
Nicoll & Son.

By contract-note, dated 13th June, and confirmed on 19th June 1878, 2D DIVISION. Messrs Johnson & Reay, iron-manufacturers, Stockton-on-Tees, sold, and Lord Ruth-
Messrs Nicoll & Son, iron-merchants, Dundee, bought, 750 tons of ship- furd Clark.
plates. R.

The contract was written upon paper bearing on the margin a crown, the initials J. & R., and the words "Brand," and "Moor," besides the crown, and below, Johnson & Reay, iron-manufacturers. The terms of the contract were as follows:—

"The Moor Ironworks,

"Stockton-on-Tees, 13th June 1878.

"Sold to Messrs Nicoll and Son, Dundee, per Messrs John Swan and Brothers (Limited), ship-plates as under, viz.—

"Quantity.—Seven hundred and fifty (750) tons.

"Quality.—'Crown,' to pass Lloyds' survey.

"Price per ton of 2240 lbs.—Six pounds (£6).

"Not less than a truck-load to be specified at a time.

"Terms of payment.—Cash, less 2½ per cent on 10th of month following delivery.

"Rate of delivery.—Over next three or four months, in about equal monthly quantities.

"Place of delivery.—Free on trucks at our works. Buyers to have the option of taking delivery of the whole, or a portion of contract, f.o.b. Stockton or Middlesbro', we charging nett cost, in any case not exceeding 2s. 6d. per ton.

For JOHNSON & REAY,
"F. W. STOKER.

"In the case of strikes or combinations of workmen, or accidents causing the stoppage of the works, the supplies of iron now contracted for may be suspended during their continuance. This clause applies to buyers and sellers."

On 9th July a similar contract-note for 300 tons ship-plates was sent by Johnson & Reay, and confirmed on 19th July by Nicoll & Son. The

No. 82. delivery under this contract was stipulated to be over the next three or four months after the date of the contract in about equal monthly instalments.

Jan. 25, 1881.
Johnson &
Reay v. Nicoll
& Son.

Nicoll & Son failed to supply specifications for all the iron bought within the times stipulated in the contracts, but Johnson & Reay, though often asking for specifications, did not close the contracts, and allowed them to run on. In May 1879 the position of affairs was this, that of the plates under the contract of 13th and 19th June some 666 tons had been delivered, leaving about 84 tons still to be specified for, and under the contract of 9th and 19th July no specifications had ever been sent, and, consequently, no plates had been delivered.

On 21st May 1879 Johnson & Reay wrote to Nicoll & Son as follows:—
“We beg to inform you that in consequence of our inability to secure sufficient specifications to keep our works going we have been compelled to close them for the present, and have therefore made arrangements with some of our friends to manufacture for us the iron which we are under contract to deliver to you.

“In deference to your wishes from time to time, by reason of your being unable to accede to our repeated requests for specifications in accordance with the terms of your contracts with us, the delivery of the iron sold to you has been deferred, and it is now very considerably in arrear. Having regard, therefore, to the arrangements we have made with the firms who are manufacturing the iron for us, and to prevent complications with them, we must ask you to be good enough to let us have specifications for the quantity due, . . . without delay, and continue to specify in accordance with the terms of your contracts.”

Nicoll & Son having taken no notice of this letter Johnson & Reay instructed their solicitors to write them, requesting specifications under the contracts at once. This the solicitors did on 29th May. In reply to this letter Nicoll & Son wrote on 2d June to Johnson & Reay, as follows:—
“We enclose specifications of plates, which you will please be very particular in rolling exact to size, both in length, breadth, and thickness and quality, so that there be none rejected, each plate to be distinctly branded ‘Moor (Crown) J. & R.’ Please have all ready by end of the week, when we will advise you where to ship them. Also say approximate weight.”

On 4th June Johnson & Reay’s solicitors wrote Nicoll & Son in these terms:—
“In asking in our letter to you of the 29th ultimo for an immediate specification we requested such specification to be for the whole of the balance of your contracts of the 9th July and 13th June 1878. The specifications you have sent will not exhaust such balance, and do not therefore comply with our letter.

“The time for delivery during each of the four contracts you have with our clients has elapsed; and we need hardly remind you that our clients are therefore not bound to deliver against any specification that you may send. Your contracts are broken, and our clients are in a position to sue you at once upon them. They have no wish to do this, however, if you will undertake to complete all the contracts without any further delay. But you must not ask our clients to do what they are not bound to do, namely, to brand any iron they may deliver to you ‘Moor (Crown) J. & R.’ They are under no contract to manufacture the iron. They simply agree to sell it; and, as they informed you in their letter of 21st ultimo, they are getting the iron covered by their contracts made for them by other firms in the district, and the iron made by them will of course bear their brand and not our clients’. We may add that the firm who will manufacture your iron will be the West Stockton Iron Company, Limited,

whose make you are now, we understand, taking delivery of under No. 82. contracts you have with them. Of course we need hardly add that the iron will in all respects comply with the conditions of our clients' Jan. 25, 1881 contracts with you." Johnson & Reay v. Nicoll & Son.

Nicoll & Son having refused to take delivery of any plates not manufactured by Johnson & Reay themselves, after some farther correspondence Johnson & Reay, on 17th November 1879, raised an action in the Court of Session against Nicoll & Son, in which they concluded for £104, 17s. 4d. as damage sustained by them owing to the differences between the contract prices and the market rates under the contract of June, and for £375, as the same under the contract of July.

They pleaded;—The defenders having wrongfully, and in breach of said contracts, failed to supply specifications, and having thus prevented the completion by the pursuers of the contracts, are liable in damages as concluded for, with expenses.

Pleaded for Nicoll & Son;—(2) There having been no undue delay on the part of the defenders in ordering the iron under the contracts of June and July 1878, and any delay that did take place having been caused through the pursuers' fault and breach of faith with the defenders, the latter are not responsible therefor. (3) The defenders being ready in June 1879 to take delivery of the whole iron under said two contracts, and being still ready and willing to do so, are entitled to absolvitor.

A proof was led, from which it appeared that the "Crown" brand of all manufacturers in the Cleveland district was much the same. Nicoll & Son endeavoured to prove that Johnson & Reay's "Crown" brand was better than that of other manufacturers, but they failed in establishing that as a fact. They, however, shewed that in August 1878, during the currency of the contracts, they had written to say that they were not inclined to take iron not of Johnson & Reay's manufacture, and intimating that they were especially unwilling to take the Stockton Company's iron.

On 12th November 1880 the Lord Ordinary ordained the defenders to pay £400, "being the damages caused to the pursuers by the defenders' breach of the contracts of 13th June and 9th July 1878."*

Johnson & Reay reclaimed against the Lord Ordinary's findings on another claim made in their action, which turned upon matters of fact.

Nicoll & Son took advantage of the reclaiming note to bring the above finding of the Lord Ordinary under review.

Argued for Nicoll & Son;—This case was easily distinguishable from the *West Stockton* case,¹ referred to by the Lord Ordinary. (1) The pursuers here were only manufacturers of iron, and not iron-merchants, and

* "NOTE.—1. *The contracts of June and July 1878.*—These contracts were open in May 1879. On the 21st of that month the pursuers intimated to the defenders that they had closed their works, and that they would supply the iron from other manufacturers. The defenders on 2d June insisted that the pursuers should deliver iron of their own manufacture, and refused to take any other. The question thus comes to be, which of the parties took the just view of the contracts.

"The decision of the Court in the case of the *West Stockton Company*, 7th July 1880, seems to the Lord Ordinary to rule the question. He cannot distinguish it from the present case, and he is therefore of opinion that the defenders are in the wrong.

"It seems to the Lord Ordinary that the damages should be settled by reference to the market prices which obtained at the date of the breach. On this footing they may, he thinks, be fairly estimated at £400."

¹ *West Stockton Iron Co. (Limited) v. Nielson and Maxwell*, July 3, 1880, ante, vol. vii. p. 1055.

No. 82. it was as manufacturers that the contracts had been entered into. (2) "Moor" Crown brand was what was purchased, and nothing else; that was clear from the stamp on the pursuers' own paper on which the contract-note was written. It was iron of that trade-mark that was sold. (3) The buyers here had selected the pursuers to supply them; they had not merely, as in the *West Stockton* case, gone into the market for a cheap contract for Crown iron. That they had always taken this view was apparent from their letter in August saying that they did not wish other people's iron. Moreover, there was evidence here that the iron made by the pursuers was better than that made by others. In the *Stockton* case it had been matter of admission that the iron was all of the same quality. Argued for Johnson & Reay;—All that was sold was a certain amount of iron "Crown quality"—a thing known to the trade,¹ and as long as that was sent they could not complain. This was, if anything, a stronger case of mere general quality than the *West Stockton* one.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD CRAIGHILL unanimously held that the case was ruled by the *West Stockton* case.

THE COURT adhered.

FINLAY & WILSON, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

No. 83. JAMES RUSSELL (Inspector of Poor of Colinton), Pursuer.—*Wallace*.
 GEORGE GREIG (Inspector of Poor of City Parish, Edinburgh), Defender.
 —*J. A. Reid*.
 JAMES CRAIG (Inspector of St Cuthbert's Combination, Edinburgh),
 Defender.—*Kinnear—M'Kechnie*.

Poor—Birth Settlement—Settlement of child born in poorhouse of one parish situated in another parish.—The parish of A built a poorhouse in the parish of B. A child born of a pauper in that poorhouse afterwards became chargeable on its birth parish. *Held* that the parish of B and not that of A was liable.

2D DIVISION. IN 1870 the City Parish, Edinburgh, built a poorhouse on the estate of Lord Ruthers-
 furd Clark. I. Craigmackhart, in the parish of Colinton, which was thereafter used as the only poorhouse of the City Parish. On 16th March 1872 a pauper named Margaret Cunningham, who was English by birth, and who had no residential settlement in Scotland, was confined of an illegitimate son, named John Cunningham, in the City Poorhouse situated in the parish of Colinton. John Cunningham became chargeable on several occasions in 1874 and 1875 in the City Parish, and liability was admitted by Colinton. Thereafter, in 1878, he again became chargeable in St Cuthbert's Parish, his mother being then dead. St Cuthbert's having claimed relief from Colinton, Colinton denied liability, and, on 10th July 1880, Russell, inspector of Colinton, raised an action against Greig, inspector of the City Parish, and Craig, inspector of St Cuthbert's, in which he concluded for declarator that the pauper child did not "possess a settlement by birth or otherwise in the parish of Colinton," and further that the settlement of the child was in the City Parish, Edinburgh. He also concluded for relief of the claims made against Colinton.

Colinton pleaded;—(1) The pauper having no settlement by birth or otherwise in the parish of Colinton, the pursuer is entitled to decree in terms of the first declaratory conclusion of the summons. (2) The birth settlement of the pauper being in the City Parish of Edinburgh, the pursuer should have decree of declarator to that effect.

¹ *Hopkins v. Hitchcock*, April 21, 1863, 32 L. J., C. P. 154.

City Parish pleaded;—(1) The pursuer having, as above set forth, No. 83. formally admitted to the said defender that the settlement of the said John Cunningham is in the parish of Colinton, and that said parish is liable in his support, is not entitled to recall said admission and repudiate liability for the support of the said pauper. (2) The said pauper having his birth settlement in the parish of Colinton, this defender is entitled to absolvitor, with expenses. (3) The said pauper having no settlement in the City Parish of Edinburgh by birth or otherwise, that parish is not liable in repayment of the advances made by the pursuer.

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St Cuthbert's pleaded;—(3) In respect the conclusions of the action cannot prejudice the rights of the defender as against the pursuer in regard to future cases of chargeability, and that they do not validly affect the present case, the action, so far as directed against this defender, ought to be dismissed, and this defender found entitled to expenses.

The Lord Ordinary, on 30th November 1880, found that the child's settlement was in Colinton, and assoilzied the defenders.*

Colinton reclaimed, and argued;—The parish of actual birth was not in all cases the parish which was necessarily liable.¹ That being so, this was a case where it was peculiarly desirable that the rule of the Act should not be unduly pressed. The poorhouse of a parish ought to be within the parish, and if without it, it should still be considered a part of the parish, at all events for its own parochial purposes, one of which was to fix birth settlements.

LORD JUSTICE-CLERK.—If the *criteria* introduced by the Poor-Law Amendment Act for fixing the settlements of paupers were founded on logical principle there might be something to say for the pursuer of this action, but they are purely arbitrary, and designed for the simplest and most reasonable adjustment of the questions which arise. That this child was born in the parish of Colinton there can be no doubt, and it is impossible for us to find that by construction it was born in the City Parish of Edinburgh. The Act says the birth parish shall be liable—and the child was born in Colinton.

The building in which it was born was no doubt erected in Colinton for the benefit and use of the City Parish, but that will not enable us to hold that it is not in the parish of Colinton.

* "NOTE.—1. The Lord Ordinary is not disposed to sustain the defence founded on the alleged admission of liability—first, because the claim is a new one, being made at the instance of the parish of St Cuthbert's; and, secondly, because at the time when the admission was made the mother of the pauper was alive, and therefore the admission should be regarded as relating to her settlement rather than to the settlement of the pauper.

"2. The pauper was born in the poorhouse belonging to the City Parish of Edinburgh, which is situated in the parish of Colinton. The question is whether he was born in the parish of Colinton or in the parish of Edinburgh. The pursuer says that in regard to questions of settlement the poorhouse must be held to be situated in the parish to which it belongs.

"The Lord Ordinary cannot adopt that view. It seems to him that the birth settlement of the pauper must be in the parish in which he was actually born. The theory of the pursuer, that the poorhouse is constructively in the parish of Edinburgh is not supported by any authority. If it were to be entertained at all, it would seem to follow that it should hold good for all parochial purposes; but the parish of Colinton does not extend it to the levying of poor-rates."

¹ Dalmellington v. Troqueer and Ruthwell, Jan. 22, 1822, 1 Sh. 259 (new ed.), 244; Craig v. Ross, March 12, 1867, 39 Scot. Jur. 390; M'Donald v. Taylor and Craig, Nov. 26, 1863, 9 Poor-Law Mag. 348.

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LORD YOUNG.—I am entirely of the same opinion, and I must confess no feeling of compassion for the parish of Colinton has been moved within me. I rather take it that a great poorhouse like this City Parish one will pay a much larger sum to the rates than any other property in the parish in proportion to the number of births that take place. There will not be so many births in it as in a small village which will pay much less to the rates. This I remark merely by the way, as it seems to me Colinton is crying out before it is hit.

I agree with your Lordship that we must apply the law as it exists. The birth settlement of every child born in Scotland is in the parish in which it is born. It is a mere question of fact. The geographical limits of every parish in Scotland are fixed. This child was born within the parish of Colinton, and its birth settlement accordingly is there.

If it be desirable to make an exception that a child born in the poorhouse of one parish situated in another parish shall have its settlement in the parish to which the poorhouse belongs, that is a matter for the Legislature and not for the Court.

LORD CRAIGHILL.—I am of the same opinion. The only rule by which a decision can be attained in this case is by ascertaining in what parish this child was born. In point of fact it was born not in the City Parish of Edinburgh but in Colinton Parish. Its settlement therefore is in Colinton.

The result of the City Parish poorhouse being in Colinton was that the mother of this child gave birth to it in Colinton. We can look to nothing but the provisions of the Act of 1845, and according to that Act the parish of birth is the parish of settlement.

THE COURT adhered.

ALEX. MORISON, S.S.C.—CURROR & COWPER, S.S.C.—JAMES M'CAUL, S.S.C.—Agents.

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THOMAS LAWSON, Pursuer.—*J. Campbell Smith.*
CALEDONIAN RAILWAY COMPANY, Defenders.—*R. Johnstone—Keir.*

Railway—Injury to Access—Compensation claimed in ordinary action—Stat. 8 and 9 Vict. cap. 19 (Lands Clauses Consolidation (Scotland) Act, 1845), sec. 17—Stat. 8 and 9 Vict. cap. 33 (Railway Clauses Consolidation (Scotland) Act, 1845), sec. 6.—A person held a feu bounded on one side by a vacant piece of ground which the superior bound himself to form into a street, the feuar being bound to maintain it when made. Subsequently a railway company scheduled this piece of ground, and obtained by a private Act (which incorporated the Railways and Lands Clauses Acts) compulsory powers to acquire it. They acquired it by voluntary agreement with the proprietor (the superior).

The railway company having lowered the level of the ground, and injured the feuar's access, he raised an action of damages against them at common law, maintaining that, as he had not got the notice which sec. 17 of the Lands Clauses Act requires to be given to all the parties "interested" in lands prior to their purchase, the railway company were not entitled to found on the statutes.

Held that the pursuer had not such an interest in the ground as to entitle him to notice under sec. 17 of the Lands Clauses Act, and that his only remedy was a claim for compensation under sec. 6 of the Railway Clauses Act, on the ground that his feu had been injuriously affected.

2D DIVISION.
Id. Curriehill.
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IN June 1870 John Cameron acquired, under a feu-contract from James Steel, a piece of ground on the west side of George Street, North Leith. This ground was defined as being bounded on the north by a new street about to be formed on a strip of vacant ground belonging to Steel, and

lying between the subjects conveyed and the line of the Caledonian Railway Company. By the feu-contract Steel was taken bound to form this street, the feuar being bound to maintain it to the extent of his frontage. In May 1872 Thomas Lawson acquired from Cameron certain premises consisting of a shop and dwelling-houses, which were the corner tenement erected on this piece of ground. These subjects were bounded on the north by the vacant ground above referred to, which was to be converted into a street.

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In 1874 the Caledonian Railway Company applied for a special Act of Parliament to authorise them to execute certain extensions of their works at Leith and elsewhere, and in that Act they scheduled the houses and shops belonging to Lawson, as also the vacant piece of ground, and some other ground still the property of Steel. This Act was passed in 1875.

The company thereafter acquired the vacant piece of ground, and the other ground, Steel's property, from him by voluntary agreement. They did not, however, take any steps to acquire Lawson's property. In February 1879 they proceeded to cut up and excavate the vacant piece of ground, and to make certain temporary erections on it, and eventually they constructed a street or road over it.

Lawson, on 22d September 1880, raised an action against the company, in which he concluded for £1000 as damage suffered by his property in consequence of their operations. He stated that the company, in addition to putting up the above-mentioned erections, had lessened the breadth of the street as originally proposed, by several feet, to his loss, injury, and damage. That "the defenders had no authority of any kind to interfere with the pursuer's property, and with the street forming the access to it, as they did. They did not proceed according to the Lands Clauses Consolidation Act, or any other Act." He also complained that the street had been lowered two feet seven inches along the side of his property, and that the shop was inaccessible as a place of business.

The company defended the action, and stated that whatever they had done had been under their statutory powers.

Lawson pleaded;—(1) The pursuer having suffered loss and damage through the unwarrantable, wrongful, and illegal operations of the defenders, they are liable to him in compensation. (2) The defenders not having observed the provisions of the Lands Clauses Act and the Railway Clauses Consolidation Act, are not entitled to plead them to any effect.

The railway company pleaded;—(2) Even on the assumption that the pursuer's property has been injuriously affected by the operations of the defenders, these operations having been authorised by the Caledonian Railway (Additional Powers) Act, 1875, the action is incompetent, and the pursuer's only remedy is under the 6th section of the Railway Clauses Consolidation (Scotland) Act, 1845, which is incorporated with said special Act.

On 1st December 1880 the Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer has not made any averments relevant or sufficient to support his second plea in law: Therefore repels the same: Finds that, in virtue of the powers conferred upon the defenders by 'The Caledonian Railway (Additional Powers) Act, 1875,' the defenders were entitled to construct roads and approaches on the ground in question, which bounds the pursuer's property on the north: Therefore sustains the second plea in law for the defenders, dismisses the action, and decerns: Finds the pursuer liable in expenses," &c.*

* "NOTE.—The pursuer is proprietor of a tenement at the corner of George Street in Leith, which he acquired from John Cameron in May 1872, who again

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Lawson reclaimed, and argued;—He was here “interested” in the ground taken by the company in the sense of the statute (Lands Clauses

had acquired the property from James Steel by a feu-disposition dated in 1870. The property was bounded on the north by a piece of vacant ground belonging to Steel, and lying between the said property and the then existing line of the Caledonian Railway. It was a narrow piece of ground intended for a street, and, by the feu-contract between Steel and Cameron, Steel became bound to form the carriageway of the street in so far as it bounded the pursuer's property, by levelling the same, putting in a water-channel and laying on a coat of broken stones blended with ashes. A tenement of houses was built on the pursuer's property, the access to which was partly by George Street and partly by the vacant ground in question, but, as was stated by the pursuer's counsel at the bar, no regular road or street was formed on the ground till 1875.

“In 1874 the Caledonian Railway Company applied for an Act of Parliament to extend their works, and, with reference to their bill, they scheduled a considerable quantity of ground in the neighbourhood, including, not only the house belonging to the pursuer, and three or four houses adjacent thereto in George Street, but also the piece of vacant ground in question, and the ground to the west thereof. The Parliamentary plans shew this ground quite distinctly. Under their Act, which was passed on 19th July 1875, the company obtained various additional powers. By section 4 they were authorised ‘to make and maintain in the lines and according to the levels shewn in the deposited plans and sections, the railways and roads hereinafter described, and all proper stations, sidings, approaches, and other works and conveniences in connection therewith respectively, and may enter upon, take, and use such of the lands delineated on the said plans, and described in the deposited books of reference, as may be required for these purposes.’ They apparently did not require to make and extend their lines in the parish of Leith, because the railways which they were authorised to make appear to have been only in the county of Lanark, and in the counties of Forfar and Perth. But by section 5 they were authorised ‘to enter upon, take, hold, and use, for the purposes of station, siding, and other accommodation, in connection with the existing undertaking, the lands hereinafter described, which are delineated on the deposited plans, and described in the deposited books of reference, or such parts thereof as they may find necessary.’ And in sub-section 4 of that section, the lands in the parish of North Leith and St Cuthbert's, burgh of Leith and county of Edinburgh, including the ground in question, are distinctly specified.

“It was stated by the pursuer's counsel at the bar, though not in the record, that during the time the defenders were in the course of obtaining these powers, but after the ground in question had been scheduled, the pursuer, who was not proprietor of the vacant ground, was called upon by the police authorities of Leith to form, and did form, a road upon the vacant ground, so that when the company actually obtained their Act there was a road in existence on the ground forming the north boundary of the pursuer's property. But, on the other hand, under their statutory powers, the defenders acquired that ground from Steel, who was the proprietor, and they proceeded with the execution of their works, and, amongst other accommodations for their existing undertaking, they constructed a road over this vacant ground along the north side of the pursuer's property. In doing so they altered the level, excavating it some two or three feet, and it is also said they narrowed it. Now, it is stated by the pursuer that they had no right whatever to alter the level or to diminish the width of this road. But I can see nothing in the Act of Parliament to support that contention. It is not stated on the record that the railway company were restricted to any particular level in regard to any accommodation road which they might form over this ground. Indeed, the plans and section shew nothing of the kind, and the company were entitled to make the road or approach in any way which they might find convenient for the purposes of their works.

“It is in these circumstances that the pursuer claims that he is entitled to damages at common law against the defenders, for having injured his property,

Consolidation Act), sec. 17 (quoted p. 446), and was therefore entitled to notice from them in terms of section 25 of the Railway Clauses Consolidation Act. Being thus "interested" in the ground in question, in virtue both of his rights and obligations as owner of the adjoining house, he was entitled to consider the ground as part of his house in a question with the railway company scheduling it, and he was therefore entitled to be treated with as if his house were being taken. The question really was, what was the meaning of the expression "interested"? and he submitted that having a right to use the ground as a road, being bound to keep it up, and it being necessary for the enjoyment of his house, he was "interested" in it in the sense of the statute. The obligation of maintenance imposed on him imported an element of difference between his right and an ordinary servitude.¹

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by lowering the level and diminishing the width of this road, because, as he avers in article 4, 'the defenders had no authority of any kind to interfere with the pursuer's property, and with the street forming the access to it, as they did. They did not proceed according to the Lands Clauses Consolidation Act, or any other Act.' Now, I confess I do not see in what way the defenders exceeded their powers. The pursuer says that they had no authority to interfere with his property, or with the street. But under the Act they are apparently entitled to interfere with the street, at all events with the ground on which the street had been formed, and the pursuer's statement of want of authority is far too vague and general to support his claim. It is certain they have not touched or interfered with the pursuer's property, or the site on which it stands, although, by lowering the road which served as an access they may have diminished its value. But, then, if I rightly read their Act of Parliament, they are thereby empowered to make approaches over that ground, and I desiderate any statement by the pursuer shewing in what respect these powers were exceeded. He says that the company did not proceed under the provisions of the Lands Clauses Act. I do not quite know what he means by that statement, but from the argument at the bar I gathered that he means that the company acquired the ground from Steel by voluntary agreement, and not compulsorily. The fact, however, remains that it was under the statutory powers that they acquired the ground, although they settled the price by voluntary agreement with Steel. They might have compelled Steel to sell the property to them, but instead of doing so they took it, as they were authorised to do, by voluntary agreement. I am quite satisfied therefore, not only that the pursuer has failed to make any relevant averments in support of his second plea 'that the defenders not having observed the provisions of the Lands Clauses and Railway Clauses Consolidation Acts are not entitled to found upon that statute to any effect,' but also that the company had full statutory authority to perform the operations complained of.

"Such being the case, the next question is, whether the pursuer's claim for compensation, in respect of injury done to his property, may be vindicated by an action at common law? or whether such an action is not excluded by the Railway Clauses Consolidation Act. It is, in my opinion, very clear that it was for the purpose of meeting such claims as the present that section 6 of the Railway Clauses Consolidation Act was enacted. Its object was to prevent actions being raised in the ordinary Courts for damages done by a railway company in the execution of their statutory works, and to substitute therefor a reference to arbiters, or a trial before a Sheriff and jury.

"I think, therefore, that the action should be dismissed, with expenses."

¹ Campbell and Others v. Edinburgh and Glasgow Railway Co., March 7, 1855, 17 D. 613, 27 Scot. Jur. 259; Crawford v. Field, Oct. 15, 1874, ante, vol. ii., p. 20; Marson v. London, Chatham, and Dover Railway Co., May 1, 1868, 37 L. J. Chan. 483; Anderson v. Dalrymple, June 20, 1799, M. 12,831; Menzies v. McDonald, June 10, 1856, 2 Macq. 463, Lord Chancellor, p. 474; Macey v. Metropolitan Board of Works, March 4, 1864, 33 L. J. Chan. 377; Clark v. London School Board, Jan. 15, 1874, L. R. 9 Chan. App. 120.

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Argued for the railway company ;—The kind of rights referred to as minor rights in the statute were those of liferenters, leaseholders, &c., not collateral rights. The claimer's right here was nothing but a servitude of way, and the obligation to maintain was only what was imposed on the feuars in every street. If Lawson's property was "injuriously affected" he was entitled to reparation, but the damage must be assessed in the manner pointed out by the Act, and in that way alone.

LORD JUSTICE-CLERK.—I am not sorry that we have had this elucidation of the points involved in this case. In the end, I am clearly of the opinion the Lord Ordinary has arrived at. I am glad to have been furnished with all the authority that is quotable on this matter, and which, merely on the words of the statute, is not without certain difficulties, as those English cases sufficiently shew. But the result, as I have indicated, which I have reached is, that there is no ground whatever why the pursuer should be indulged in an action at common law against the railway company for doing that which, I think it has been shewn, they were entitled to do under their statutes. The only reason why the pursuer says the railway company were not entitled to do as they have done under their statutes was that they had given no notice to him, and he says that he has an interest in this road in front of his house of the nature referred to in the 17th and 19th sections of the Lands Clauses Act, which says, sec. 17 :—"When the promoters of the undertaking shall require to purchase any of the lands which by this or the special Act, or any Act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this Act to sell and convey the same, or their rights and interest therein, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof ; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

Now, the real question we have to consider is whether that clause applies to interests of the nature of that set up by the pursuer, or whether the clause is not limited to these minor or restricted rights of property in land with which we are all familiar.

The cases that have been quoted are not very absolute. The case of a servitude, probably, is of a more definite kind. It is probably difficult to distinguish this right—of which I shall say a word immediately—from the right of servitude, but it may be called a case of servitude with some peculiar characteristics.

In regard to the English cases that were mentioned, it was said that the servitudes were servitudes of light—that they were not in the land at all, and could not have been entered upon in any reasonable sense. And that is quite true. Here, unquestionably, the railway company did enter upon the surface of this road, just as much as upon any other property, and the question is, whether there was an interest in the surface of the road requiring notice under the 17th section of the statute.

As I have said, it is difficult to distinguish this right from that of servitude.

At the same time, there are some matters that are bound up in it that create some amount of peculiarity. I am assuming for the present that this is a private street, and not one of the public thoroughfares of the burgh. On that matter, it is true, our information is very bare. But if it is one of the public thoroughfares of the burgh then the case is beyond even stating.

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If, on the other hand, there are private rights reserved to the feuars who are named under these obligations, that, I think, creates a different kind of case; and not only has the feuar right to use this road as an access, but he has the administration of the road absolutely under the provisions of his right, unless a public authority—the road trust, or the police committee of the town-council—have a higher right. How that stands we are not informed, but the conclusion I have come to is, that this is not an interest of such a nature as that referred to in the 17th clause of the Lands Clauses Consolidation Act. That the pursuer may be deeply injured by the operations of the railway company is perfectly possible, but that they will injure what is wholly and exclusively his is plainly not so. The road is not an access solely to his house. The street is an access to all the houses there, and that is quite enough to bring it under the category of cases depending on that view. There may be an injury done to him for which he is entitled to have compensation, because the company's operations injuriously affect that which beyond all question is his property, namely, his house, but that he is entitled to proceed for compensation at common law is what I fail to see.

On these grounds, very shortly stated, I am inclined to adhere.

LORD YOUNG.—I am of the same opinion, and I think the case is remarkably clear, and remarkably idle in this respect, that the pursuer has no interest in it whatever. The whole facts are capable of being stated in a sentence. The pursuer is proprietor of a corner house in this sense, that the front of it is to a street called George Street, whether a public or a private street I do not know,—that depends probably on its age. To the side of the house there is a bit of vacant ground, on which, according to his title, another street at right angles to George Street was to be formed and be extended. In that piece of ground he had no property whatever, any more than in George Street. But he had a right, in a question with his author, to have that street formed, he, on his part, undertaking that to the extent of the frontage or sideage of his house he would maintain it. The railway company scheduled this piece of ground, and took it under their Act of Parliament, and thereby,—that is to say, by their works thereon,—injuriously affected this access to the pursuer's property.

The railway company admit that if, by taking this ground, which was an access to the pursuer's property, they injuriously affected it, they must pay compensation, to be estimated under the Lands Clauses Consolidation Act. The pursuer says, "No, you must pay me compensation, to be estimated by a common law jury in a common law action." Why? Because this ground is not taken under the statute; but if it was not taken under the statute it was not taken at all, for a railway company cannot take ground except under their statute, and the remedy is to put them out, or rather their servants, who are in possession.

But I put it to Mr Campbell Smith at an early period—"What interest have you in asking that notice should have been given to you?" "Oh, this," he says, "that then they would have been obliged to take my property, and, regarding

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the ground as my property, then it is part of my house, and I should have said, taking part of my house, you must take the whole house, and so pay for it." But I think that argument falls at once—the argument that this is the party's house, and as his property the railway company must take the whole house; and it falls on the statement of it, for it is too heavy to stand on its legs. It will not bear its weight for an instant. Then, what is the ground for preferring a common law jury to any jury empanelled under the Lands Clauses Consolidation Act? Surely a jury chosen or cited by authority of the Sheriff under the Lands Clauses Act is as good a jury as a common law jury in the Court of Session. Both would very probably be composed of the very same men. There is surely no interest in insisting on such a preference at all.

Again, if we should decide upon that matter, that he had an interest in this ground of a nature requiring that notice should be given to him, and that it should be taken by the railway company—that while the railway company have taken the land, and paid the proprietor, they have omitted to take this particular interest—I say if we decided that that was an omission, it was merely a formal omission; and the statute (sec. 117) provides that within six months of decisions establishing the right of the person having such interest the railway company shall purchase or pay compensation for the same. They shall not be put out of possession, but they shall pay compensation for what they have possessed at a valuation under the statute. There, again, the result of the most complete success that would be looked for is just what might have been seen from the beginning—the value of the interest in the ground; that is, the damage done to the pursuer by the destruction of that interest shall be determined by a valuation jury.

But the pursuer insists in having a common law jury. It is the most obstinate, wrong-headed perseverance in an erroneous course of procedure, simply without any interest in the world, that I ever experienced. It is according to the practice which we have known something about since the beginning of railways down to this year 1881 in Scotland, that such interests in the ground are not taken by railways or compensated for otherwise than the railway company offer to do here.

With respect to all analogous instances the course of dealing has been that which has been proposed, namely, that damage done by the destruction of any interest shall be settled by the valuation of the jury.

Now, we had a case very like this before us the other day.¹ I do not suppose anything turns upon the question whether the streets by which the proprietors there had a right of access to their property, and which were interrupted and interfered with by the railway company, were public or private streets. The distinction never was suggested for a moment. Indeed, it would make no difference. If I have a house in George Street or Princes Street, and if George Street or Princes Street is interfered with *ex adverso* of my premises, what does it signify that the street is public or private? The more public the street is, as in the case of Princes Street, the more valuable is the property by reason of its being upon that street; and interference with the street is interference with its most valuable adjunct. Princes Street might be private from one end to the other,—that is to say, the proprietors in Princes Street might have excluded the public, and the railway company would still have been liable, if they had taken

¹ Walker's Trustees v. Caledonian Railway Company, *supra*, p. 405.

the street, to compensate those injured by the street being so occupied. But the distinction between a public and private street imports nothing, except this, that in the former case a greater number of persons are entitled to use it. No. 84.
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Railway Co.

But, indeed, "public" or "private" are hardly very applicable to such matters as those which we are dealing with here. The history of all modern streets, which are made by parties feuing out their land for building, is that they are private streets to begin with, the proprietors being only too anxious that they shall be public as rapidly as possible; the value that they expect from their property being that the streets shall become great thoroughfares. That is the value they expect. The public take possession of such thoroughfares at their convenience, and after a season the public could not be stopped, but within a season they could be stopped, for those having the right, a limited right, it might be, might agree to stop them. But, as I have said, I do not think these considerations have any bearing here.

I quite agree with the Lord Ordinary, but I have thought it right to make these observations upon the idle character of this action, which is brought upon erroneous grounds, insisting that a jury should be selected in one manner in preference to a jury selected in another, while the fact is that in both cases the jury would be returned by the Sheriff to determine the amount of compensation which should be awarded.

LORD CRAIGHILL concurred.

LORD JUSTICE-CLERK.—In regard to the case we had before us the other day, the main plea of the railway company was that the streets were public streets. No doubt they were; but the answer was that the public had as good a right as the party claiming to compensation. I do not say whether the argument would have been the same if they had been private streets; but that was the ground, and the main ground, on which the judgment in that case was rested. I think it right to make that addition to what I said before.

THE COURT adhered.

J. & A. HASTIE, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

JAMES DRUMMOND, Complainer.—*Lord-Adv. M'Laren—J. C. Smith.* No. 85.
RICHARD CARSE AND OTHERS (Janet Carse's Executors), Respondents.—
Asher—J. A. Reid. Jan. 27, 1881.
Drummond
(Carse's Fac-
tor) v. Carse's
Executors.

Judicial Factor—Costs of unsuccessful litigation, liability for.—Held that the expenses in which a judicial factor was found liable to his opponent in a litigation properly entered upon and conducted by him, though unsuccessful in its result, were proper charges of administration, for which he was entitled to take credit, even though they exhausted the estate, before paying a creditor of the factory estate.

JAMES DRUMMOND, C.A., was, in 1877, appointed judicial factor on the 2^d Division. estate of Stewart Carse, painter in Musselburgh. The estate consisted almost entirely of certain house property in Fisherrow, which the factor took powers to sell, and which realised £1150. Ld. Curriehill.
I.

No. 85. An action of constitution and payment was, on 4th November 1878, raised against Mr Drummond, as judicial factor foresaid, by Richard and William Carse, as executors of Janet Carse. This action was unsuccessfully opposed by Mr Drummond, and on 29th January 1880 he was decreed and ordained, as judicial factor on the estate of the late Stewart Carse, to pay to the executors of Janet Carse the sum of £220, 19s. 0½d.; and by the same interlocutor the Court found "the said James Drummond liable in expenses, both in the Outer and Inner-House, but subject to a deduction of one-third from the audited expenses incurred by the pursuer." These expenses, amounting to £106, 1s. 11d., Mr Drummond paid without a charge, on the footing that he was personally liable to the pursuers of the action therefor, with right of relief against the factory estate. But the principal sum of £220, 19s. 0½d., contained in the decree, he refused to pay, on the ground that the estate was exhausted. Accordingly the decree was extracted and a charge given to Mr Drummond as judicial factor, but at the same time under pain of poinding and imprisonment, which he suspended, on the ground that he had no factory funds in his hands, and was not liable personally.

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The way in which the factory funds were alleged to have been exhausted was as follows:—

After the Fisherrow property had been sold it was discovered that it had been adjudged by the trustees of the late Edward Carse more than ten years previously for a debt then said to amount to £450 due by Stewart Carse. These trustees had not obtained declarator of expiry of the legal, and they were willing to deal with their adjudication merely as a security and to retrocess Stewart Carse's representatives on receiving payment of the debt and interest, under deduction of the rents intromitted with by them as adjudging creditors.

Mr Drummond called a meeting of the whole children and representatives of the said deceased Stewart Carse, and consulted with them regarding this claim, and they all assured him that, although decree had been obtained in absence, constituting the said debt and adjudging for it, there was no debt really due, and that in the interests of the estate it was his duty to open up the said decree, and he thereupon, in 1877, instituted an action of reduction of the decree. The litigation in this reduction was long, keen, and expensive,—proof was led, and a remit made to an accountant,—a counter action was raised against the complainer by the defenders in the reduction, and the two actions were conjoined, with the result that by interlocutor of the Second Division, dated 29th January 1880,* the complainer was held to have failed to establish his reasons of reduction; but, on paying the amount of the original debt as contained in the decree of adjudication, and interest, under deduction of the rents intromitted with by Edward Carse's trustees, to be entitled to obtain from them a discharge of the decree of constitution and adjudication and writs following thereon. By the same interlocutor the Lords "find the said James Drummond liable in the expenses of both actions, and of the conjoined actions, both in the Outer and Inner-House, but subject to the deduction of one-fourth from the audited expenses incurred by the defenders in the conjoined actions in the Outer-House."

Mr Drummond redeemed the adjudication by paying the principal sum adjudged for, with interest, under deduction as aforesaid, and he also paid the expenses in which he was found liable by the interlocutor just recited, which amounted to £336, 5s. 1d. But he paid these expenses and

* Reported as to one of the points raised under date Jan. 10, 1880, *ante*, vol. vii., p. 452.

the expenses of the action at the instance of Janet Carse's executors, No. 85. amounting, as before mentioned, to £106, 1s. 11d., in all £442, 7s., not out of his own pocket, but out of the trust-estate of Stewart Carse.

Mr Drummond admitted that if these expenses were not preferable charges on the trust-estate there were ample funds to pay the sum of £220, 19s. 0½d., for which the present charge was given.

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The complainer, Mr Drummond, pleaded;—(1) The complainer being liable to pay the sum charged for only as judicial factor, and having no factory funds in his hands, the charge, in so far as directed against him personally, ought to be suspended. (2) The personal diligence threatened by the charge not being warranted by the interlocutor forming its alleged ground, the complainer is entitled to suspension as craved. (4) The complainer having litigated *in bona fide* is entitled to pay the expenses *bona fide* incurred by him out of the estate.

The respondents, Janet Carse's executors, pleaded;—(2) On a true and just accounting, there being sufficient funds belonging to the estate to meet the sums in the charge, this suspension should be refused. (3) The complainer is not entitled to diminish the funds of the factory estate by paying therefrom any sums in which he is personally liable.

The Lord Ordinary, on 30th November 1880, repelled the reasons of suspension, and found the letters and charge orderly proceeded.*

The complainer reclaimed.¹

At advising,—

LORD YOUNG.—The Lord Ordinary has rightly described the respondents as “holders of a decree of constitution against the complainer as judicial factor”

* “NOTE.— The complainer maintains that the whole sums which he has been found liable to pay, not only principal debts and interest, but also the expenses of process, are due by him only as judicial factor, and that none of these sums, not even the expenses, are payable by him as an individual. I confess I can see no ground in the present case for deviating from the general rule established in the case of *Gibson*, 11 Sh. 656, that a litigant in the position of the complainer must, if unsuccessful, pay out of his own pocket to his opponent the expenses in which he may be found liable, in so far as the trust-funds may be inadequate for that purpose. He cannot, therefore, plead, as against the respondents, who are creditors of the trust-estate, and who obtained decree for the amount of their debt on 29th January 1880, with expenses, on the same day that the complainer was found liable in expenses to Edward Carse's trustees, that the expenses in any of the actions are preferable to the respondents' debt. In short, he is not entitled, to the prejudice of the respondents, as holders of a decree of constitution against the complainer as judicial factor, to plead that the trust-funds are exhausted by paying expenses for which he is himself primarily liable as an unsuccessful litigant.

“The complainer says that, according to the sound construction of the interlocutors of the Court in all the actions, he was not found personally liable in the expenses. To me it is pretty clear that the Court meant the expenses to follow the ordinary rule, because, while the finding of liability for payment of the principal debt and interest is against ‘James Drummond, as judicial factor,’ the expenses are given against him solely as ‘James Drummond.’ If I had deemed the construction doubtful I would have reported the case without a judgment; but, in my humble opinion, the meaning of the judgment of the Court is without doubt that which I have now attached to it.”

¹ *Authorities*.—*Gibson v. Pearson*, May 25, 1833, 11 S. 656, 5 Scot. Jur. 387; *Kirkland v. Crichton*, Feb. 3, 1842, 4 D. 613, 14 Scot. Jur. 239; *Grahame v. Marshall*, Nov. 22, 1860, 23 D. 41, 33 Scot. Jur. 21; *Young, &c. v. Nith Commissioners*, July 6, 1876, *ante*, vol. iii., p. 991.

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on the estate of their deceased debtor. On that claim they have charged the complainer "as judicial factor" to pay, and he now asks us to suspend the charge, "at least in so far as the said charge threatens or may form a step in the process of doing personal diligence against the complainer, or diligence against his personal property." I think it right to say that I doubt the competency of diligence on such a decree of constitution against the person or property of a judicial factor, who is an officer of this Court, and wholly accountable in the factory process for his conduct and administration. I waive this doubt in deference to the desire of both parties, that the question in dispute between them should be determined in this process of suspension, which they were agreed presented it with all the materials which they could command, or desired, for its decision. It would certainly be inconvenient to convert this process into an accounting by the judicial factor for his administration, but the parties told us that the only question of interest to them was whether or not the complainer was entitled, with the factory funds, to pay certain expenses which he had been ordered to pay to the respondents and others in his litigations with them, and desired us to assume that the factory estate was insufficient or not, to meet the debt charged for, according as it should be held that he was or was not so entitled.

The Lord Ordinary has so taken the case, and, so taken, it is of course assumed that the complainer is not personally liable for the respondents' debt, the only question being whether or not he is bound to restore to the factory estate (which is the proper debtor) the amount of those expenses which he has, improperly as the respondents contend, paid out of it. This question obviously regards the proper acts and charges of administration which (always assuming their propriety) must, of course, be paid in the first instance. These are generally, and so far as possible ought to be, paid as they are incurred. I need hardly say that the factor is not the ultimate judge of their propriety, and that improper payments made, or credits taken, will be disallowed on the examination of his accounts. This examination we are now, at the desire of the parties, and for their convenience, anticipating with respect to the matter I have referred to.

The general rule of law and practice undoubtedly is that a judicial factor is entitled to be kept *indemnitas*, and also to suitable remuneration for trouble out of the factory estate, provided he has done his duty and has not misconducted himself in his office, and nobody fit to be appointed would accept of the office on any other footing.

But if the costs and charges of the factor are to be allowed or not, according as they were properly incurred or not, what ground is there for dealing exceptionally with the expense of litigation, which, like any other expense, may or may not be incurred properly? A judicial factor will not, of course, be allowed to expend the factory funds in improper litigation, and either in the suits themselves (if in this Court), or ultimately on the examination of his accounts, the estate will be protected and the cost thrown on himself personally, if his conduct shall appear to the Court to have been such as to require it, and I venture to say that the Court would not be slow to take account of any impropriety on the part of its own officers, and that in the suit in which or with reference to which the misconduct occurred.

With respect to the litigations referred to in this record, which were before this Court, it is not suggested that the Court censured the factor for pursuing

the one or defending the other, or expressed any disapprobation of his conduct. This is not conclusive, and I accordingly put it to the counsel for the respondents whether misconduct, disentitling the complainer to the indemnity he would otherwise have been entitled to from the estate, was alleged and inquiry desired. The answer was in the negative, and that the respondents' case was rested entirely on the legal view on which the Lord Ordinary had proceeded, viz., that the factor was not entitled to payment or credit for the expenses decerned for against him to the effect of rendering the estate insufficient to meet their debt of £220, and that without reference to the propriety or impropriety of his conduct as factor.

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I assume, for the purposes of this case, that a judicial factor is personally liable to his adversary in a lawsuit for expenses decerned for against him, though I desire to say that I express no opinion on the question. Assuming this, I perceive no distinction between this liability and any other incurred by a judicial factor in the course of the factory, with respect to his right of relief out of the factory estate. The general rule is that the factor is personally liable for every debt which he incurs in the course of his office, it being for him, and not for the party with whom he contracts, to see to the sufficiency of the factory funds to meet the liability. He is thus personally liable to every professional man and tradesman whom he employs, and for the price of all commodities he orders, however clearly he acted according to his duty in incurring the obligation. But his right to pay with the factory funds, or to be relieved out of the estate, depends precisely on whether or not he acted according to his duty, and the respondents' third plea in law, which the Lord Ordinary in effect sustains, is, in my opinion, untenable. If the factor's proper acts and charges reduce the estate so that it is insufficient to meet the liabilities, this is a misfortune, but affords no reason for disallowing them contrary to the rule, that the factor, if guilty of no misconduct, is entitled to be indemnified. I have already pointed out that there is here no question of misbehaviour disentitling the complainer to the indemnity which in the absence of misbehaviour is his legal right. The respondents, with respect to their debt charged for, are in no different position from any other creditor or claimant on the estate, and suffer no more than all others interested in it, *i.e.*, having claims on it, from the fact that it is reduced in amount by the acts of unsuccessful litigation, though the circumstance may be more provoking to them than to others.

The case of a trustee in bankruptcy, who spends in litigation a dividend set aside under the Bankrupt Act to meet a contingent claim, is not in point, for reasons obvious enough, and which were expressed in the course of the argument. In that case the result would be the same in whatever way the dividend so set aside was spent instead of being reserved and made forthcoming, as under the statute it ought to be. The trustee spending would be personally liable to make it good to the party disappointed by his violation of his duty.

LORD JUSTICE-CLERK.—I concur in the opinion which has just been delivered by your Lordship, and I would only add that the analogy of a trustee in a sequestration is manifestly inapplicable to a judicial factor. A trustee in a sequestration is the officer of the creditors and under their control. A judicial factor is an officer of Court appointed on an estate the administration of which the Court has assumed, and he is responsible to the Court. I therefore think there is a wide distinction between the positions of the two officials.

No. 85. LORD GIFFORD, though present during the debate, had resigned before judgment was given.

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LORD CRAIGHILL, not having been present at the debate, delivered no opinion.

THIS interlocutor was pronounced:—"Having heard counsel for the parties on the reclaiming note for the complainer against Lord Curriehill's interlocutor of 30th November 1880, Sustain the reasons of suspension, and recall the said interlocutor, and *simpliciter* suspend the charge complained of, and whole grounds and warrants thereof, in so far as the said charge threatens or may form a step in the process of doing personal diligence against the complainer's personal property, and decern: Find the respondents liable in expenses to the complainer," &c.

M'CASKIE & BROWN, S.S.C.—THOMAS WHITE, S.S.C.—Agents.

No. 86.

GEORGE BENSON MONKHOUSE (D. L. M'Allum & Co's. Trustee),
Appellant.—*Kinnear—Ure.*

Jan. 28, 1881.
Monkhouse v.
Mackinnon.

WILLIAM MACKINNON (Hannay & Sons' Trustee), Respondent.—
Jameson—Dickson.

Bankruptcy—Duties of Trustee—Deliverance upon claims where no dividend is declared—Bankruptcy (Scotland) Act, 1856, secs. 126 and 127.—Held, upon a construction of the 126th and 127th sections of the Bankruptcy (Scotland) Act, 1856, that a trustee in bankruptcy ought not to proceed, under the 126th section, to examine the oaths and grounds of debt, or to issue any deliverance regarding claims, until he is in a position to declare a dividend, and, therefore, that a deliverance admitting a claim where no dividend was declared was no bar to the trustee reconsidering the claim and rejecting it by a subsequent deliverance.

1ST DIVISION.
Sheriff of
Lanarkshire.
M.

D. L. M'ALLUM & Co., iron-merchants, Newcastle-upon-Tyne, lodged an affidavit and claim for £6307, 18s. 9d., dated 2d June 1874, with William Mackinnon, trustee upon the sequestrated estates of Messrs Hannay & Sons, iron-masters, Glasgow. The claim was admitted by deliverance dated 12th August following to the extent of £6303, 3s. 2d. A circular was, at the same time, sent to the creditors, in which the trustee intimated, *inter alia*,—"2. That I have examined the claims of the several creditors who have lodged their oaths and grounds of debt on or before the 28th ult., and made up lists of those creditors entitled to be ranked on the funds of said estates, and also of those whose claims have been rejected in whole or in part. 3. That the commissioners have postponed the declaration of a dividend until the next statutory period.

"Of all which intimation is hereby given in terms of the statute."

No dividend was intimated or paid upon the estate.

D. L. M'Allum & Co. afterwards became bankrupt, and a trustee or assignee was appointed upon their estates.

The National Bank of Scotland subsequently claimed to be ranked for £4436, 1s. 5d. on Hannay & Sons' estate, and the trustee, on June 7, 1880, pronounced this deliverance on the claim for M'Allum & Co.:—"In respect that the claim by the National Bank of Scotland, amounting to £4436, 1s. 5d., for acceptances of D. L. M'Allum & Company to Hannay & Sons has not yet been withdrawn, the trustee rejects this claim to that extent, and ranks the claimant only for the balance of £1867, 1s. 9d., said acceptances being the true obligation of

D. L. M'Allum & Company; and the same not yet having been retired by them, the same fall to be deducted from their claim as lodged." No. 86.

This was an appeal by the trustee upon D. L. M'Allum & Co's. estate against that deliverance. Jan. 28, 1881.
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He pleaded, *inter alia*;—1. The trustee on the said sequestrated estate having admitted and duly ranked the appellant's claim to the extent of £6303, 3s. 2d., he is not now entitled to alter or modify his judgment, and the deliverance complained of ought to be recalled, with costs.

Hannay & Sons' trustee pleaded, *inter alia*;—5. No dividend having been declared or paid by respondent, he was entitled and bound to issue the deliverance appealed against, and the same being competent and well founded, the appeal should be dismissed, with expenses.

The Sheriff-substitute (Erskine Murray), upon 23d December 1880, pronounced this interlocutor:—"Finds that the respondent Mackinnon, trustee on the estate of Hannay & Son, pronounced, at the time required under the 126th section of the Bankruptcy Act, 1856, a deliverance in terms of that section, admitting the present claim to a ranking: Finds (2) that the dividend was, however, postponed, and has been indeed postponed for several years, and when at last it has been announced, and the notification under the 127th section fell to be made, the respondent has notified a rejection, for grounds stated by him: Finds (3) that appellant has raised the plea of *res judicata*: Finds in law that on the whole that plea is not well founded: Therefore repels the same; allows to both parties a proof of their averments, and to appellant a conjunct probation," &c.

D. L. M'Allum & Co's. trustee appealed to the Court of Session.

It was stated at the hearing that Hannay & Sons' trustee was not even then in a position to declare a dividend, and that the Sheriff's interlocutor misstated that matter.

The 126th and 127th sections of the Bankruptcy Act, 1856, and the 104th section of the Bankruptcy Act, 1839, are quoted in the opinion of the Lord President.

At advising,—

LORD PRESIDENT.—The interlocutor now under review was pronounced upon an appeal from the deliverance of the trustee in the sequestration of Hannay & Sons. The claim disposed of by that deliverance was for £6307, 18s. 9d. on the part of a trustee or assignee in bankruptcy in England on the estate of D. L. M'Allum & Co. The deliverance appealed against bore that—"In respect that the claim by the National Bank of Scotland, amounting to £4436, 1s. 5d., for acceptances of D. L. M'Allum & Co. to Hannay & Sons has not yet been withdrawn, the trustee rejects this claim to that extent, and ranks the claimant only for the balance of £1867, 1s. 9d., said acceptances being the true obligation of D. L. M'Allum & Co.; and the same not yet having been retired by them, the same fall to be deducted from their claim as lodged."

The appellant in the Sheriff Court stated this as his first plea in law,—“The trustee on the said sequestrated estate having admitted and duly ranked the appellant's claim to the extent of £6303, 3s. 2d., he is not now entitled to alter or modify his judgment, and the deliverance complained of ought to be recalled, with costs.” That plea is, as the Sheriff-substitute represents it, substantially one of *res judicata*. The deliverance of the trustee, which is said to constitute the *res judicata* upon this claim, was issued upon 12th August 1874, and certainly bears to be a deliverance upon a claim of D. L. M'Allum & Co., and

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to admit the full claim of £6307, 18s. 9d., subject only to a deduction of a rebate of five per cent from the date of the sequestration. The question comes to be, whether upon a construction of the statute that deliverance finally disposed of the claim in so far as the first dividend is concerned, and whether the trustee is therefore precluded from reconsidering it?

The position of the sequestration at the time when the first deliverance was pronounced was this: Four months had expired since the date of the sequestration, and the commissioners had proceeded under the 125th section of the statute "to audit the trustee's accounts and settle the amount of his commission, and authorise him to take credit for such commission in his accounts with the estate." They had then proceeded to consider whether or not to declare a dividend, and their decision was to postpone it. In the words of the section they are authorised to "declare whether any and what part of the net produce of the estate, after making a reasonable deduction for future contingencies, shall be divided among the creditors." If they resolve that no dividend shall be declared, there are provisions in the 134th section in regard to the manner in which it is to be postponed. That was the conclusion to which the commissioners came, and apparently there was no reason whatever for the immediate disposal of the claims.

It rather seems that the policy of the Bankrupt Statutes generally is, that the trustee should not proceed to consider the claims of creditors with a view to ranking until it has been seen whether the estate is to yield a dividend. If there is to be no dividend, such a proceeding would be only expensive and unnecessary. And accordingly the Bankruptcy Statute of 1839 (2 and 3 Vict. c. 41), sec. 104 (the section corresponding to the 126th section of the later statute) enacts, "that if a dividend is to be made the trustee shall proceed to examine and admit or reject claims, and make up a list of creditors entitled to a dividend." The peculiarity of the 126th section of the later statute of 1856 is, that the words "if a dividend is to be made" are left out, and the section stands—"The trustee shall also, within the said fourteen days, examine the oaths and grounds of debt, and in writing reject or admit them or require further evidence in support thereof, for which purpose he may examine the bankrupt, creditor, or any other party on oath relative thereto; and in case he shall reject any claim, he shall in his deliverance state the grounds of such rejection, and he shall complete the list of the creditors entitled to draw a dividend, specifying the amount of their debts, with interest thereon to the date of the sequestration, and distinguishing whether they are ordinary creditors or preferable or contingent, and he shall make up a separate list of any creditors whose claims he has rejected in whole or in part."

It is contended by the appellant that the omission of "if a dividend is to be made" in the later statute clearly indicates that the Legislature intended that the trustee should proceed to perform the duty imposed by the 126th section whether a dividend was to be declared or not. The question therefore is, whether the trustee did validly and effectually proceed to examine and reject or admit claims, and make up a list of creditors entitled to payment of dividend, and whether accordingly the appellant's claim was then disposed of, so as to preclude the trustee from going back upon the decision he then pronounced, and coming to a different conclusion.

Reading the 126th section by itself, I am not surprised that the Sheriff-substitute experienced (as he says he did) a great deal of difficulty in coming to a determina-

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tion. But when the 127th section is read along with it, that difficulty seems to me to disappear. When we look at it, we are led to the conclusion that there has been loose, and what I may call rather bungled, legislation upon the matter, but that nevertheless it is not intended that the trustee shall dispose of the claims of creditors until he is ready to declare a dividend. It must be observed that while the 126th section imposes upon the trustee the duty of making up a state of the claims, and provides for his making a deliverance thereupon, it does not contain any provision as to how the deliverance is to be given effect to. It is not provided that there is to be any intimation of it to the creditors. If the 126th section were to be literally followed, the trustee would retain in his own hand the state of claims, and the other materials upon which he has proceeded, and further, the deliverance he has pronounced upon them. If so, there would plainly be no opportunity for creditors to complain against an adverse decision. The only section which provides for an intimation of the deliverance and a right of appeal is the 127th. And when we come to look at it, it is quite impossible to hold that anything can be done under it until the dividend is declared. It provides that "the trustee shall, within eight days after the expiration of such fourteen days, give notice, in the *Gazette* published next after the expiration of such fourteen days, of the time and place of the payment of the dividend, and also notify the same by letters put into the post-office on or before the first lawful day after the said fourteen days, addressed to each creditor, in which he shall specify the amount of the claim and proposed dividend thereon, and when he has rejected any claim he shall notify the same to the claimant by letter as aforesaid, which letter shall also contain a copy of his deliverance and specify the amount of the claim; and a certificate by the trustee, or an execution by a messenger or sheriff-officer, that such letters have been put into the post-office shall be sufficient evidence thereof." Let us observe what under this section is the only mode in which a trustee is entitled to make his deliverance known to the creditors. It is by sending a post-letter addressed to each creditor, in which the amount of the claim, if it be admitted, and of the proposed dividend thereon, is to be specified; and if it be rejected, it is by sending a letter to that effect, along with a copy of the deliverance rejecting it. It is plainly impossible to comply with that provision till the dividend is declared, because the notice to the creditors is to be of a similar date with the notice in the *Gazette*, and it has, further, to contain the amount of the dividend to be allowed. So, without going further, section 127 proves conclusively that no deliverance can be intimated until a dividend has been declared. The 127th section therefore cannot come into operation until the declaration of the dividend, and so there is no occasion for the trustee to proceed under the 126th section until that period also. If he were to proceed, that course would be productive of nothing but a latent deliverance, which would be entirely useless.

And when we look further at section 127 the matter is still clearer. It continues—"And if any creditor be dissatisfied with the decision of the trustee, he may appeal by a short written note to the Lord Ordinary or to the Sheriff; but if no such note be lodged with and marked by the Bill-Chamber or Sheriff clerk (as the case may be) before the expiration of fifteen days from the date of the publication in the *Gazette* of the said notice, the decision of the trustee shall be final and conclusive so far as regards that dividend; and in case the claim have been rejected, such dividend shall be without prejudice to any new claim being afterwards made in reference to future dividends, but which new claim shall

No. 86. not disturb prior dividends." There again we have a form for and conditions of the appeal which the creditor is to have when his claim has been rejected. Jan. 28, 1881. The appeal must be lodged within fifteen days after notice in the *Gazette* of the time and place of payment of the dividend—a period which can never occur in the present case, according to the appellant's construction of the statute, because there was no such *Gazette* notice published, and the right of appeal would therefore be taken away.

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But in answer to that it is contended that the 169th section provides a right of appeal in every case. But that is only where there is no special provision, as there is in the present case, under the 127th section. It would not be an appeal under the 169th section if it complied with the terms of the 127th, and if it did not comply with the provisions of the 127th section it would not be admissible, because it must be taken within the fifteen days. It is therefore quite clear that until proceedings are taken under the 127th section the creditor has no intimation of the deliverance and no opportunity of appealing. Therefore any proceeding under the 126th section which is not followed out by proceedings under the 127th, and likewise the taking any proceedings under the 126th where no dividend has been declared, would be idle and inconsequent.

I am therefore of opinion that the Sheriffs were right, and that their judgment should be adhered to.

LORD MURE—I am of the same opinion. We are dealing with a purely statutory matter, and what has been done can be final only if done in terms of the statute. At the time when this deliverance, which is founded upon by the appellant as a *res judicata*, was made, no dividend had been declared. What the trustee did therefore, in 1874, was not a statutory proceeding, and there has been no deliverance within the meaning of the statute, because no dividend was then declared; and as I read the statute it authorises a deliverance of this description only when a dividend is declared. The 123d section provides that the creditor shall produce his oath and grounds of debt two months before payment of the first dividend; and it appears to me that the whole matter of claims and their disposal is appointed to be regulated and determined with reference to a dividend to be declared. The 126th section, in particular, shews how creditors and their claims are to be dealt with by the trustee with a view to the declaration of a dividend; and the 127th makes the proceedings final only when a dividend has been declared. I therefore entirely concur in your Lordship's construction of the statute.

The present position of matters, as I understand the case, is this: Before any time had been fixed for payment of the first dividend the National Bank put in their claim and asked to be ranked on the estate, as they were quite entitled to do, under the 123d section, at any time within two months of the declaration of the first dividend. Now, I think it was within the power of the trustee to deal with that claim, and to give effect to it if well founded. Whether it is a good claim depends on the merits of the case, on which the Sheriff-substitute has allowed a proof.

LORD DEAS and LORD SHAND were absent.

LORD CURRIEHILL concurred.

THIS interlocutor was pronounced:—"Refuse the appeal; adhere

to the interlocutor of the Sheriff-substitute of 23d December 1880, and decern; remit to the Sheriff-substitute to proceed with the cause as may seem just: Find the respondent entitled to the expenses of the appeal," &c.

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ELLIS & BLYTH, W.S.—J. W. & J. MACKENZIE, W.S.—Agents.

SCOTTISH HERITABLE SECURITY COMPANY (LIMITED), Pursuers.—*Keir*.
JOHN R. GRANGER, Defender.—*Kinnear—Alison*.

No. 87.

Lease—House becoming uninhabitable—Right of tenant to leave—Rent where tenant's occupation interrupted for long period.—The tenant of a house, the lease of which expired at Whitsunday, removed from the house in the end of February preceding, in consequence of dangerous defects in the drainage. The landlord had the drains put in order, but the operation took two months. In an action by the landlord for the half year's rent, held that the failure of the landlord for so considerable a period to supply a habitable house disentitled him to recover any part of the half year's rent.

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Lease—Circumstances entitling tenant to rescile from agreement to prolong lease.—On 6th February 1880 the tenant in possession of a dwelling-house agreed, by letter, to take the house for two years from Whitsunday following, when his lease expired. In the end of February he removed his family and furniture from the house, on account of its being uninhabitable by reason of defects in the drains.

Opinion, per cur., that, although the defects in the drains had been remedied by 20th April, the tenant was not bound to resume possession, and was entitled to rescile from his agreement to prolong the lease.

In August 1880 an action was raised by the Scottish Heritable Security Company in the Sheriff Court of Lanarkshire against Dr John R. Granger, Glasgow, for payment of £40 as the half year's rent payable at Whitsunday 1880, of a house in Glasgow, in the following circumstances:—

In October 1876 Dr Granger entered into possession of the house, No. 1 Sutherland Terrace, Hillhead, Glasgow, under a lease granted by the then proprietors, Messrs Gilchrist & Gardner. This lease was to endure until Whitsunday 1882, with a break, in the option of the tenant, at Whitsunday 1880. The rent was £80 per annum. In September 1878 the Scottish Heritable Security Company (Limited) became heritably vested in and were in possession of the house as heritable creditors.

On 23d January 1880 Dr Granger wrote to the manager of the Scottish Heritable Security Company:—"Dear Sir,—As I have already informed your factor here (Mr Archd. Stewart), I now inform you that it is in my option to break my lease at May first. We have been occupying at much too high a rental (£80), and, to induce us to remain, Mr Stewart has offered to reduce that to £67, 10s., but I still think further reduction necessary, and I hope, for the following reasons, you will see it your interest to recommend Mr S. to make further deduction.

"Our house is not, by any means, what it should be in regard to drainage, by which, in the past, we were put to so much trouble and you to expenses, for occasionally still we are like to be driven from the house by sewage smells.

"Then in two rooms we never can have fires, on account of smoke annoying both our neighbours and ourselves, and, let me add, these are both evils which cannot be cured and must be endured, or so, at least, says Mr Stewart.

"I think I have said quite enough to shew that I am, at least, entitled to a reduction of 20 per cent from our present rental.—Yours faithfully,

"JOHN R. GRANGER."

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On 31st January Dr Granger wrote to Mr Stewart, the company's factor, as follows:—"Dear Sir,—If you really cannot see your way to make any further reduction on our rental from £67, 10s., I agree to take the house, with the hope that you may do so next year, and on the distinct understanding that you will not make any attempt to add to it for, at least, the next four or five years. Waiting the favour of your reply, I am, yours faithfully,
JOHN R. GRANGER."

On 4th February Mr Stewart wrote to Dr Granger:—"I understood you took the house. If you did not mean that, let me know by return. It is now for you to say if you take the house for two years."

To this Dr Granger answered on 6th February:—"I am in receipt of yours, and become a yearly tenant at £67, 10s. for two years."

On 16th February 1880, Dr Granger wrote to Mr Stewart:—"Dear Sir,—I beg to withdraw my offer entirely for a lease of this house beyond the two years already stipulated for."

"My eldest girl is at present laid up with typhoid fever, and as soon as she is able to be removed, or if the worst should happen (for, in the meantime, we have to look the worst in the face), I will insist on the house being examined by an outside party, and any repairs on the drains thought necessary put into execution without delay.—Yours faithfully,

On 20th February Dr Granger removed his children from the house.

On the 21st his youngest child, an infant, died, and other children were ill with typhoid fever.

On 21st February Messrs J. & J. Boyd, writers, Glasgow, wrote to Mr Stewart:—"Sir,—Dr Granger, the tenant of the house, 1 Sutherland Terrace, informs us that, in consequence of his children being laid down with gastric fever, he has had the drains of the house lifted, and thoroughly examined, and the result is, that they are so thoroughly and radically deficient that he has been ordered by Drs Fergus and Finlayson at once to leave the house. He has already removed his children, and he will himself remove so soon as he can get accommodation elsewhere. We have advised Dr Granger, and now intimate to you, that he will not be responsible for rent after this date."

On 23d February Messrs Dick & Stevenson, writers, Glasgow, wrote in reply:—"Dear Sirs,—Mr Archibald Stewart has handed us your letter to him of the 21st inst.

"He was not aware, until the present complaint was made, that there was anything wrong with the drains, and he informs us that he called upon your client on Saturday, and satisfied him that, in the event of the drainage being defective, it would be at once put right, and he has ordered a competent person to make an inspection.

"Meantime, we write to say that we cannot admit that the illness of your client's children is due to any insufficiency of the house, and we deny all responsibility for damage which your client may sustain.

"As above stated, our clients are ready and willing to put the drains in order if they find anything wrong with them, and they will, of course, hold your client liable for the rent of the house until the expiry of his lease."

Soon after Dr Granger removed his furniture.

On 11th March Messrs Dick & Stevenson wrote to Dr Granger:—"Dear Sir,—We are informed by the factor that you have removed your furniture and plenishing from this house, and we beg to repeat what we have already said to your agents—that our clients do not recognise your right to remove, and will insist on your paying the rent in terms of your lease, and it is only out of courtesy to you that they meantime refrain from calling upon you to replenish the house."

The company's factor proceeded to have the house put in order, which was done by removing the existing drains and substituting one round the

outside of the house. This operation occupied about two months, during which time Dr Granger and his family lived in another house. When the house was ready, about 20th April, the company called upon Dr Granger to resume his occupation, but this he refused to do.

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Dr Granger defended the action, and pleaded the uninhabitable condition of the house, and intimated a claim for damages.

Pleaded for the company ;—(2) The pursuers not having made the contract with the defender, out of which his alleged loss and damage arises, they are in no way liable to him, even although damage could be established. (3) The defender having leased the said house from the pursuers' predecessors, Messrs Gilchrist & Gardner, and entered upon, and continued in the possession thereof for upwards of three years, while the same was, according to his allegations, during the whole of that period, in an insanitary and unhealthy condition, is not now entitled to resile from his lease, or claim damages from the pursuers. (4) The defender's removal from and continued declinature to return to his said house was unnecessary and unwarranted, and if any loss or damage has arisen therefrom the pursuers are in no way responsible therefor. (5) Any loss or damage which the defender may have sustained having arisen through his own conduct and negligence, the pursuers are not responsible therefor.

Pleaded for Dr Granger ;—(1) The pursuers being the proprietors of the said house, or at least in possession thereof, and collecting the rents, were under an implied obligation of warrandice that the house was in a habitable condition. (2) The house occupied by the defender having been rendered dangerous to health and unfit to live in, the defender was justified in leaving the same. (3) The pursuers having failed in their implied warrandice that the house was habitable, the defender was entitled to terminate his contract of tenancy.

Dr Granger shortly afterwards raised an action of damages against the company, in which he concluded for £400 as damages and *solatium*. The company defended this action.

The two actions were conjoined, and a proof was led, from which the facts above stated and others mentioned in the Sheriff-substitute's interlocutor and note appeared.

On 30th November 1880 the Sheriff-substitute (Spens) pronounced this interlocutor :—" Finds that the party Granger occupied the premises in question under a lease with Messrs Gilchrist & Gardner from October 1876 to February last : Finds that said lease contemplated endurance to Whitsunday 1882, with a break, however, in said lease at Whitsunday 1880 : Finds that in September 1878 the parties, the Scottish Heritable Security Company, entered into possession of the premises in question : Finds that the party Granger, taking advantage of the break in the lease, obtained, on 6th February last, a modification of the rent of the lease as from Whitsunday 1880 to Whitsunday 1882, the rent being reduced from £80 to £67, 10s. per annum : Finds that about said 6th February several members of the party Granger's family took ill, and it being suspected that the drains of the house were wrong an inspection was made, which resulted in serious defects being discovered in a drain which was situated under the lobby floor of the basement story : Finds that the party Granger removed himself and family from said house, in the first place, to a house in Ashton Terrace, and also entered into an agreement of lease, as from Whitsunday 1880, for a house in Albion Crescent, which he is now occupying : Finds that he repudiated, and repudiates, the lease of the premises in question : Finds that he made no demand on the landlords to put the drains in a proper state : Finds, however, since he left the pre-

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mises extensive operations and repairs have been ordered and carried out in connection with the drainage of the house in question, which were completed on or about 20th April: Finds the Heritable Company offered to make a deduction of rent, prior to the raising of the present actions, for the period of non-occupation, but to this offer the party Granger refused to accede, unless the lease was to be considered at an end: Finds, under reference to note, that the party Granger has failed to prove that the sickness from which certain members of his family suffered was due to the state of the drains of the premises in question: Finds also, *separatim*, that he has failed to prove *culpa* against the Heritable Company, or those for whom they are responsible, for the state of said drains, even on the assumption that the illness in question, and the trouble and expense in connection therewith, were due to the state of the drains: Finds, under reference to note, that the party Granger was not entitled to repudiate the lease in question: Finds that the party Granger is entitled to a deduction from the half year's rent for non-occupation of the premises, in respect in the circumstances above set forth he was entitled to leave the premises in question until the drains of the house were put in a proper state: Finds that he is also entitled to a deduction for the expense he was put to in connection with such removing, and fixes said deduction at £25: except, however, as regards the said deduction hereby allowed, repels the whole claims for damage advanced by the said party Granger, and decerns against him in favour of the parties the Scottish Heritable Security Company (Limited) for the sum of £15, with interest on said sum as craved," &c.*

* "NOTE.—I have to deal here with conjoined actions. The first of these actions is an action for the half year's rent of the premises occupied by the party Granger, concluding for £40. The other is an action at the instance of Mr Granger claiming £400 damages for illness caused in the pursuer's family,—the death of an infant,—the removal from the premises in question, and inconvenience and expense attaching thereto. . . . The factor seems always to have been ready, not only to listen to the complaints as to the drainage being wrong, but to order experienced tradesmen to do everything to put the premises right. However, as I have already said, the action for damages is not based on *culpa*. Apart, however, from this question, I do not think that it is possible to hold, upon the proof, that the illness in Dr Granger's household is proved to be due to the defective drainage. It is very likely that such was the case (and here I may say that I thoroughly agree with Dr Granger that it was right in the circumstances to remove his family, and this I will deal with later on), but it is one thing to see that a thing is probable and another thing to hold it proved; and here, I take it, the Heritable Company are entitled to say, if this illness is to be founded on as against us, it must be proved that it was due to defective drainage. Dr Granger says that he can conceive of no other cause, but every one knows that typhoid fever and illnesses of such description are caused in ways which are never discovered, and although the illness of the household may have been due to defective drainage I cannot hold that it has been proved that such was the cause.

"With his family ill, and examination having revealed that there was a hole in the drain pipe under the floor, and a bad smell coming from the stuff lying about this pipe (whether it was soap waste or excreta), I am clear that Dr. Granger was entitled to leave the house until, at least, matters were put right. The result of the investigation made by the Heritable Company was, that the conclusion was arrived at, that to make a thoroughly satisfactory job of the drains it was advisable that the drain in question should be removed to the outside, and the position of a w.c. shifted, &c., and this has been done at a very considerable expense, between £40 and £50, I think. To get that work done seems to have taken about two months. For that period I think there is

Dr Granger appealed to the Court of Session, but only against the decerniture against him in the action at the instance of the Heritable Security Company for £15. No. 87.

Argued for Dr Granger;—The landlord having failed in his obligation to supply a tenantable house was not entitled to enforce the right which that alone would confer on him of demanding rent. The interruption of the tenant's occupation was of such duration as of itself to put an end to the current lease.¹ As regards the new lease, when the offer was made the tenant was in ignorance of the state of the house, and as nothing had followed on the offer he was entitled to resile.

Argued for the company;—Though it was admitted that a tenant in such circumstances as had been disclosed here might be entitled to leave the house until it was made habitable, still that would not entitle him to break the lease altogether. A deduction being allowed for the necessary interruption of occupation, he was still liable in the balance of the rent. On the question of the new lease the tenant having voluntarily entered into it in full knowledge of the discomforts of the house was bound by it.

LORD YOUNG.—Dr Granger, the appellant in this case, was the tenant of a house in Glasgow, under a written lease, from October 1876 until Whitsunday 1882, a period of six years, with a break at Whitsunday 1880, in the tenant's option. The action by the respondents is for payment of a half year's rent, amounting to £40, for the possession of the house under this lease from Martinmas 1879 to Whitsunday 1880. The Sheriff-substitute has explained in his

no claim against Dr Granger for rent; but I do not think that Dr Granger was entitled to repudiate the lease. He knew, or ought to have known, just as much about the drains as the Heritable Company, and on the 6th of February, having a break in the existing lease at Whitsunday 1880, he agreed to take on the house for two years from that last-mentioned date; nay, more, just about this very time he wrote to the Heritable Company wanting a still further deduction from rent than that obtained from the factor, on the ground of the drainage not being what it ought to be. It is impossible, therefore, to hold that the state of the house was not present to his mind at the date of the renewal of the lease of 6th February, which lease he repudiated before the end of the month. The position which, I am of opinion, Dr Granger should have taken up was to call upon the landlords to put matters right. Probably it would have been better for him to have got the assistance of a skilled person as to what was necessary, and called upon the landlords to carry out the alterations suggested. If the landlords refused to do what was necessary, then, I think, Dr Granger would have been entitled to repudiate the lease, or he would have been entitled to have carried out the alterations at his own hands, and deducted the cost from the rent. It is, I think, necessary to determine in this case whether the lease is or is not binding, because unless Dr Granger had established (which I take it he has not done on the proof) that he could only get a house temporarily by taking it on to the Whitsunday term, then I think rent must run against him as from the period when the drains had been put in proper order, and the house was fit for occupation, which seems to have been about the 20th of April. For the inconvenience caused by removal, and the non-occupation of the premises in question for a couple of months, I think £25 a fair sum to award as a deduction from rent, and decree accordingly for £15 is pronounced in the action against the party Granger."

¹ Bayne v. Walker, July 3, 1815, 3 Dow, App. 233; Kippen v. Oppenheim, Dec. 14, 1845, 10 D. 242, 20 Scot. Jur. 74; Clark v. Glasgow Assurance Co., Aug. 8, 1854, 1 Macq. 668; Drummond v. Hunter, Jan. 12, 1869, 7 Macph. 347, 41 Scot. Jur. 203; Duff v. Fleming, May 18, 1870, 8 Macph. 769, 42 Scot. Jur. 423.

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No. 87. note, that the landlords—this Heritable Security Company—before raising the action, offered to make a deduction from the rent for the time when the tenant was not actually in occupation of the house, and we are now told that they acquiesce in the finding of the Sheriff, that the amount effecting to that period is £25. The question is, therefore, now narrowed in this action for rent to whether Dr Granger is to pay £15 or no. That, at least, appears to be the subject of this litigation, but the Sheriff indicates in his judgment that there is a somewhat larger question between the parties. Dr Granger, it seems, refused to accept this reduction of £25 in his rent, unless the lease was to be held to be at an end,—that is to say, the parties desire under this record, which relates solely to a half year's rent, to try the question as to the effect of certain letters, whether they bind Dr Granger for a longer period or no. Counsel for the appellant accordingly stated at the bar that the questions raised involved not only the half year's rent mentioned in the action, but the whole rent for two years afterwards. In this action we can decide nothing except as to the half year's rent mentioned on record, although personally I am very willing to give my opinion upon the other matter, to aid the parties to settle all questions between them.

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The facts as to the £15 are shortly as follows :—The drains in this house were, to say the least, not in a satisfactory state. It was not a sweet smelling house. At the request of the tenant some attention was paid to the drains in February 1879; thereafter, in the end of January 1880, Dr Granger, having regard to the option given him to terminate the lease at Whitsunday 1880, entered into negotiations with the factor for the landlord to take on the house for some time longer at a reduced rent. He was absolutely entitled to break off the old lease, and the proposals now were for a new lease. On 6th February the tenant wrote concluding a bargain for a new lease at a reduced rent. At this time some of his family had sickened, and this sickness spread until they became seriously ill, and by 16th February their condition was critical. Upon 21st February the youngest child—a baby—died, and the other children were prostrated by severe attacks of typhoid fever. This state of affairs induced Dr Granger to make inquiry as to the state of the drains, and the result was, that he was satisfied that the illness of his children, and the death of one, was due to the state of the drains in the house. The Sheriff-substitute seems to think he had reasonable grounds for this belief. I concur with the Sheriff in this view. Indeed, I think, this tenant was not only entitled, but bound, to remove his children from this house.

The landlord then proceeded to inspect the drains and put them in order. They were found to be in a very bad state, and it was two months before the house was in a condition for the return of the family. This brings us to the end of April. The landlord maintains that the tenant should have returned to the house then, and, as I have said, is prepared to make a deduction from the rent in respect of the two months' disturbance of possession while the drains were being repaired.

Upon this nice question, whether the father of a family who are alarmingly ill—one already dead—is justified in removing them from the house which is the cause of their illness, and is bound, when the cause of the illness is removed, to return to the house, though, for but a short time, the solution of this action, involving a sum of £15, depends. I am of opinion that a tenant so disturbed in his possession, with his family struck down by illness, is not bound to return

to the house the moment the disturbing cause is removed, particularly if there is nothing to oblige him to remain in the house for more than a few weeks. I think that the failure—not necessarily through *culpa*—on the part of a landlord to fulfil his obligation to supply a habitable house disentitles him to ask for rent for the half year, and entitles the tenant to state the defence which we have here, and which I humbly recommend your Lordships to sustain. No. 87.
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Upon the ulterior question, which is plainly more interesting to the parties—that is, whether the tenant is bound to return to the house and to pay rent for two more years—I am of opinion that, although *prima facie* he would appear bound to return to the house, not under the old lease, but under a new one entered into under his letter of 6th February, still in consequence of the letters of 16th and 21st February I think he is no longer bound. Nothing having followed upon the letter of 6th February, in the circumstances, the serious and increasing sickness in the family, arising from the bad state of the house, entitled him to resile. If that be considered to be going too far I am then further of opinion that, in the circumstances, we would not be warranted in giving specific implement under the letter of 6th February. If the tenant be held to be bound the remedy of the landlord in such a case would be only a claim for damages, and nothing having taken place between 6th and 16th February, any damages awarded must necessarily be infinitesimal. I only indicate this as an opinion for the benefit of the parties, as the question I have last dealt with is not raised on record. On the true question raised, I think the appellant is entitled to have the Sheriff-substitute's interlocutor recalled, and to be assoilzied.

LORD CRAIGHILL.—I concur in the result arrived at by, and in the opinion of, Lord Young. The only question to be determined by us is whether the landlord is to have more than the £15 for which the Sheriff-substitute has decreed, or less. The condition on which a landlord is entitled to recover rent is that he fulfils the obligation of supplying a house safe to live in, and if time be necessary to put the house in a position to be inhabited is the landlord to be entitled to say,—“You had better withdraw till the house is put right, but there is to be no end put to the lease, and you must return the moment the house is habitable, and everything must be as if there had been no interruption?” The question, of course, turns, to a great measure, on the degree. In this case there can be no doubt that the tenant was entitled, nay, bound, to remove. It is hardly possible to conceive of anything more important in a house than the drains. There had been for a long period complaints of smells, and much discomfort followed thereon. I do not say that the landlord was remiss or indifferent, and when complaints were made to him he at once sent to have them put right. But all this only shews how very deep-seated the defects were, and by February 1880 matters had become intolerable. Not only were there offensive smells, but first one and then other members of the family sickened, and towards the end of the month the baby died. It followed that the tenant put the two things together, and attributed the illness and death to the state of the drains. The Sheriff-substitute thinks they were probably connected, and I concur in that view, also in the Sheriff's opinion that the tenant was right to remove his family from the house. If the drains could have been put right in a day or two perhaps the case might have been different, but it is not necessary to go into that, as it took two months to make this house habitable for this tenant or anyone else. The question then is, the tenant having left the house

No. 87. for good reason, and provided himself with another, is he bound to return to it when, after the lapse of two months, the house has been made habitable? I think there was sufficient failure on the part of the landlord to warrant the tenant in not returning to the house. His occupation, which was to be continuous, was interrupted for no less a period than two months. That is an interruption which the landlord had no right to insist that his tenant should agree to. That being so, it is not necessary for us to go beyond the lease, which terminated at Whitsunday 1880, because, if the tenant was not bound to return under it before its expiry then he could not be bound to return afterwards.

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It is said, however, that there was a new lease from Whitsunday 1880, and that the landlord is prepared to give a habitable house for the whole period of that lease. It is not usual to give an opinion upon a point which is not raised by the pleadings, such as this; but as it may be for the benefit of the parties here I concur in the course taken by Lord Young, and also in the view stated by his Lordship.

It appears to me that this offer for a new lease would never have been made if the appellant had known the true state of the house, and that he would have to remove before the term of commencement of the new lease.

LORD JUSTICE-CLERK.—I entirely concur in the opinions which have been delivered.

This is an important case, because the sanitary state of houses in large cities has attracted considerable attention. I am of opinion that it has been proved (1) that the state of the drains in this house was so defective as to be dangerous to health, and that as at 10th February 1880; (2) that the appellant's family suffered in health in consequence; (3) that the appellant was entitled to remove them whenever it was ascertained that the above was the state of affairs, and in consequence of this all being so, he was not bound to return when the drains were repaired. I am further of opinion, with Lord Young, that the appellant was, in the circumstances, entitled to resile from the alleged new lease.

THE COURT pronounced this interlocutor:—" (Firstly) in the action at the instance of The Scottish Heritable Security Company (Limited) against the appellant, defender therein—Find that during the half year from Martinmas 1879 to Whitsunday 1880 the house referred to in the record was, from the bad state of the drainage thereof, in such a condition as not to be habitable with safety to human life, and that the appellant was in consequence compelled to remove, and did remove himself and family therefrom in the course of said term, viz., in the month of February 1880, and that he is not in law liable for the half year's rent sued for: Therefore sustain the appeal; recall the interlocutor appealed against; assoilzie the appellant from the conclusions of the summons, and decern. (Secondly) in the action at the instance of the appellant against the respondents, The Scottish Heritable Security Company (Limited)—Find that with respect thereto this appeal is not insisted in: Recall the interlocutor appealed against, in so far as it finds the respondents, defenders therein, entitled to expenses, and *quoad ultra* dismiss the appeal, and decern: And (thirdly), in the conjoined actions, find no expenses due to either parties in the Sheriff Court, and find the appellant entitled to the expenses of this appeal, and remit to the Auditor," &c.

R. AINSLIE BROWN, S.S.C.—STUART & CHEYNE, W.S.—Agents.

WILLIAM THEW & Co. AND MANDATARY, Appellants.—*M'Kechnie*.
SINCLAIR & Co., Respondents.—*A. J. Young*.

No. 88.

Feb. 1, 1881.
Thew & Co. v.
Sinclair & Co.

Personal bar—Acceptance of composition—Mora.—Held that a creditor who had refused to accept a composition on his debt, but had neglected for ten months to return to his debtor a bill for the amount of the composition which was subsequently sent to him, was not barred thereby from insisting in an action for the payment of the whole amount of his debt.

WILLIAM THEW & Co., merchants, London, and John Roberts, S.S.C.,^{1st Division.} their mandatary, presented a petition in the Sheriff Court at Edinburgh against Sinclair & Co., drysalters, Calton Street, Edinburgh, praying the Court to ordain the defenders to pay to the pursuers the sum of £35, 12s., with interest thereon from the date of citation till payment. ^{Sheriff of Midlothian.}
^{M.}

Cond. 3 was in the following terms :—"The pursuers have often desired and required the defenders to make payment of said sum, but they refuse or at least delay to do so, and have thus rendered the present action necessary. With reference to the counter statement, it is explained that the defenders offered a small composition, which the pursuers refused, but the pursuers offered to accept 10s. per £. This offer the defenders declined. The defenders sent a bill for the smaller composition in disregard of the pursuers' refusal to accept it, and the bill lay with the pursuers unnoticed for some time, until it was returned by pursuers' solicitor on or about 24th May 1880."

To this the defenders answered :—(Ans. 3) "Admitted that the defenders refused to pay the sum sued for. Explained that in 1879 the defenders found it necessary to compound with their creditors, and offered a composition which was accepted by them, including the pursuers of the present action. In payment of the said composition on the pursuers' debt, the defenders, through their agents, on 25th July 1879, sent the pursuers a promissory-note for £8, 15s. 6d., payable by three equal instalments at four, eight, and twelve months. The pursuers duly received and retained the said bill until 27th May 1880, when it was returned to the defenders by the pursuers' agents."

The pursuers pleaded, *inter alia* ;—2. The pursuers having declined to agree to the composition proposed, and not having accepted the bill referred to by the defender under said composition arrangement, nor received payment thereof, but returned the same, are entitled to decree.

The defenders pleaded, *inter alia* ;—1. The pursuers having accepted of a composition on their debt, and the defenders having been all along quite willing to pay the said composition, the pursuers are not entitled to insist on payment of their original claim.

On 19th July 1880, the Sheriff-substitute (Hallard) issued the following interlocutor :—"The Sheriff-substitute having heard parties' procurators on the closed record, Finds that the defenders, having become embarrassed in their circumstances, proposed a composition contract to their creditors: Finds that having been applied to for consent of this transaction, the pursuers expressly declined the same: Finds that notwithstanding said refusal the defenders sent to the pursuers a composition bill for £8, 15s. 6d., payable in equal instalments: Finds that said bill was sent to the pursuers on 25th July 1879, and was retained by them till 27th May 1880: Finds that by such retention of the composition bill the pursuers are barred from insisting in their original claim: Sustains the defences to that effect: Dismisses the action, reserving to the pursuers their right to insist for the composition due on their debt."

No. 87. for good reason, and provided himself with another, is he bound to return to it when, after the lapse of two months, the house has been made habitable? I think there was sufficient failure on the part of the landlord to warrant the tenant in not returning to the house. His occupation, which was to be continuous, was interrupted for no less a period than two months. That is an interruption which the landlord had no right to insist that his tenant should agree to. That being so, it is not necessary for us to go beyond the lease, which terminated at Whitsunday 1880, because, if the tenant was not bound to return under it before its expiry then he could not be bound to return afterwards.

Jan. 28, 1881.
Scottish Heritable Security Co. (Limited) v. Granger.

It is said, however, that there was a new lease from Whitsunday 1880, and that the landlord is prepared to give a habitable house for the whole period of that lease. It is not usual to give an opinion upon a point which is not raised by the pleadings, such as this; but as it may be for the benefit of the parties here I concur in the course taken by Lord Young, and also in the view stated by his Lordship.

It appears to me that this offer for a new lease would never have been made if the appellant had known the true state of the house, and that he would have to remove before the term of commencement of the new lease.

LORD JUSTICE-CLERK.—I entirely concur in the opinions which have been delivered.

This is an important case, because the sanitary state of houses in large cities has attracted considerable attention. I am of opinion that it has been proved (1) that the state of the drains in this house was so defective as to be dangerous to health, and that as at 10th February 1880; (2) that the appellant's family suffered in health in consequence; (3) that the appellant was entitled to remove them whenever it was ascertained that the above was the state of affairs, and in consequence of this all being so, he was not bound to return when the drains were repaired. I am further of opinion, with Lord Young, that the appellant was, in the circumstances, entitled to resile from the alleged new lease.

THE COURT pronounced this interlocutor:—" (Firstly) in the action at the instance of The Scottish Heritable Security Company (Limited) against the appellant, defender therein—Find that during the half year from Martinmas 1879 to Whitsunday 1880 the house referred to in the record was, from the bad state of the drainage thereof, in such a condition as not to be habitable with safety to human life, and that the appellant was in consequence compelled to remove, and did remove himself and family therefrom in the course of said term, viz., in the month of February 1880, and that he is not in law liable for the half year's rent sued for: Therefore sustain the appeal; recall the interlocutor appealed against; assoilzie the appellant from the conclusions of the summons, and decern. (Secondly) in the action at the instance of the appellant against the respondents, The Scottish Heritable Security Company (Limited)—Find that with respect thereto this appeal is not insisted in: Recall the interlocutor appealed against, in so far as it finds the respondents, defenders therein, entitled to expenses, and *quoad ultra* dismiss the appeal, and decern: And (thirdly), in the conjoined actions, find no expenses due to either parties in the Sheriff Court, and find the appellant entitled to the expenses of this appeal, and remit to the Auditor," &c.

R. AINSLIE BROWN, S.S.C.—STUART & CHEYNE, W.S.—Agents.

WILLIAM THEW & CO. AND MANDATARY, Appellants.—*M'Kechnie*.
SINCLAIR & CO., Respondents.—*A. J. Young*.

No. 88.

Feb. 1, 1881.
Thew & Co. v.
Sinclair & Co.

Personal bar—Acceptance of composition—Mora.—Held that a creditor who had refused to accept a composition on his debt, but had neglected for ten months to return to his debtor a bill for the amount of the composition which was subsequently sent to him, was not barred thereby from insisting in an action for the payment of the whole amount of his debt.

WILLIAM THEW & CO., merchants, London, and John Roberts, S.S.C.,^{1ST DIVISION.} their mandatary, presented a petition in the Sheriff Court at Edinburgh against Sinclair & Co., drysalters, Calton Street, Edinburgh, praying the Court to ordain the defenders to pay to the pursuers the sum of £35, 12s., with interest thereon from the date of citation till payment. ^{Sheriff of Midlothian. M.}

Cond. 3 was in the following terms:—"The pursuers have often desired and required the defenders to make payment of said sum, but they refuse or at least delay to do so, and have thus rendered the present action necessary. With reference to the counter statement, it is explained that the defenders offered a small composition, which the pursuers refused, but the pursuers offered to accept 10s. per £. This offer the defenders declined. The defenders sent a bill for the smaller composition in disregard of the pursuers' refusal to accept it, and the bill lay with the pursuers unnoticed for some time, until it was returned by pursuers' solicitor on or about 24th May 1880."

To this the defenders answered:—(Ans. 3) "Admitted that the defenders refused to pay the sum sued for. Explained that in 1879 the defenders found it necessary to compound with their creditors, and offered a composition which was accepted by them, including the pursuers of the present action. In payment of the said composition on the pursuers' debt, the defenders, through their agents, on 25th July 1879, sent the pursuers a promissory-note for £8, 15s. 6d., payable by three equal instalments at four, eight, and twelve months. The pursuers duly received and retained the said bill until 27th May 1880, when it was returned to the defenders by the pursuers' agents."

The pursuers pleaded, *inter alia*;—2. The pursuers having declined to agree to the composition proposed, and not having accepted the bill referred to by the defender under said composition arrangement, nor received payment thereof, but returned the same, are entitled to decree.

The defenders pleaded, *inter alia*;—1. The pursuers having accepted of a composition on their debt, and the defenders having been all along quite willing to pay the said composition, the pursuers are not entitled to insist on payment of their original claim.

On 19th July 1880, the Sheriff-substitute (Hallard) issued the following interlocutor:—"The Sheriff-substitute having heard parties' procurators on the closed record, Finds that the defenders, having become embarrassed in their circumstances, proposed a composition contract to their creditors: Finds that having been applied to for consent of this transaction, the pursuers expressly declined the same: Finds that notwithstanding said refusal the defenders sent to the pursuers a composition bill for £8, 15s. 6d., payable in equal instalments: Finds that said bill was sent to the pursuers on 25th July 1879, and was retained by them till 27th May 1880: Finds that by such retention of the composition bill the pursuers are barred from insisting in their original claim: Sustains the defences to that effect: Dismisses the action, reserving to the pursuers their right to insist for the composition due on their debt."

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The pursuers appealed to the Sheriff, and on 4th October 1880 the Sheriff (Davidson) adhered.

Feb. 1, 1881.
Thew & Co. v.
Sinclair & Co.

The pursuers appealed to the Court of Session.

LORD PRESIDENT.—I cannot say that this case is in a satisfactory state. The action is brought for payment of a bill for £39, 0s. 7d., and it is dismissed by the Sheriff-substitute and the Sheriff on the footing that the pursuers have accepted a composition upon the debt, and are consequently not entitled to sue for the whole. If that had been made out in point of fact the judgment would have been quite right, but as the case stands it is not so made out. We have nothing before us but the record, and no such admission is made. It is true that the defenders aver that the composition was accepted, and their statement is quite relevant. They say that “in 1879 the defenders found it necessary to compound with their creditors, and offered a composition, which was accepted by them, including the pursuers of the present action. In payment of the said composition on the pursuers’ debt, the defenders, through their agents, on 25th July 1879, sent the pursuers a promissory-note for £8, 15s. 6d., payable by three equal instalments at four, eight, and twelve months. The pursuers duly received and retained the said bill until 27th May 1880.” If that statement is true, the defenders are entitled to prevail. But what do the pursuers say? They explain that “the defenders offered a small composition, which the pursuers refused, but the pursuers offered to accept 10s. per £. This offer the defenders declined. The defenders sent a bill for the smaller composition, in disregard of the pursuers’ refusal to accept it, and the bill lay with the pursuers unnoticed for some time, until it was returned by pursuers’ solicitor on or about 24th May 1880.”

Now, as I understand the judgments of the Sheriffs, they proceed on these admissions as sufficient for the decision of the case. This is quite clear from the terms of the Sheriff-substitute’s interlocutor. It is in the last finding of that interlocutor that the fallacy or vice of the judgment is to be found. I cannot assent to the proposition that by the mere retention of the composition bill the pursuer is barred from insisting in his full claim. Such a doctrine would be followed by very serious and dangerous consequences. The creditors are asked, not in pursuance of any trust-deed granted by the insolvent, nor even of any writing, such as a minute of a meeting of creditors, but simply on the motion of the debtor himself, to accept a composition. The creditors declined, but offered to accept a larger composition. Then the defenders send them a bill for the composition they had offered, payable by instalments, which the pursuers neglect to return for nearly twelve months. Is that sufficient to bar the pursuers from insisting for the whole amount of their debt? I am certainly of opinion that it is not. Therefore, while the defence is relevant, I think that it is not proved, and what I should propose is that we should recall the interlocutors appealed against, and remit to the Sheriff to take a proof.

LORD MURE and LORD CURRIEHILL concurred.

LORD DEAS and LORD SHAND were absent.

THE COURT recalled the interlocutors appealed against, and remitted to the Sheriff to allow proof.

J. CAMPBELL IRONS & Co., S.S.C.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

JAMES SIMPSON, Appellant.—*M'Kechnie*.
JAMES L. SELKIRK, Respondent.—*Strachan*.

No. 89.

Feb. 2, 1881.
Simpson v.
Selkirk.

Process—Debts Recovery (Scotland) Act, 1867 (30 and 31 Vict.), cap. 96—Addition of plea after case decided in inferior Court—Pars Judicis.—When, in an action under the Debts Recovery Act, 1867, a person having sufficient means to enable him to employ an agent conducts his own cause he will not, in an appeal against the judgment, be entitled to state a new plea.

ON 14th June 1880 James L. Selkirk, executor-dative of the late Rev. George Selkirk Jack, raised an action under the Debts Recovery Act, 1867, in the Sheriff Court of Fife, against James Simpson, Thornton. The summons concluded for payment of the sum of £50, "being the restricted amount of an account." 1st Division.
Sheriff of
Fife.
M.

The account, which was incurred during the years 1872–73–74, included, besides board and washing, payments of college fees, tradesmen's accounts, and various small cash advances. The defender, without the assistance of an agent, conducted his own cause before the Sheriff-substitute (Lamond), and pleaded, "The account is paid."

On 8th July 1880 the Sheriff-substitute noted the pleas, in terms of the statute, and put out the case for hearing on 22d July.

On that day he granted "decree, with expenses, defender having failed to prove by competent evidence that the debt has been paid."

On 29th July 1880 the defender appealed, through his agent, to the Sheriff (Crichton), and at the hearing his procurator moved the Sheriff to allow a plea that the account sued on was prescribed to be added.

The Sheriff refused to admit the plea, and, on 25th October, dismissed the appeal.*

The defender appealed to the Court of Session.¹

LORD PRESIDENT.—It is not very easy for a Judge sitting in this Court to place himself exactly in the position of a Sheriff sitting in the Small-Debt or Debts Recovery Courts, and I daresay one is inclined to think that the Sheriffs go too fast, and do not give sufficient indulgence to the parties, and I am very much inclined, when there is the least appearance of a litigant having been taken up too sharply, to restore him, if possible, to his rights. Certainly here, on the face of the proceedings, there is some appearance of haste, when we remember that it is a case of a man defending himself without legal advice. If it had appeared that the appellant was so poor a man as not to be able to afford legal advice it would have made the case much stronger. But there is no appearance of that. We must assume that this was a man of means, for he sent his son to a boarding school at a considerable cost, and must therefore have had means enough to employ an agent. But he did not choose to do so until after the case had been decided against him, so he can take no benefit from that consideration. The question then is, whether there has been such injustice done as to justify us in upsetting the Sheriffs' judgments? I am not inclined to think that there has.

If an account sued for in the Small Debt Court appears clearly on the face of it to be prescribed under the statute, I think that it is the duty of the Sheriff to give effect to the prescription, whether it is pleaded or not; for in that Court

* "NOTE.—Looking to the opinions of the Court in the case of *Cumming v. Spencer*, 21st Nov. 1868, 7 Macph. 156, the Sheriff is of opinion that the defender's motion cannot be granted."

¹ *Authorities.*—*Murray v. Mackenzie*, April 21, 1869, 41 Scot. Jur. 394, 1 Coup. 247; *Gunn v. Taylor*, Sept. 20, 1873, 2 Coup. 491.

No. 90.

Feb. 4, 1881.
Douglas v.
Maclachlan.

bankrupt's workshop, but not to include joiner's bench, grindstone, workmen's tools, trestles, planks, or wood not specially appropriated for the above purposes lying in the loft above the store, all of which the trustee reserves power to dispose of otherwise. Should any of the said window-cases, windows, door-frames, and doors be in the shop above the store, the trustee to give delivery of them. The materials at the feu to include all wood and slates laid down to be used in the building, trestles excepted. It being agreed that Mr Campbell is to pay the stamps on both deeds above mentioned, instead of one-half each."

The memorandum of agreement was approved of at a meeting of the trustee and commissioners, and was engrossed in the sederunt-book of the sequestration. The Misses Campbell paid the £10 for the stones, as required by the second head of the agreement, and withdrew their claim to rank for £108, 4s. 4d., the unsecured balance of their debt, on the bankrupt estate.

Thereafter the Misses Campbell entered into possession of the subjects, completed the buildings, and drew the rents. It was stated that the expense of completing the buildings was about £500. The bankrupt was aware of these arrangements, and made two separate offers to buy the subjects from the agents of Misses Campbell on behalf of his sister. A draft disposition by the trustee in favour of the Misses Campbell was prepared, but was never executed. Douglas obtained his discharge without composition on 26th December 1862. A dividend of 1s. 6d. was paid by the trustee, who was discharged on 24th May 1866. On 28th January 1869 the Misses Campbell assigned the bond and disposition in security to their agent, Mr Maclachlan, for £400, and he thereafter drew the rents for his own behoof.

On 24th February 1879 Donald Douglas raised an action against Mr Maclachlan and the Misses Campbell, concluding for declarator that the bond and disposition in security was extinguished by the intromission of the defenders with the rents of the subjects, and that the subjects belonged to him, and also for an accounting.

On 5th June 1879 Mr Maclachlan raised a counter action against Dugald Campbell, the trustee in the sequestration, and the creditors, concluding for declarator that by the memorandum of agreement the trustee was bound to grant a disposition of the subjects to the Misses Campbell, and that the pursuer was now vested in their right, and had right of absolute property in the subjects, and that the defender Douglas should be ordained to execute a disposition of the subjects in the pursuer's favour, and failing his doing so, for adjudication in favour of the pursuer.

Douglas, the pursuer of the first action, pleaded ;—1. The pursuer is entitled to decree as concluded for, in respect (1) of his discharge and re-investiture, and of the said trustee having been discharged without disposing of the said lands and others ; (2) of the said debt being more than paid, and there being a balance of intromissions in the defender's hands ; and (3) of the defender having refused to produce an account of his intromissions as heritable creditor, and receive or pay any balance due to or by him.

Maclachlan, who alone defended the first action, pleaded ;—1. The pursuer has no title to sue. 2. The pursuer is barred, *personali exceptione*. 4. In virtue of the conveyance contained in the said bond and disposition in security, and assignation, and of the agreement set forth in the defender's statement of facts, the defender is absolute proprietor of the subjects in question, and he is therefore entitled to absolvitor, with expenses.

The actions were conjoined.

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The Lord Ordinary pronounced this interlocutor:—"In the action at the instance of Donald Douglas against the said Dugald Maclachlan and Christina Campbell, sustains the first plea in law for the defender the said Dugald Maclachlan, and assoilzies him from the conclusions of the action: And in the said conjoined actions of declarator and adjudication in implement, finds and declares that by agreement entered into in or about October 1859 between Dugald Campbell, sometime trustee on the sequestrated estate of the said Donald Douglas, on behalf of and as duly authorised by the creditors of the said Donald Douglas, on the one hand, and the said Dugald Maclachlan for himself, and on behalf of and as duly authorised by the said Christina Campbell and the now deceased Margaret Campbell, on the other hand, it was agreed that, upon the conditions specified in the memorandum of agreement signed by the said Dugald Campbell and the said Dugald Maclachlan, the rights of the said Christina Campbell and Margaret Campbell in and to the heritable subjects mentioned in the conclusions of the actions, constituted by a bond and disposition in security, granted by the said Donald Douglas in favour of the said Christina Campbell and Margaret Campbell, dated 20th March, and recorded in the General Register of Sasines 1st April 1859, should become rights of absolute property, and should be freed and discharged of all right of property or reversion competent to the said trustee and creditors and the said Donald Douglas; and that the said trustee, on behalf of the said creditors, became bound to grant to the said Dugald Maclachlan or the said Christina Campbell and Margaret Campbell a conveyance to the said heritable subjects, or any rights of property or reversion which the said Donald Douglas might have therein: Finds and declares that the said agreement was acted upon and that the said Dugald Maclachlan is now, by virtue of assignation in his favour by the said Christina Campbell and Margaret Campbell, dated 28th January 1869, and recorded in the General Register of Sasines 26th February 1869, vested in the whole right, title, and interest of the said Christina Campbell and Margaret Campbell under the said bond and disposition in security, and also under the said agreement with the said Dugald Campbell, and has right to the heritable subjects before referred to: *Quoad ultra* assoilzies the said Donald Douglas from the conclusions of the conjoined actions, and decerns: Finds the said Dugald Maclachlan entitled to expenses, but subject to modification; allows an account thereof to be lodged, and remits." &c.*

* "NOTE.—The said Donald Douglas was sequestrated on the 25th August 1859. Dugald Campbell, accountant in Greenock, was thereafter duly confirmed trustee on his sequestrated estates.

"The effect of the confirmation of the trustee was, under the 102d section of the Bankruptcy Act, to vest in him, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, the whole property of the debtor, Donald Douglas,—as regards the heritable estate, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment, and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration. It appears, accordingly, that the pursuer Donald Douglas was thereby divested of all right of property in the heritable subjects which he now claims, and the same were vested in the trustee on his sequestrated estates.

"The pursuer was discharged, without payment of a composition, on 26th December 1862, and consequently was not retrocessed in his estates.

"It is no doubt true that if the trustee and creditors abandon a claim to pro-

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Douglas reclaimed, and argued ;—The fee of the property remained in the bankrupt. The trustee had never made up a title to the subjects, and they, therefore, did not vest in him.¹ The Misses Campbell's possession, and all the possession which followed, must be referred to the security title. No length of possession could convert a security right into a right of property without some other step.² The trustee must be held to have abandoned the subject. He had no power to alienate the heritable property of the bankrupt without the consent of the creditors, and of the Accountant in Bankruptcy, under sec. 115 of the Bankruptcy Act. The agreement was not of the nature of a compromise allowed by the 176th section of the Bankruptcy Act, but was a sale of the heritage.

Argued for the respondent ;—Douglas had no title to sue, as the whole of his property had been taken from him and vested in the trustee under the 102d section of the Bankruptcy Act. The actings of the trustee shewed that he had no intention of abandoning this part of the estate. On the contrary, he made it useful by transacting on the footing that it was a valuable asset. Whether the objection to a sale, under sec. 115,

perty the bankrupt's radical right may revive to the effect of entitling him to sue therefor—*Fleming v. Duncan*, Nov. 16, 1876, 4 Ret. 112. But there is no such case here. What took place is this :—Two Misses Campbell held an heritable bond over the subjects for £400, and an assignation to certain building materials on the ground. They valued this security at £300, leaving an unsecured balance of principal and interest of £108, 4s. 4d., for which they claimed in the sequestration. Thereafter, in October 1859, they entered into an agreement with the trustee, by which it was, *inter alia*, agreed that, in consideration of the trustee allowing them to retain Arbutnot's feu, and buildings thereon, the subjects in question, and the materials included in the assignation, they should withdraw the claim lodged by them in the sequestration, and have no ranking on the estate. It was further agreed that the trustee should grant the defender, Mr Maclachlan, or his clients (the Misses Campbell), as he might prefer, a conveyance to the feu, and any right of property or reversion the bankrupt might have therein, the title to be taken as it stood, and the trustee not to be bound to produce any of the titles except the act and warrant in his own favour. This agreement was submitted to the commissioners and creditors, and approved of by them, and recorded in the minute-book of the sequestration. It has been acted on by all concerned, and, in respect of it, the Misses Campbell, and the defender, who is now in their right, have been in possession of the subjects ever since. Had the defender obtained from the trustee the conveyance specified in the agreement the Lord Ordinary does not see what possible ground of claim to the subjects the pursuer could have had. Unfortunately, however, the defender neglected to do so. The proceedings in the sequestration were brought to an end, and the trustee discharged on 24th May 1866 without having granted a conveyance of the subjects. This may create some difficulty in the way of the defender now getting a title from the trustee ; but the Lord Ordinary does not see how it should revive any right to the subjects on the part of the pursuer, who was absolutely divested of them as at the date of the sequestration.

"The Lord Ordinary does not think he can give effect to the conclusion for adjudication against Douglas. He does not see that he is under any obligation to implement the obligation undertaken by the trustee ; and as the statutory effect of the act and warrant of confirmation of the trustee was to adjudge the subjects, to the same effect as if a decree of adjudication had been pronounced in favour of the trustee, and recorded at the date of the sequestration, he does not see that there was anything left in Douglas to be the subject of a second adjudication."

¹ *Fleming v. Walker's Trustees*, Nov. 16, 1876, *ante*, vol. iv., p. 112.

² *Thomson v. Threshie*, June 7, 1844, 6 D. 1106, 16 Scot. Jur., 486.

was good or not, the bankrupt had no interest to plead it, as all his right had vested in the trustee and creditors. The agreement was valid as a compromise under sec. 176.

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At advising,—

LORD PRESIDENT.—The question in this case regards the right of property in certain subjects situated in Tarbert, in the county of Argyll, which formerly belonged to Donald Douglas, the reclaimer. He was sequestrated in August 1859, and these subjects, along with the rest of his estate, accrued to his trustee under the statutory title conferred by section 102 of the Bankruptcy Act. The bankrupt was discharged, not on a composition, but after payment of a dividend. His discharge is dated 26th December 1862.

His present object is to recover the subjects which fell under the adjudication of the 102d section of the Bankruptcy Act. He is opposed by Mr MacLachlan, who says that he has obtained right to the subjects from the trustee. The agreement by which this was said to be accomplished is dated 13th October 1859, within two months of the date of sequestration. The trustee was authorised to enter into that agreement by the commissioners on the estate, and he had a special direction to do so from a general meeting of the creditors. At that time the Misses Campbell, Mr MacLachlan's cedents, held a bond for £300 over these subjects, and it appears that an agreement was entered into for the purpose of making over the subjects to the Misses Campbell. The heads of the agreement were—"1st, In consideration of the trustee allowing Mr MacLachlan's clients to retain Arbutnot's feu and buildings thereon, and the materials included in the assignation by the bankrupt to Misses Campbell, they are to withdraw the claim lodged by them in the sequestration, and are to have no ranking on the estate." Then there is an arrangement as to certain stones. "3d, The trustee to grant Mr MacLachlan or his clients, as he may prefer, a conveyance to the feu or any right of property or reversion the bankrupt may have therein, the title to be taken as it at present stands, but the trustee not to be bound to produce any of the titles except the act and warrant in his own favour. The trustee to relieve Mr MacLachlan, or his clients the disponees, of all feu-duties, public and parochial burdens, due and exigible at and preceding Whitsunday last, which is to be the term of entry, the disponees relieving the trustee of feu-duties and burdens exigible after that term, and repaying to the trustee the proportion of feu-duty charged against the bankrupt by Mr Campbell of Stonefield up till Martinmas next. 4th, A mutual discharge to be granted by the parties. 5th, The said disposition to be drawn and extended, and the discharge revised by Mr MacLachlan at his clients' expense, and they to pay one-half of the stamp-duties of disposition and discharge, the trustee paying his own agent the revising fees of the disposition and drawing and extending fees of the discharge, and also the other half of the stamp-duties." Then there was a further provision as to what was to be held to be conveyed by the disposition. These proceedings appear to be regular and complete, and the trustee had full authority to enter into the agreement. The estate gained by the withdrawal of a claim of £108, 4s. 4d., which was asserted to be the unsecured balance of the debt due to the Misses Campbell. On the other hand the Misses Campbell obtained a right of property instead of the right of security which they formerly held.

¹ Dalzell v. Denniston, &c., Dec. 12, 1876, *ante*, vol. iv., p. 222.

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Douglas reclaimed, and argued ;—The fee of the property remained in the bankrupt. The trustee had never made up a title to the subjects, and they, therefore, did not vest in him.¹ The Misses Campbell's possession, and all the possession which followed, must be referred to the security title. No length of possession could convert a security right into a right of property without some other step.² The trustee must be held to have abandoned the subject. He had no power to alienate the heritable property of the bankrupt without the consent of the creditors, and of the Accountant in Bankruptcy, under sec. 115 of the Bankruptcy Act. The agreement was not of the nature of a compromise allowed by the 176th section of the Bankruptcy Act, but was a sale of the heritage.

Argued for the respondent ;—Douglas had no title to sue, as the whole of his property had been taken from him and vested in the trustee under the 102d section of the Bankruptcy Act. The actings of the trustee shewed that he had no intention of abandoning this part of the estate. On the contrary, he made it useful by transacting on the footing that it was a valuable asset. Whether the objection to a sale, under sec. 115,

perty the bankrupt's radical right may revive to the effect of entitling him to sue therefor—*Fleming v. Duncan*, Nov. 16, 1876, 4 Ret. 112. But there is no such case here. What took place is this :—Two Misses Campbell held an heritable bond over the subjects for £400, and an assignation to certain building materials on the ground. They valued this security at £300, leaving an unsecured balance of principal and interest of £108, 4s. 4d., for which they claimed in the sequestration. Thereafter, in October 1859, they entered into an agreement with the trustee, by which it was, *inter alia*, agreed that, in consideration of the trustee allowing them to retain Arbuthnot's feu, and buildings thereon, the subjects in question, and the materials included in the assignation, they should withdraw the claim lodged by them in the sequestration, and have no ranking on the estate. It was further agreed that the trustee should grant the defender, Mr MacLachlan, or his clients (the Misses Campbell), as he might prefer, a conveyance to the feu, and any right of property or reversion the bankrupt might have therein, the title to be taken as it stood, and the trustee not to be bound to produce any of the titles except the act and warrant in his own favour. This agreement was submitted to the commissioners and creditors, and approved of by them, and recorded in the minute-book of the sequestration. It has been acted on by all concerned, and, in respect of it, the Misses Campbell, and the defender, who is now in their right, have been in possession of the subjects ever since. Had the defender obtained from the trustee the conveyance specified in the agreement the Lord Ordinary does not see what possible ground of claim to the subjects the pursuer could have had. Unfortunately, however, the defender neglected to do so. The proceedings in the sequestration were brought to an end, and the trustee discharged on 24th May 1866 without having granted a conveyance of the subjects. This may create some difficulty in the way of the defender now getting a title from the trustee ; but the Lord Ordinary does not see how it should revive any right to the subjects on the part of the pursuer, who was absolutely divested of them as at the date of the sequestration.

"The Lord Ordinary does not think he can give effect to the conclusion for adjudication against Douglas. He does not see that he is under any obligation to implement the obligation undertaken by the trustee ; and as the statutory effect of the act and warrant of confirmation of the trustee was to adjudge the subjects, to the same effect as if a decree of adjudication had been pronounced in favour of the trustee, and recorded at the date of the sequestration, he does not see that there was anything left in Douglas to be the subject of a second adjudication."

¹ *Fleming v. Walker's Trustees*, Nov. 16, 1876, *ante*, vol. iv., p. 112.

² *Thomson v. Threshie*, June 7, 1844, 6 D. 1106, 16 Scot. Jur., 486.

was good or not, the bankrupt had no interest to plead it, as all his right had vested in the trustee and creditors. The agreement was valid as a compromise under sec. 176.

No. 90.

Feb. 4, 1881.
Douglas v.
Maclachlan.

At advising,—

LORD PRESIDENT.—The question in this case regards the right of property in certain subjects situated in Tarbert, in the county of Argyll, which formerly belonged to Donald Douglas, the reclamer. He was sequestrated in August 1859, and these subjects, along with the rest of his estate, accrued to his trustee under the statutory title conferred by section 102 of the Bankruptcy Act. The bankrupt was discharged, not on a composition, but after payment of a dividend. His discharge is dated 26th December 1862.

His present object is to recover the subjects which fell under the adjudication of the 102d section of the Bankruptcy Act. He is opposed by Mr Maclachlan, who says that he has obtained right to the subjects from the trustee. The agreement by which this was said to be accomplished is dated 13th October 1859, within two months of the date of sequestration. The trustee was authorised to enter into that agreement by the commissioners on the estate, and he had a special direction to do so from a general meeting of the creditors. At that time the Misses Campbell, Mr Maclachlan's cedents, held a bond for £300 over these subjects, and it appears that an agreement was entered into for the purpose of making over the subjects to the Misses Campbell. The heads of the agreement were—"1st, In consideration of the trustee allowing Mr Maclachlan's clients to retain Arbuthnot's feu and buildings thereon, and the materials included in the assignation by the bankrupt to Misses Campbell, they are to withdraw the claim lodged by them in the sequestration, and are to have no ranking on the estate." Then there is an arrangement as to certain stones. "3d, The trustee to grant Mr Maclachlan or his clients, as he may prefer, a conveyance to the feu or any right of property or reversion the bankrupt may have therein, the title to be taken as it at present stands, but the trustee not to be bound to produce any of the titles except the act and warrant in his own favour. The trustee to relieve Mr Maclachlan, or his clients the disponees, of all feu-duties, public and parochial burdens, due and exigible at and preceding Whitsunday last, which is to be the term of entry, the disponees relieving the trustee of feu-duties and burdens exigible after that term, and repaying to the trustee the proportion of feu-duty charged against the bankrupt by Mr Campbell of Stonefield up till Martinmas next. 4th, A mutual discharge to be granted by the parties. 5th, The said disposition to be drawn and extended, and the discharge revised by Mr Maclachlan at his clients' expense, and they to pay one-half of the stamp-duties of disposition and discharge, the trustee paying his own agent the revising fees of the disposition and drawing and extending fees of the discharge, and also the other half of the stamp-duties." Then there was a further provision as to what was to be held to be conveyed by the disposition. These proceedings appear to be regular and complete, and the trustee had full authority to enter into the agreement. The estate gained by the withdrawal of a claim of £108, 4s. 4d., which was asserted to be the unsecured balance of the debt due to the Misses Campbell. On the other hand the Misses Campbell obtained a right of property instead of the right of security which they formerly held.

¹ Dalzell v. Denniston, &c., Dec. 12, 1876, *ante*, vol. iv., p. 222.

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If the trustee had granted the disposition which he was bound to grant, the title of the Misses Campbell and Mr MacLachlan, their successor, would have been undoubted. But that was not done, and the matter remains on the personal contract in the memorandum of agreement. Douglas now says that in consequence of the termination of the sequestration and his discharge the subjects revert to him, as when a trustee and creditors abandon a right or a subject falling under the sequestration the right reverts to the bankrupt. Now, as a general rule, that may be quite true. But I see no room here for the application of the rule. The trustee and creditors did not abandon the subject. On the contrary, they dealt with the subject as an asset, and entered into an onerous contract to transfer it to the Misses Campbell. It appears to me that the ground on which the reclamer relies entirely fails, and that the Lord Ordinary's judgment is sound. There may be some technical difficulty in completing the title, but I have no doubt in whom the substantial right is vested.

LORD SHAND.—I agree with your Lordship in holding that the Lord Ordinary's judgment is sound. The bankrupt was divested of his estate by the sequestration, and by force of the Bankruptcy Statute the property in question was transferred from him to his trustee, just as if adjudication in implement had been granted in favour of the trustee. I know of two ways, and only two, by which a bankrupt can recover the title to his heritable estate. The first of these is retrocession—and the second, clear abandonment by the creditors in his favour of their right to the property. Now, here there is no suggestion that any retrocession was made. The bankrupt got his discharge without composition, but he was not reinvested in any part of his estate, although the discharge, admittedly by mistake, bears that he was. The only question therefore is, whether the trustee and creditors abandoned this subject so as to give him right to take it up. I have seldom listened to an argument less convincing than that which was addressed to us in support of the contention that the trustee and creditors had abandoned this subject. What occurred was this. The Misses Campbell lodged a claim in the sequestration, which brought out an unsecured balance due to them of £108, 4s. 4d. A negotiation between the trustee on the one side and the heritable creditors on the other thereupon began, the result of which was that the heritable creditors agreed to withdraw their claim to a ranking on condition that the trustee and commissioners should transfer to them the absolute right to the property which they had previously held in security only. This was a sale of the property, and excludes all idea of abandonment. If, then, there has been no abandonment and no retrocession, there can be no title in the bankrupt to demand that the property shall be transferred to him.

Another argument was presented to us, founded on the circumstance that this property was sold by private bargain, but not as the statute requires in that case, with the consent of a majority in number and value of the creditors. If the creditors had raised this objection it might have been a formidable one; but has the bankrupt any title to plead it? He was discharged on composition after paying a dividend of 1s. 6d. in the £. If the estate had paid a considerable composition, he might possibly be entitled to object to a private sale, on the ground that a larger price might have been got by public roup, and so there might have been a reversion in his favour. But such a notion is excluded by the circumstances of the present case. I therefore think the bankrupt, having

no possible interest in any reversion or recovery for the benefit of his estate, has No. 90.
no title to insist in this objection.

But there is another ground on which I think the bankrupt cannot succeed. Feb. 4, 1881.
Douglas v.
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He was personally well aware twenty years before he raised the present action, that the trustee and commissioners were transacting with the heritable creditors with regard to his property. He made offer to buy the subjects from the creditors in two letters. That offer was not agreed to. The bankrupt then stood by, and allowed the heritable creditors to conclude an arrangement with the trustee and commissioners, and thereafter to lay out large sums of money on the property, and to act on the faith of the contract being binding. They have so acted for twenty years, and now the bankrupt wishes to overturn the contract, when, through the expenditure and an improved demand for such property, the subject is greatly increased in value. His contention cannot, in such circumstances, be sustained, and if it were necessary for the decision of the case I think this ground alone would be sufficient to justify the Court in holding that the bankrupt is not entitled to succeed.

LORD DEAS was absent at the advising, but the Lord President stated that he concurred.

LORD MURE was absent at the discussion, and gave no opinion.

THE COURT adhered.

THOMAS CARMICHAEL, S.S.C.—M'NEILL & SIMP, W.S.—Agents.

MRS MARGARET BIRKMYRE AND OTHERS (Birkmyre's Trustees),
Petitioners.—*Trayner—Guthrie.*

No. 91.

Feb. 5, 1881.
Birkmyre, &c.

Trust—Power to grant leases—Trusts (Scotland) Act, 1867 (30 and 31 Vict.), c. 97, sec. 3.—Section 3 of the above Act empowers the Court to grant authority to trustees to grant long leases of the estate under their management "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." A trust-deed directed that after the death of the truster's widow (who was to have a life-rent of the whole estate), the trustees were to enter into possession of the whole lands thereby disposed, and to divide and pay over the proceeds half-yearly among his children as an alimentary provision, and, upon the death of the last survivor of the said children, to sell and dispose of the whole lands so conveyed, and to divide the proceeds among his grandchildren then alive. The trustees, during the life of the truster's widow, presented a petition to the Court for leave to grant a lease of part of the said subjects for 999 years, the expediency of which course was beyond dispute. The Court (*rev. judgment of Lord Lee*) held that the proposed lease was not contrary to the truster's intention as expressed in the trust-deed, and granted authority as craved.

MR WILLIAM BIRKMYRE, merchant in Glasgow, died leaving a trust-1st Division.
Lord Lee.
B.
disposition and settlement whereby he disposed of his whole estate, and, *inter alia*, of certain subjects bordering the road leading from Port-Glasgow to Glasgow. The trust-deed directed that upon the death of the petitioner, Mrs Margaret Birkmyre, the wife of the truster, who was to have a life-rent of the subjects, the trustees were "to enter upon the possession of the whole lands above disposed, and to divide and pay over the proceeds thereof" equally among the truster's children, "and that half-yearly." The deed then proceeded,—“And I declare the provisions hereby made in favour of my said children, born or to be born, to be

No. 91. strictly alimentary, and it shall not be in their power to assign the same, nor shall the same be arrestable or affectable for their or any of their debts or deeds of any kind, as they are intended for their own personal support and subsistence only.”

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Birkmyre, &c.

The trust-deed, in the second place, directed the trustees, on the death of the longest liver of the truster's children, “to sell and dispose of the whole lands and others above conveyed, and, on realising the proceeds thereof, to divide the same after deducting any expenses which may have been incurred in the management of the said trust, and in the sale of the said lands and others, equally among the lawful children” of the truster's children, “and thereupon the trust shall be held to be at an end.”

In July 1878 the trustees, including the liferentrix Mrs Birkmyre, and all the beneficiaries under the trust-deed, presented a petition to the Court under the Trusts (Scotland) Act, 1867, 30 and 31 Vict., c. 97, sec. 3,* praying the Court for leave to enter into a lease with the Corporation of Port-Glasgow, whereby certain of the trust-subjects, part of those situated near the City Road, were to be leased by that body for 999 years at a rent of £110 (with a duplication every twenty-first year). It was shewn in the petition that if the proposed long lease were allowed there would be an immediate increase of rent from the subjects to the extent of £31, 12s. 0d., and that the subjects were so situated that there was little likelihood of their ever becoming more valuable, so that the expediency of granting it was indisputable.

On 7th January 1881 the Lord Ordinary (Lord Lee) issued the following interlocutor:—“Having resumed consideration of the petition as amended, with the draft lease, No. 18 of process, the reports and supplementary reports of Messrs Graham and Smellie, and whole process, and having heard counsel thereon, finds that the proposed lease is inconsistent with the intention of the trusts referred to in the petition, and expressed in the trust-disposition and settlement, No. 7 of process: Therefore refuses the prayer of the petition, and decerns.”†

* By sec. 3 of 30 and 31 Vict., cap. 97, “Trusts (Scotland) Act, 1867,” it is enacted that “it shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof, and the Court shall determine all questions of expenses in relation to such application; and when it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application,” *inter alia*, “to grant feus or long leases of the heritable estate, or any part of it.”

† “NOTE.—The leading petitioners in this case are the trustees under the settlement of Mr William Birkmyre, merchant in Port-Glasgow, and they are also possessed of life interests in the subjects held in trust. They desire the authority of the Court to enter into a lease with the Corporation of Port-Glasgow, whereby the subjects described in the petition are to be held by that body for 999 years at a rent of £110 (with a duplication every twenty-first year) for the purposes of their gas-works. The Court has no power to grant such authority under the statute, unless it can be affirmed that the transaction is ‘expedient for the execution of the trust, and not inconsistent with the intention thereof.’ The terms of the trust-deed, as narrated in the petition, and fully set forth in the extract, No. 7 of process, appear to the Lord Ordinary to make it impossible to pronounce any such finding in this case.

“The trust-deed directs that after the death of the truster's widow (the petitioner Mrs Birkmyre, and who is to have a liferent of the subjects), the trustees are to enter upon the possession of the whole lands disposed by the settlement, to realise the profits, and to divide and pay over the proceeds ‘half-yearly’

The petitioner reclaimed.¹

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LORD PRESIDENT.—In this case there can, I think, be no doubt of the expediency of the proposal of the petitioners. The subject in question yields about £30 per annum less than it would do if this long lease were entered into; therefore there would be an immediate improvement of income if the proposal were granted, and there is no reason to suppose that the subject is of such a nature or so situated as to be likely to become of much greater value in future. The present advantage is not subject to any future possible disadvantage so far as we can see. That being so, the only question left for consideration is whether the course proposed is inconsistent with the intention of the truster,—that is to say, whether it is inconsistent with the main design and object of the trust-settlement. There is, fortunately, no difficulty in understanding what these were. They are fully and clearly stated in the deed itself. The testator evidently intended to give a liferent of the entire property to his wife, and after her death to divide the income among his children, until the death of the last survivor of them. The income, and the income alone, is given to the children. After the death of the last the entire property is to be sold, and the proceeds divided among the testator's grandchildren. It does not appear to me that this long lease will interfere in any way with the object of the testator; it would enhance the present value of the subjects, and not interfere with the rights and interests of the liferenters or of the fiars. Everything would go on in the execution of the trust precisely as if the lease had not been granted, but with the additional benefit of a larger income. It is said that this is a sale, and that the only sale authorised is to take place after the death of the longest liver of the children, and that that implies a prohibition against any earlier sale. It is of importance to observe, however, that there is not in this case as in some of the cases cited to us, a direct prohibition against sale; on the contrary, the estate is only to continue to exist *in forma specifica* till a certain event shall occur, and is then to be sold; the intention was not to preserve the estate entire, but simply to keep

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among his children as an alimentary fund; and, upon the death of the last survivor of the said children, they are to sell and dispose of the whole lands and others conveyed, and to divide the proceeds among their children then in life. The trust, therefore, is a trust to hold the subjects during the lifetime of the truster's children, and to sell, on the death of the last survivor, for behoof of the grandchildren of the truster then in life.

"It is always a delicate matter to authorise the anticipation of a period appointed for the sale of subjects in the neighbourhood of a place like Port-Glasgow; and the truster may have had very good reasons for providing, as he did, that the subjects should be retained during the lifetime of his children (subject to a power of granting leases for nineteen years), and should be sold on the death of last survivor of them. The question is whether the granting at present of the proposed lease for 999 years would be consistent with the intention of the trust-deed, as regards the management and disposal of the property. And the Lord Ordinary feels bound to answer that question in the negative. The case seems to him to belong to the same class as that of *Anderson*, May 13, 1876, 3 R. 639.

"The concurrence of some of the grandchildren at present in existence does not appear to the Lord Ordinary to be sufficient to enable the Court to grant the petition. Those who are parties to the petition are in pupillarity or minority."

¹ *Authorities*.—*Anderson, &c.*, May 13, 1876, *ante*, vol. iii., 639; *Weir's Trustees*, June 13, 1877, *ante*, vol. iv., 876; *Downie, &c.*, June 10, 1879, *ante*, vol. vi., 1013; *Hay's Trustees v. Hay Miln*, June 13, 1873, 11 Macph. 694.

No. 91. it as an income-yielding subject, and then, at the occurrence of a certain event, to sell and divide it among the grandchildren. We must observe, further, that the power of sale conferred by the deed cannot imply an intention to prohibit such a sale as is here proposed, for it is not of the nature of the sale that the trustees would have to make when the period for sale as directed in the settlement should arrive. Then the trustees would have to sell the estate in such a way as to get money to divide among the beneficiaries; they never could grant a long lease such as this. So the power asked in the petition is a different power to that given to the trustees in the future, and so is not, within the view of the testator, a power of sale at all. On the whole matter, I think we shall be aiding rather than frustrating the intention of the testator if we grant this petition.

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LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

THE COURT recalled the Lord Ordinary's interlocutor, and granted the prayer of the petition.

DUNCAN & BLACK, W.S., Agents.

No. 92. GAVIN PAISLEY, Collector and Treasurer for the Burgh of Partick, Pursuer.
—*Trayner—R. V. Campbell.*
JOHN MARSHALL, Defender.—*Kinnear—Mackintosh.*

Feb. 16, 1881.
Burgh of Partick v. Marshall.

Police—Assessment—Short tenancy—Stat. 25 and 26 Vict. cap. 101 (General Police and Improvement Act, 1862), secs. 84 and 89—Stat. 17 and 18 Vict. cap. 91 (Valuation Act, 1854), secs. 4, 8, and 11.—Section 84 of the General Police Act enacts,—“Once in each year the commissioners . . . shall assess all occupiers of lands or premises within the burgh according to the valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland . . . in the sums necessary to be levied for the police purposes of this Act, . . . and shall fix a day on which the same shall be payable : . . . Provided always that such assessment shall be imposed as from the 15th day of May in one year to the 15th day of May in the following year, and shall not exceed a rate equal to . . .”

Section 89 enacts,—“The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year, and owners who shall let for rent or hire lands or premises for less than a year shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the commissioners shall judge expedient.”

On 8th September 1879 the commissioners of police in a burgh resolved to assess for the year from 15th May 1879 to 15th May 1880 according to the valuation-roll for that year (which was not then completed, in so far as appeals against it could not be finally disposed of prior to 30th September), at a certain rate per pound, and declared that the owners of premises let for periods less than a year should be responsible for the rates their tenants failed to pay.

The owner of houses let continuously for a year in successive short periods, sometimes to the same tenant, and sometimes to various tenants, objected to an assessment levied upon him as an owner responsible for his tenants (1) on the ground that the assessment was not valid, having been imposed at a time when the valuation-roll had not been finally completed, and (2) that section 89 only applied in cases where a house let for periods less than a year was vacant for some portion of the year.

Objections repelled.

On 8th September 1879 the Commissioners of Police of the burgh of Partick, under the provisions of the 84th section* of the "General Police and Improvement (Scotland) Act, 1862," resolved to assess the burgh at the rate of 1s. 6d. per pound of yearly value for the year from 15th May 1879 to 15th May 1880. They, at the same time, and as part of their resolution imposing the assessments, declared that the owners of all premises let for less than a year should themselves, as well as the occupiers, be responsible for these assessments and rates applicable to such premises, and that the same should be recovered from such owners in the event of the occupiers failing to pay the same within two months after they fall due.†

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 R.

John Marshall was owner of certain premises within the burgh, all of which during the year ending 15th May 1880 from time to time were let for rent or hire on monthly or other tenancies for periods of less than a year. None of the premises stood unlet or unoccupied for three months consecutively during the year.

Notices of the amount of the assessment for each respective property were issued on 6th October and 2d December 1879, and in February 1880. A special notice was sent to Marshall on 24th September 1879 intimating the amount of the assessments on his property and the resolution of the commissioners to hold the owner of the premises responsible

* Stat. 25 and 26 Vict. cap. 101, sec. 84.—"Once in each year the commissioners (being summoned in manner hereinbefore directed, by written or printed summonses, which shall state that the meeting is for the purpose of laying on an assessment), shall assess all occupiers of lands or premises within the burgh according to the valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions herein-after provided, in the sums necessary to be levied for the police purposes of this Act, in so far as the same may have been adopted, and for the purposes to which the police assessment authorised by any Act in force in such burgh at the time of such adoption might have been applied, and shall fix a day on which the same shall be payable, and the rate of assessment, and the day so fixed by the commissioners shall be published by handbills posted in the burgh, and by advertisement in any newspaper circulating therein (if any be), or otherwise in some newspaper circulating in the county in which the burgh is situated: Provided always that such assessment shall be imposed as from the 15th day of May in one year to the 15th day of May in the following year, and shall not in any year exceed a rate equal to 2s. 6d. in the pound of the gross yearly value of such lands or premises when the enactments of this Act with respect to water have been adopted, or a rate equal to 1s. 6d. in the pound of the gross yearly value of such lands or premises where such enactments with respect to water have not been adopted; and such assessment shall for the purposes of this Act be called the police assessment: Provided further, when in any burgh under the provisions of any Police Act a higher rate of assessment is now and has been in use to be levied upon lands and tenements above a certain fixed rent than upon lower rented lands and tenements, it shall be in the power of the commissioners in laying on the assessment under this Act to continue the same relative rates of assessment if they think proper."

† Sec. 89.—"The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year, and owners who shall let for rent or hire lands or premises for less than a year shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the commissioners shall judge expedient."

No. 92. therefor. The sum payable was £30, 13s. 6d., and it fell due on 3d November 1879.

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Marshall denied liability for the assessments.

Gavin Paisley, the collector and treasurer of the burgh, on 20th July 1880, raised an action against Marshall, concluding for the amount of the assessments.

Marshall defended the action, and explained "that the great proportion of the defender's tenants occupied their houses for the whole year in question consecutively, although holding under contracts of tenancy for periods short of a year. Explained further, that at the date of laying on the assessments sued for none of the premises had been vacant for a period of three months or upwards during the year to which the assessments applied."

He also added,—“Explained that by the 84th section of the General Police Act the assessments in question fall to be imposed ‘according to the valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland,’ and that the valuation-roll of Lanarkshire for the year from Whitsunday 1879 to Whitsunday 1880 was not and could not have been completed at the date of the laying on of the said assessments. Reference is made to the Valuation Act, 17 and 18 Victoria, chapter 91, and, in particular, to sections 4, 5, 8, 11, and 12 thereof.*

The pursuer pleaded;—The defender, being an owner who let for rent or hire the premises in question on monthly and other tenancies for less than a year, is responsible for payment of the assessments now sued for.

Pled for Marshall;—(2) Upon a sound construction of the statute libelled, the commissioners have no power to assess the defender for the occupier's rates due by his tenants. (3) There not being, in the case of any of the defender's tenants, any assessment leviable, applicable to any period less than a year, the section of the statute libelled does not apply. (4) The assessment sued for has not been duly imposed, in respect that it was imposed before the valuation-roll of the year was made up and completed. (5) In any view the commissioners were bound to make their election between the owners and occupiers, and were not entitled to assess both, in the manner libelled.

On 2d November 1880 the Lord Ordinary decerned against Marshall in terms of the conclusions of the summons.†

* By section 4 of this Act the valuation-roll is directed to be made up annually on or before 15th August in each year; by section 11 it is provided that from and after 8th September the assessor shall give up the roll for public inspection; and by section 8 all appeals against valuations are to be heard before 30th September in each year.

† “NOTE.—This action has been raised by the collector and treasurer of the burgh of Partick for the purpose of having an authoritative judgment of this Court as to the true meaning of the 89th section of ‘The General Police and Improvement (Scotland) Act, 1862.’ The form of the action is that of an ordinary petitory action in which the pursuer asks decree against the defender as owner of certain houses and premises within the burgh, for payment of certain police and other assessments imposed on these subjects by the commissioners of the burgh for the year from Whitsunday 1879 to Whitsunday 1880, for the purposes of and under the powers conferred by said statute. The liability of the defender depends upon the applicability of the 89th section of the statute to his case.

“The statute provides, by section 84, that once in each year the commissioners shall, for the year then current, i.e., from Whitsunday to Whitsunday, ‘assess all occupiers of lands or premises within the burgh, according to the

Marshall reclaimed.

No. 92.

LORD PRESIDENT.—This action is raised on behalf of the Magistrates of Partick Burgh of Partick v. Marshall, Feb. 16, 1881.

for recovery of certain assessments for police purposes which were imposed upon

valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions herein-after provided, in the sums necessary to be levied for the police purposes of this Act.

"A question, which I shall afterwards advert to, is raised as to whether the assessments sued for were properly imposed according to the valuation-roll for 1878-79. But the main question is whether the defender, as 'owner' of the subjects in question, is liable for these assessments which the Act (section 84) directs to be 'imposed' upon 'occupiers.'

"Now, the statute (section 89) directs the tax so 'imposed' upon 'occupiers' to be also 'levied' from them; but it contains an exception from the general rule in cases where the premises are let for less than a year. The words are,—'The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year, and owners who shall let for rent or hire lands or premises for less than a year shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the commissioners shall judge expedient.'

"It is admitted that none of the premises belonging to the defender are let for a whole year. They are all let to tenants on contracts of tenancy for periods short of a year, although in some—perhaps in many—cases these contracts are from time to time renewed, so that, in point of fact, the same tenant may, and does, occupy his house for an entire year. None of the houses were unlet or unoccupied for three months consecutively, so that the present question turns upon the construction of the latter part of the 89th section.

"The defender maintains that, as the premises were *de facto* let for the whole year 1879-80, he does not come within the scope of the 89th section at all, while the pursuer maintains that he does, and points out that a decision in favour of the defender would in very many cases lead to the result that the assessments could not be recovered except to a very limited extent. A tenant under a monthly contract might often find it difficult, and would almost certainly refuse, to pay a whole year's assessment, especially as he has no means of recovering any part of it from his landlord or from succeeding tenants.

"It must be admitted that the enactment is not very well expressed, and that the meaning of the words used is by no means clear; but, after hearing and considering a very able argument from both sides of the bar, my opinion is in favour of the pursuer's view. I think that, as the defender's houses are admittedly let for periods less than a year, the defender as well as his tenants are responsible for the assessments applicable to the several periods less than a year for which they are respectively let to the tenants. Thus, let it be supposed that one of the defender's houses is let for a month to A, then for a month to B, and so on to other ten tenants each for a month. In such a case it could not be maintained with success that within the meaning of the statute the defender has not let his house for rent or hire for several distinct periods each less than one year. If so, it follows not only that the 'occupiers' would be responsible each for, at least, one month's assessment, but that the defender would also be responsible for each and all of the assessments, *i.e.*, for the whole year's assessments, and that these would be recoverable from him if the commissioners of the burgh should choose to exercise their option of proceeding against him. Now, does it, or can it, make any difference that, instead of having twelve tenants each for one month, the defender lets his house to one tenant twelve times during the year for one month at a time? I think not, and I am therefore of opinion that the defender is responsible for the whole year's assessment. And I fail to

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premises belonging to the defender for the period between Whitsunday 1879 and Whitsunday 1880. The defender is not the occupier of the premises ; and it therefore becomes necessary to advert to the particular grounds on which the pursuer says he has become liable for payment of a tax which is primarily an occupier's tax. The pursuer says—(Cond. 2) "The premises of which the defender is owner are situated at Nos. 152, 142, 138, 130 Castlebank Street, 13 Graham Street, 61, 65, and 62 Merkland Street, 2 Marshall Place, and 52 Merkland Street, all within the bounds of the burgh of Partick. These premises were all, during the year ending 15th May 1880, from time to time let by the defender as owner for rent or hire, on monthly or other tenancies, for periods of less than one year. All the said premises were occupied during the said year by monthly tenants, or other tenants for periods less than a year ; and none of the said premises stood unlet or unoccupied for three months consecutively during the said year. The rents for the said premises are each £4 and upwards per annum, conform to statement herewith produced, shewing the rents and occupiers of all the said premises as appearing on the valuation-roll for the said year." And in another part of the record (Cond. 8) it is stated,—“All the occupiers, according to the said valuation-roll of the premises of which defender is owner as aforesaid, received special notices of the amount of their respective rates for the said police and public health assessments, of the time for appeals, payment, and other matters. A first

see any force in the defender's argument that the pursuer is not entitled to assess both him and his tenants. He may not recover the assessment from both, for that would be taking payment twice over ; but he is surely entitled, if not bound, to intimate the assessment both to the defender and to his tenants, in order that all parties may know the amount of their responsibility, and that the defender, as owner, may, in letting his premises, be able to arrange matters so that the rates are taken into account in fixing the rent.

“But, then, the assessment must be duly imposed in terms of the statute, and the defender says that instead of imposing it according to the valuation-roll for 1879-80, ‘made up and completed,’ the commissioners imposed it on 8th September 1879, whereas the roll was not completed till after that date. I do not, however, think the objection well founded. It is not said that an excessive assessment has been imposed upon the burgh collectively, or that the defender's houses are assessed upon values higher or other than that which appears in the roll for the year current at the date of the resolution of the commissioners to assess. By the 8th September annually the new roll must be made up by the county assessor and lodged with the town-clerk, if there be one, or with the Sheriff of the county if there be no clerk. It is, no doubt, subject to revision on appeal, and until that is concluded the roll is not ‘completed in terms of the Valuation Acts.’ But when the roll leaves the assessor's hands and passes into public custody on 8th September it is sufficiently accurate to enable the commissioners of the burgh to estimate what sum will be required for public purposes. It is always necessary to allow a margin in laying on such assessments ; perfect accuracy is unattainable. There may be in the course of the year irrecoverable arrears, or houses, &c., unlet, or exemptions which, unless a moderate margin is allowed, would leave a deficiency to be met either by a supplementary assessment or by an increased assessment in the following year. Unless, therefore, it can be said (and it is not here pretended) that the commissioners of this burgh have assessed for an unreasonably large aggregate sum, I am of opinion that they have followed the directions of the 84th section of the statute, seeing that the assessments for 1879-80 imposed in respect of the defender's houses, and now sued for, are imposed according to the annual value thereof appearing in the valuation-roll made up and completed for that year.

“On the whole matter, therefore, decree is given to the pursuer in terms of the conclusions of the summons, with expenses.”

notice was issued to the occupants of defender's premises on or about 6th October 1879, a second on or about 2d December 1879, and a third and final notice in or about the month of February 1880, all in the terms set forth in the printed forms herewith produced. Notwithstanding these notices, and of the simultaneous notices to the defender aftermentioned, these occupiers of the said premises have all failed to pay the said police and public health assessments, which amount together to the sum of £30, 13s. 6d. now sued for, conform to the said statement herewith produced, wherein the said assessments are separately set forth in detail for each of the said premises." These statements are practically admitted by the defender, and the question comes to be, whether in these circumstances the defender is liable in payment of these assessments under section 89 of the General Police Act of 1862? In construing that section it is necessary to go back to a previous section which authorises the imposition of the assessment, and it is very necessary to keep in view the distinction between the imposition and the levying of the tax.

The 84th section is concerned entirely with the imposition, and it authorises the Commissioners of Police in each year to "assess all occupiers of lands or premises within the burgh, according to the valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions hereinafter provided, in the sums necessary to be levied for the police purposes of this Act, in so far as the same may have been adopted;" and when they come to this resolution they are to publish the resolution by handbills in the burgh and by advertisements in the newspapers; and it further provides that such assessments shall be imposed as from 15th day of May in any one year to 15th day of May in the following year, and shall not in any year exceed the rate of 2s. 6d. in the pound of the gross yearly value of such lands or premises. Now, what the Commissioners of Police are to do under this section is to pass a resolution, and publish it, and all that the resolution is required to contain is that a certain sum is to be imposed upon the burgh at a certain rate per pound. That is the resolution, and that is the notification required under this section. The levying of the assessment is a totally different matter, and there is nothing in the statute about the matter of levying until we come to section 89, except section 87, which provides that "the commissioners shall assess the owners in place of the occupiers of all lands or premises let at a rent under £4, and levy such assessment from such owners; but the commissioners shall allow to such owners a deduction from such assessment equal to one-fourth of the amount thereof; and such assessments shall be recoverable from such owners, along with any penalty which may have become exigible thereon, in the same way as herein provided with respect to the recovery thereof from occupiers." That is an exceptional provision, and does not interfere with the continuity of the statutory provisions. Therefore we see that, while section 84 of the statute provides for the mode of imposing the assessments, section 89 provides for the mode of levying the assessment. Now, the 89th section plainly consists of two parts. The first directs (and for the first and only time directs) how the tax is to be levied, and from whom. The words are these—"The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises." That is the general and leading enactment, and applies universally, with the exceptions after mentioned. The assessments are to be levied from the occupiers; "but deduction shall be allowed by the commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months

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consecutively in any one year." That is not a well-expressed clause, but it plainly means this, I think, that if any premises are unoccupied for a part of a year not less than three months, then deduction corresponding to the period that the premises are unoccupied may be made from the assessments; and it is to be observed that that is not in the least degree confined in its action to the case where premises are let for shorter periods than a year, but would apply where any premises are not only unoccupied *de facto*, but where no rent is paid for them. Such a state of matters might occur from various circumstances. A man may take a house for a year, occupy it for six months, and then abscond without paying any rent; that would fall under this clause of the statute very plainly, and no doubt other cases will fall under it also. Cases where the premises are let for a shorter period than a year, and the owner fails to find a tenant for the remaining part of the year, would also fall under the clause. The first part of the section applies to all assessments imposed, and provides that they are to be paid by the occupiers, and allows deductions for premises unoccupied during a certain part of the year. Then comes the second portion of the section—"Owners who shall let for rent or hire lands or premises for a period less than a year, shall themselves, as well as the occupiers, be responsible for the assessments applicable to any period less than a year, and these assessments may be recovered from such owners or from such occupiers as the commissioners shall judge expedient." Now, there is one class of cases, admittedly, upon the face of this statute, which appears to fall under this provision—if the owner lets his premises for a part of the year, and they are not let at all for the remainder of the year, the case plainly falls within the clause, and the owner may be made answerable. But the pursuer contends that it is of no consequence whether the premises are occupied only for a part of the year or occupied for the whole year, provided they are occupied upon contracts for a less period than the whole year, and I think it very plain that the words of the clause are quite sufficient to cover that case, which is the case now before us. The premises with which we are dealing here were fully occupied during the year from May 1879 to May 1880, and they were occupied upon contracts of tenancy for periods of less than a year. The words of the Act are very clear in describing "such owners who shall let for rent or hire lands or premises for less than a year." Such owners are the subject of the proposition which we have to construe, and what is it that is predicated of them? They "shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year." Now, the argument is that these words are applicable to any period less than a year, and limit the liability of the owner to the assessment applicable only to fractions of a year for which the premises are let, and that he cannot be made answerable for the assessments for the whole year. That depends, it appears to me, on the circumstances of the case. If he is representing only a tenant who occupied for a fraction of a year, then he will be liable to pay an assessment applicable to that fraction of the year that that occupant was in occupation. But suppose that there are several occupants or consecutive occupations producing an occupation uninterruptedly during the entire year, is there anything in these words to exclude liability for the whole year in such a case? Plainly not; and for this reason, that the statute says the owner shall be responsible for the said assessment applicable to "any period less than a year," which must apply to "period or periods less than a year." That is the plain intention and motive of the language, because if a man as a tenant occupies for one period of the year,

and that tenant is succeeded by another who occupies for the rest of the year, No. 92. the plain intention of the enactment leads one to the conclusion that the land-lord is to be equally answerable, along with the tenant, for the assessment ^{Feb. 16, 1881.} applicable to that period, the object being to give the commissioners readier ^{Burgh of Par-} means of levying the assessments than they otherwise could have. Tenants of ^{tick v. Mar-} this description are not generally to be found in the valuation-roll. There may ^{shall.} be a great deal of difficulty in finding them out, and still greater difficulty in inducing them to pay the assessment, because they are generally, of course, of a very poor class, and therefore it is that this statute, when premises are let in this way, makes the owner equally with the occupier liable in the assessments. We have had a very ingenious and subtle argument upon this section from the defender's counsel, but I confess there is no foundation for it upon the words, or upon the plain meaning, of the Act of Parliament. I am therefore of opinion that the defender is liable for these assessments under section 89, if these assessments have been properly imposed.

But it is said there was an imperfection in the manner in which the assessment was imposed, and that question depends on other considerations than those to which I have already adverted. Section 84 of the statute, as we have seen, provides that the assessment is to be imposed "according to the valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland;" and it is said that the assessment here was not imposed in terms of the valuation-roll, because it was imposed on 8th September 1879, and the valuation-roll was not, in the words of the Act, "made up and completed" till the 30th of that month. It appears to me that, looking to the language of this 84th section of the statute, there is no force in this objection at all. All that the commissioners have to do is to pass a resolution to the effect that they require a certain sum of money, and in order to raise that amount of money they will assess, and do thereby assess, the community at so much per pound on their rentals. That is all that is required to be done in following out the provisions of the 84th section of the statute. It is not a thing that is to be completed at once, so that the assessment may be collected the next day after the resolution is passed. It is only a resolution that the thing is to be done—that is to say, that such an assessment is to be levied; and, in the meantime, the assessment is imposed—that is to say, the resolution is made that what is to be hereafter levied is to be levied at a certain rate per pound upon the rental. The resolution which the commissioners passed upon 8th September appears to me to be quite regular, and within the meaning of this clause of the Act of Parliament. They resolved to assess upon the valuation-roll; and if the Commissioners had added to their minute, which they might quite well have done, "according to the valuation-roll when it is made up and completed for the year," I think the defender could not have had a word to say against the validity of the resolution. In short, the date of making the resolution appears to me to be of no consequence at all if, in point of fact, it is carried out, and ultimately the tax is levied according to the valuation-roll. The defender does not, I understand, say—and if he had done so he would have had to say explicitly—that he has been charged more in name of police assessments than is justified by the valuation-roll as made up and completed on 30th September; and, that being so, it appears to me that this objection fails altogether, because, in the first place, the resolution to impose the assessment may, in my opinion, be made at any time, provided it be carried out



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and levied precisely in terms of the statute. I am therefore of opinion that the judgment of the Lord Ordinary is well founded.

LORD MURE.—There are here two distinct questions before us, first, whether the circumstances of this case are such as to admit of the application of the provisions of the 89th section of the General Police Act of 1862, by which authority is given to police commissioners to recover assessments from the owners instead of the occupiers of the premises assessed; and, secondly, whether, upon the assumption that the case does come within the operation of that section of the statute the pursuer has complied with the statutory conditions as to the manner in which the assessment is to be imposed and levied or recovered.

On both questions I concur with your Lordship, and have little to add.

(1) It is very clear that sec. 89 deals with two different matters, viz., the case of property not let continuously throughout the year, but remaining unlet or unoccupied for three months consecutively, for which a deduction is to be allowed. That is the first part of it, and then it deals with the case of owners who have let their premises for less than a year, and provides that they, as well as the occupiers "are to be responsible for the assessment applicable to any period less than a year, and the same may be recovered from such owner, or from such occupiers, as the commissioners shall judge expedient." The defender, as I understood the argument, maintained that the latter part of the section did not apply, except in the case where the premises had also been unoccupied for three months continuously. I do not think that is a sound contention. That provision of the section was, I think, introduced for the purpose of enabling the authorities to levy the assessments from the owners in all cases where the premises were let for periods less than a year, even if the premises should in that way continue to be let for such short periods from time to time during most of the year. That, in the view I take of it, is the plain meaning and the plain policy of the section. The public authorities have not the same opportunity of recovering assessments in such cases from the occupiers as they have from the owners, as the occupiers as a class move about and are not, as a rule, people of much substance. But they are known, of course, to the owners, and where an owner has property of a description which requires to be so let, he must just make such arrangements with his tenants in adjusting their rents as will reimburse him in the sums he may be called on to pay for assessments on his property.

(2) On the second question, the provisions of secs. 84 and 91 appear to me on fair construction to amount to this, that the assessment is to be levied according to the valuation-roll as completed for the year. If that is done, and I understand it is admitted to have been done in the present instance, the assessment is, in my opinion, not open to objection. I therefore concur in the result at which your Lordship and the Lord Ordinary have arrived.

LORD SHAND concurred.

THE COURT adhered.

MACBRAIR & KEITH, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

ALFRED A. MILLER (Neilleay's Trustee), Pursuer.—*Campbell Smith—
J. M. Gibson.*

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HUTCHESON & DIXON, Defenders and Reclaimers.—*Kinnear—Jameson.*

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Retention—General Lien—Auctioneer.—A firm of auctioneers received horses to sell on commission and kept them in stables in connection with their sale yard until they were sold, and made advances against them to the owner. There had been a previous course of dealing between the parties, on which a balance arose in favour of the auctioneers. The owner having become bankrupt, held (*diss.* Lord Craighill) that the auctioneers were entitled to a lien over the horses in their stables for the general balance due to them on all their transactions with him.

ALFRED ARTHUR MILLER, accountant in Glasgow, as trustee on the 2^d Division. estates of George Neilleay, horse-dealer, Beith, in the county of Ayr, which were sequestrated on 20th June 1879, raised an action in the Court of Session against Messrs Hutcheson & Dixon, auctioneers in Glasgow, concluding for payment of £42, 3s., being the price, under deduction of livery and other expenses, of two geldings which had belonged to the bankrupt, and which had been sold by the defenders at one of their auction sales on 22d June 1879. Ld. Craighill.
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The pursuer averred that these geldings were consigned to the defenders by the bankrupt within sixty days of his sequestration, he being then insolvent; and that, the defenders being in the knowledge of the fact, they were bound to pay over to the pursuer the price realised for them.

The defenders, in their answers, admitted that the geldings had been consigned to them on 22d May for the purpose of being sold, and that they kept them at livery in their stables until the date of sale. They further averred that "in May and June 1879, prior to Mr Neilleay's sequestration, the defenders had various dealings with Mr Neilleay in the ordinary course of their said business. They received from him various lots of horses from time to time, including the geldings libelled. Some of these they sold, and some they returned to Mr Neilleay. On the horses in their hands the defenders made several advances to Mr Neilleay, and he incurred accounts to them for livery, on the mutual understanding that the defenders should have the security of the horses at any time in their hands for the sums due to them from time to time. On the fore-said dealings there remained, at the date when the geldings libelled were sold, a balance in the defenders' favour on the season's transactions, all conform to an account thereof produced. As shewn in that account, the nett proceeds of the geldings was exceeded in amount by the foresaid balance on the various transactions."

On these statements and admissions the pursuer pleaded, *inter alia*;—

(1) The bankrupt, whose estate is vested in the pursuer as trustee, having consigned to the defenders for sale the geldings in question subsequent to the date of his sequestration, or at all events within sixty days of the same, and when he was insolvent, and the insolvency was known to the defenders, the defenders are bound to account for and pay to the pursuer the proceeds of the sale, less expenses incurred, being the sum sued for. (2) The said two geldings being at the date of the sequestration the property of the bankrupt, and undisposed of by the defenders, the same belonged to his sequestrated estate, and the defenders are now bound to pay over to the pursuer, as trustee foresaid, the price realised therefor. (4) In any event, the defenders are excluded from a preference upon the free proceeds of the sale of the geldings to the prejudice of the bankrupt's other creditors.

The defenders pleaded;—(3) The defenders having in the ordinary

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course of their employment by the bankrupt in their business as keepers of livery stables and sellers of horses, received from him *in bona fide* the geldings libelled to be sold for the bankrupt, and kept at livery until sold, were entitled to a general lien over the said geldings for the balance due to the defenders by the bankrupt on the season's transactions. (4) The defenders having made advances and incurred livery accounts in respect of, *inter alia*, the geldings libelled, they are entitled to retain the same for repayment of said advances.

Proof was allowed in the action, and from the evidence it appeared that the defenders kept horses consigned to them at livery until they were sold, but that they did not in other respects carry on the trade of livery stable keepers, and that for many years the bankrupt had dealt with the defenders. From the evidence of one of the partners in the defender's firm it appeared that in their dealings with Neilleay they had been accustomed to make advances to him against horses consigned to them by him for sale, and that when he took away one horse and left another in its place the arrangement was that they were to retain possession of the horse left in their hands until the money they had advanced on the first horse was repaid to them. He also stated that at their stables no horse was allowed to go out of the stables without the consent of one of the firm. In proof of the course of dealing carried on between them and Neilleay the defenders produced, *inter alia*, two advance-notes by him in their favour. The first was in the following terms:—"19th May 1879.—Hutcheson & Dixon have this day advanced me the sum of £20. Horses and gig placed in their hands for positive sale." The second was dated 5th June 1879,—“Hutcheson & Dixon have this day paid me the sum of £20, advance on two horses to sell.” The horses referred to in the second advance-note were the two geldings specially referred to in this case.

On 8th December 1880 the Lord Ordinary (Lord Craighill) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof, and having considered the debate and whole process—Finds, as matter of fact (1) that the horses, the price of which is sued for in the present action, were the property of Neilleay, the bankrupt, and were sold by the defenders at the price of £56, 5s. on the 22d July 1879, two days after the sequestration of his estates under 'The Bankruptcy (Scotland) Act, 1856;' (2) that these horses were placed in the stables connected with the business premises of the defenders on 22d May last, not for the purpose of positive sale, but that, in case they should not be sold by Neilleay himself, they should, upon instructions to this effect from him, be sold either by public roup or private bargain, by the defenders, who in the latter case were to receive commission upon the price, as well as the cost of the horses' keep, and in the former case were to receive only the cost of their keep; (3) that parties are agreed that the charges connected with the sale and the cost of keep from 22d May to 22d July 1879 amount to the sum of £24, 19s.; (4) that on the 5th June 1879, while said horses remained in the stables of the defenders, they advanced upon the security of these horses the sum of £20; (5) that it has not been proved that there was any course of dealing between the said bankrupt or the defenders, or that there is any general practice of trade entitling the defenders to bring against the price of said horses any general balance, or any other item of counter claim other than the said sum of £24, 19s. and the said sum of £20; and (6) that the said sums of £24, 19s. and £20, amounting together to £44, 19s., being deducted from £56, 5s., the price of the said horses, there remains a balance of £11, 6s. of the price of said horses still

in the hands of the defenders : Finds as matter of law, the facts being, as above set forth (1) that the defenders are not entitled to retain from the price of said horses other sums than the said sum of £24, 19s. and £20 ; and (2) that the pursuer is entitled to recover from the defenders the said balance of £11, 6s., with interest at the rate of 5 per centum per annum from the 23d July 1879 until payment, as concluded for in the summons, and decerns : Finds the pursuer entitled to expenses, subject, however, to some modification ; allows an account of these expenses to be given in, and remits that account, when lodged, to the Auditor for his taxation and report.”

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The defenders reclaimed, and argued ;—They were entitled to a lien over these horses for their general account, the relation between them and the bankrupt being that of commission-agents or factors and principal. They were not livery stablers, who only had a special lien.¹ The defenders traded on the footing that they were to have a general lien over the stock belonging to the bankrupt.

Argued for the pursuer ;—The defenders were not entitled to a preference over the other creditors. They were not factors, but simply livery stablers, and as such only had a special lien.

LORD JUSTICE-CLERK.—It is only with hesitation that I differ from the Lord Ordinary in this case, but after the full and able argument which we have had on this matter, which is not without some commercial importance, the conclusion I have reached is at variance with that of his Lordship. The real question is, whether these stable keepers have a lien for a general balance due to them over the horses consigned to them for sale? Over moveables, putting aside hypothec, no security can be constituted without possession. But possession there was here beyond question. Again, a security may be constituted with possession by contract over the goods of a person who is a party to the contract. Thirdly, lien is presumed in certain commercial relations without any express contract. In my apprehension the question for decision here is, whether these stable-keepers are within any of the categories known to law in which a lien can be constituted in their favour? and I think that they are, because they are in the position of a factor selling the goods of a principal for him, and claiming a lien for a general balance, and a factor is entitled to retain goods coming in ordinary course of dealing into his hands until a general balance due to him be paid. If, then, the defenders here are ordinary commercial agents, there is no doubt. But it is said that they are only auctioneers, and also that at all events they are only livery stable keepers, and that in either case they are not general commercial agents, and therefore not entitled to any general lien. Now, as to the first point, I do not know what an auctioneer is if he be not a commercial agent. Goods are sent to him that he may turn them into money by public sale, and he may, if he chooses, advance money on the goods consigned to him. These defenders made advances on the horses consigned to them, sold the horses, and retained so much as would pay the balance due them, or when they had other horses in hand they said, “We have a lien on these horses until the balance due us is discharged.” I do not see how they were in any different position from commercial agents in this sense. I do not see how this conclusion can be, as has been contended, any extension of the

¹ Bell's Comm. ii. 109 ; Sibbald v. Gibson & Clark, Dec. 11, 1852, 15 D. 217, 25 Scot. Jur. 143 ; Gairdner v. Milne & Co., Feb. 13, 1858, 20 D. 565, 30 Scot. Jur. 387 ; Hutton v. Fleming, March 17, 1871, 9 Macph. 718 ; Strang v. Phillips, March 16, 1878, *ante*, vol. v. 770.

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law of lien, and in my humble opinion these defenders are just in the position of factors having a general lien. So much, then, for the first ground.

But then, in the second place, it was said that the defenders are livery stable keepers, and that the public and the bankrupt Neilleay dealt with them as persons keeping horses for hire.

But I am satisfied that that is not a proper description of the calling which the defenders really follow. Mr Scott, a partner in the defenders' firm, says the stables are not livery stables, but simply saleyard stables, and there is no evidence that the defenders ever received any horses for any other purpose than that of sale. No doubt they allowed the bankrupt to take his horses out of the stables from time to time to be shewn to intending purchasers. Any man who sends goods to an auctioneer to be sold by him may still deal with any purchaser who is willing to buy them before the sale comes on. Here it is not disputed that when the horses were consigned they were consigned for sale and nothing else, and that according to the course of dealing followed by the parties, as the bankrupt explains it in his evidence, he was not entitled, without permission of the defenders, or some responsible person in their service, to take away horses belonging to him which were standing in their stables.

I am therefore of opinion that the defenders were commercial agents, and entitled to retain for a general balance horses consigned to them.

LORD YOUNG.—I am of the same opinion. This summons concludes for a decree against the defenders for £42. I confess I always see with some pain an action in this Court for a sum so small. The expenses on each side will doubtless be as great. In this case the Lord Ordinary by his judgment has reduced the sum claimed to £11, and the pursuer seems to be satisfied with his success to that extent, for he has not said a word against the interlocutor of the Lord Ordinary. But it was explained that there is a large principle in this case, in which the defenders as auctioneers are much interested. I have endeavoured during the argument to point out that there is no question here of general interest, everybody being at liberty to make what contracts he pleases, and it is with reference to that point only that I propose to make any observations, for I concur with your Lordships as to the law to be applied to this particular case.

Lien is just a contract of pledge collateral to another contract of which it is an incident. If the principal contract be about a horse—that it is to be fed and kept by one man for another,—to that contract there is the incident called lien—that is, an agreement that the person to whom the possession of the horse is committed shall have right to retain the possession till his claim for the food and attention given to the horse shall be satisfied. That is a special lien, and it stands like general lien, on which I shall say a word presently, upon contract, express or implied. The law always, in the absence of evidence of an agreement to the contrary, assumes that the owner of the horse shall not reclaim possession till he has satisfied the claim of the other party for what he has done under the contract.

There is also general lien, which is this, that a factor possessing goods, having that possession as a lawful contract, may retain that possession until the general balance due to him by the owner of the goods is satisfied. Such a lien may in any case be constituted by contract. It stands on contract. That contract may be expressed, or it may be implied from the course of dealing of the parties, or

from the usage of trade. Mr Smith spoke as if it were a dangerous thing to hold that such liens may be constituted by contract. But it is only the common law of freedom applying to all who are *sui juris*. If there be no fraud or force, or any such ground for setting aside what a free man has done, a contract to give a general lien will hold good. The law of general lien, which does not differ in England and Scotland to any material degree, is most accurately stated by Mr Bell (Com. ii., p. 87 of M'Laren's ed.),—"General retention or lien is a right to withhold or detain the property of another in respect of any debt which happens to be due by the proprietor to the person who has the custody, or for a general balance of accounting arising on a particular term of employment. These rights are either founded on express agreement, or are raised by implication of law, which again may be from the understood and accustomed construction of particular contracts and connections, or from the usage of trade, or from the course of dealing between the parties."

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The late Mr Smith also (Mercantile Law, 561), after defining lien at common law, says,—“Whenever one of any other kind is sought to be established, the claim to it is not deduced from principles of common law, but founded on the agreement of parties, either expressed or to be inferred from usage, and will fail if some such contract be not shewn to have existed.” And, again, he says that the question whether a lien by express agreement has or has not been created “depends on the terms of each individual contract. Where the intention of the parties to create one is plain, there can be no doubt of their legal right to carry it into effect.” And again he says,—“As to liens resulting from usage, these depend on implied, as those last mentioned upon express, contract.”

I make these observations, because, for my part, I will not have this question about £11 magnified into a question of importance. People can contract as to liens as they please, and these stable keepers can refuse to take in horses except on such terms as they choose, and can, as shippers do, contract that there shall be a general lien over the goods entrusted to them for the balance owing to them at the time. The law of general lien for bygone freight stands on that.

In this case I am of opinion that the proof shews that while reasonable advances were to be made by the auctioneers the horses which might be in the stables were not to be removed by Neilleay without leave from the auctioneers. I therefore agree that there was a general lien, and concur in the judgment your Lordship has proposed.

LORD CRAIGHILL.—I adhere to the findings, both in fact and in law, which I pronounced when the case was before me in the Outer-House, though it cannot be expected that I should do so without hesitation after hearing the views expressed by your Lordships. The facts of the case are—(his Lordship here narrated the facts above set forth). The defenders do not dispute that the horses were the property of the bankrupt, but they have claimed right of lien for (1) an advance of £20 made on the two horses referred to in this case, (2) for the keep of those horses, and (3) for a general balance due to them, which they said is secured by the possession of the horses. Only as to the last question has there been any controversy in the Inner-House.

It appears to me that, as was said by Mr Jameson at an early stage of the argument, this is a controversy more of fact than of law, and therefore while I am not to be held as adopting all the views of the law which your Lordships have expressed, I think we may not very greatly differ upon the legal questions

No. 93. involved. The defenders have maintained their right to a general lien on three grounds.

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They have argued,—(1) That in reference to the transactions referred to in the case they were the factors of the bankrupt; that his goods came into their possession as factors, and that therefore they were entitled to factor's lien. (2) Their next ground was that of general usage of trade. (3) Lastly, they said the course of dealing between the parties was that there should be a right of retention of any horse or horses for the general balance which might be due at the time.

As to the first ground, I am still of opinion that the facts of the case do not warrant the view that the horses came into the defenders' possession, as factors, for sale. They have stables, and keep horses. They call themselves in one of their pleas not only auctioneers but livery stable keepers. If the horses were held by them in that capacity they are not factors. The second finding of this interlocutor is, that the horses were put into the defenders' stables to be kept there till it should be seen whether they should be sold by Neilleay, or whether Neilleay should give positive instructions that they be sold by the defenders. I think that is the result of the evidence. I know what Scott, the partner of the defenders' firm who was examined, and Neilleay, say on this matter, but the documents seem to me to shew that some horses were for positive and some for possible sale. That distinction appears on the face of these documents. The horses were sold by the defenders only if sales were not accomplished in the interim by Neilleay. On 22d May five horses, including those in question, were put into the defenders' stables. Three were sold by them, not by Neilleay, and two stood unsold for weeks. What does that signify? Weekly and bi-weekly sales come and go, and these horses are not sold, because Neilleay had not made up his mind to give instructions for their positive sale, and until he did so the horses were kept at livery. If that be so, we do not require to consider whether an auctioneer is a factor or not. For my part, I would not commit myself to the opinion that an auctioneer is in all circumstances a factor, any more than I would say that in no circumstances can an auctioneer be called a factor. I am not sorry that it is unnecessary to give a definite opinion on that point. It is enough, I think, to hold that the defenders did not receive or hold the goods for sale in the sense that they must sell them.

On the second point it was hardly even contended that the usage of trade gives any such general lien as is claimed, and so there only remains the question, third, Whether, by the course of dealing between those parties, there was conferred on the defenders a general right of retention?

Now, that which influences me in setting aside the account which Scott and Neilleay give of the course of dealing is that their depositions appear to me to be inconsistent with the documentary evidence in this case. That evidence, I think, discountenances the idea of such a course of dealing as is contended for. Sometimes a document recognises that a sum has been received by Neilleay on the security of a particular horse, and at another time it is not so at all. The fact of such special arrangements shews me that it could not be part of the contract of the parties that not only might an advance on a particular horse be matter of claim, but that any general balance should also be claimable. And so I think that the third ground of the defenders' contention is also untenable.

THE COURT recalled the interlocutor of the Lord Ordinary, and assilized the defenders.

W. OFFICER, S.S.C.—DOVE & LOCKHART, S.S.C.—Agents.

JOHN AULD, Pursuer and Respondent.—*J. P. B. Robertson—
C. N. Johnston.*

No. 94.

WILLIAM M'Bey AND GEORGE DRUMMOND, Defenders and Appellants.—
Keir.

Feb. 17, 1881.
Auld v.
M'Bey, &c.

Reparation—Damages—Road—Duty of driver to keep at a distance from carriage in front.—Two omnibuses were being driven along a narrow road at a moderate speed, and a number of children were running after the first omnibus. One of the children, a boy of six years of age, having fallen, the driver of the second omnibus was so near that he could not pull up his horses in time, and the wheel of his omnibus went over the boy and killed him. In an action of damages by the father of the boy, *held* that it was the duty of the driver of the second omnibus to keep a sufficient distance between his own omnibus and the one in front to allow him to draw up if one of the children fell, and having failed to do so, that the proprietor of the omnibus and the driver were liable in damages.

JOHN AULD, labourer, Newburgh, raised an action in the Sheriff Court ^{1st DIVISION.} of Aberdeen against Mr M'Bey, omnibus proprietor, and George Drum- ^{Sheriff of}mond, a driver in his employment, for damages on account of his son, who ^{Aberdeen-}was six years of age, having been run over and killed by the defender's ^{shire.} omnibus. ^{C.}

The circumstances, as disclosed in a proof, were:—Two omnibuses were in the habit of starting from Aberdeen for Newburgh daily at the same hour, the one belonging to the defender M'Bey, and the other to a man called Tough. On 26th September 1880 both omnibuses stopped at an inn on the road. Tough's omnibus started first to go along a narrow part of the road towards Newburgh. A number of children ran after it, and some got on the omnibus and climbed to the top; the others ran behind or got on to the step. M'Bey's omnibus, driven by Drummond, started, and was making up to the other 'bus, when the pursuer's son, who was one of the children who were running after the first omnibus, fell, and before Drummond could pull up his horses, the wheel of the 'bus passed over the boy, killing him on the spot. The witnesses differed as to the distance between the omnibuses at the time, some witnesses saying there were twenty yards and some only three. It was not proved that Drummond was driving at an excessive rate of speed.

The Sheriff-substitute (Dove Wilson) found that "the pursuer has failed to prove that the injury complained of was caused through the negligence of the defender's servant, and therefore assoilzies the defenders from the conclusions of the action."

The Sheriff (Guthrie Smith), on appeal, pronounced this interlocutor:—"Recalls the said interlocutor: Finds it proved that on or about the 26th September 1878, on the public road at Bridgefoot, near to Newburgh, the pursuer's son, Thomas Auld, aged six years, was run over and killed by a 'bus driven by the one defender and belonging to the other, through the fault of the defenders, to the loss, injury, and damage of the pursuer; assesses the damage at £60, for which decerns."*

* "NOTE.— . . . The Sheriff is of opinion that there was contributory negligence on the part of the boy. Allowance must of course be made for children who are necessarily left to run about the streets of a village giving way to their natural instincts: but in hanging on to the 'bus they were certainly engaged in a practice which ought not to be permitted, and if anything had happened to them without the intervention of a third party, they would have had themselves to blame. The question is, were the defenders to blame? and, as regards

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The defenders appealed, and argued ;—The question of law was, whether the driver of the second omnibus was bound to keep at such a distance that if one of the boys fell off he could draw up in time. Such a duty would be very oppressive. The boy was doing wrong in going on the first omnibus, and exposed himself to risk. The driver should not be made responsible for the fault of the boy. The driver was not shewn to be in fault. He was driving at a moderate rate of speed.¹

The pursuer argued ;—The defenders were bound to shew that no fault lay on the driver. They had failed to do so.²

LORD PRESIDENT.—This case, like every other of the same class, is attended with some difficulty, because of the variety in the evidence given, arising in a great measure from the points of view from which the different witnesses saw the occurrence, and from the accuracy of observation of some witnesses as compared with the inaccuracy of others. I have found that when the question is as to what happened on a particular occasion the best witnesses are boys and girls. Their eyes are generally open, and they are not thinking of other things, and they are not talking to their neighbours. Every one who has had experience in the criminal Courts must know that when the question is as to what occurred at a particular place and time the best evidence is often given by boys and girls. Now, I think that here the evidence of the boys is quite reliable, and amounts to this, that Thomas Auld was not on the omnibus, but was on the road running after it in order to get on it if he could. The question which that state of facts presents is this, What was the duty of the driver of the second omnibus in these circumstances? It is extremely vexatious and provoking for drivers of all kinds that children should get in their way. But I am afraid that it is part of the disposition of boys and girls to get in the way of carriages, and that is a fact in the natural history of young people which must be taken into account in dealing with the duty of drivers. Drivers must take account of this disposition as an incident inseparable from their occupation. The question is, whether this driver followed his duty in respect of these children, or whether he failed in his duty? Now, my opinion is that he failed in his duty. The result of the whole evidence is that he was too near the other omnibus. If he had been twenty or thirty yards further back this

their responsibility, these are the rules as enunciated in the Court of last resort, which fall to be applied :—

"1. The plaintiff in an action for negligence cannot succeed if it is found by the jury that he himself has been guilty of any negligence or want of ordinary care, which contributed to cause the accident.

"2. But there is another proposition equally well established, and it is a qualification on the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defender could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him—*Radley v. L. and N.-W. Railway Co.*, House of Lords, Dec. 1, 1876, L. R. 1 App. Cases, 754."

¹ *Radley v. L. and N.-W. Railway Co.*, Dec. 1, 1876, L. R. 1 App. Ca. 754 ; *Davis v. Mann*, 1842, 10 M. and W. 546 ; *Grant v. Caledonian Railway Co.*, Dec. 10, 1870, 9 Macph. 258, 43 Scot. Jur. 115 ; *King v. North British Railway Co.*, Oct. 29, 1874, 12 Scot. Law Rep. 53 ; *Galloway v. King*, June 11, 1872, 10 Macph. 788, 44 Scot. Jur. 449 ; *Aberdeen Commercial Co. v. Jackson*, Oct. 16, 1873, *ante*, vol. i., p. 25 ; *Campbell v. Ord and Maddison*, Nov. 5, 1873, *ante*, vol. i., 149.

² *Clerk v. Petrie*, June 19, 1879, *ante*, vol. vi., p. 1076.

accident would not or might not have happened. If it had happened, it would have happened in a different way. The boy is said to have stumbled over a stone, and fallen. However that may be, he did fall, and it was impossible for the driver to pull up the horses, even with the assistance of the passengers beside him, before the wheels passed over the boy. That proves that he was too near. I do not think that the accident would have happened unless he had been too near.

This is the simple view I take of the case, and I do not adopt the views of the Sheriff as to contributory negligence, for I do not think the case involves a question of contributory negligence at all.

LORD MURE and LORD RUTHERFURD CLARK concurred.

LORD DEAS and LORD SHAND were absent.

THE COURT pronounced this interlocutor :—" Find it proved that, on or about the 26th September 1878, on the public road at Bridgefoot, near to Newburgh, the pursuer's son, Thomas Auld, aged six years, was run over and killed by a 'bus driven by the one defender and belonging to the other through the fault of the defenders, to the loss, injury, and damage of the pursuer : Therefore refuse the appeal, and decern," &c.

PEARSON, ROBERTSON, & FINLAY, W.S.—R. C. GRAY, S.S.C.—Agents.

JESSIE BLACK AND ANOTHER, Pursuers.—*Asher—R. V. Campbell.*
ALEXANDER MASON, Defender.—*Macdonald—Mackintosh.*

No. 95.

Feb. 18, 1881.

Prescription—Deduction of years of minority—Verus dominus—Road—Right of way.—An estate was conveyed to a father in liferent for his liferent use only, and to the heirs of his body in fee. The father died during the minority of his two daughters, who succeeded as heirs-portioners. In an action raised at their instance to have it declared that a certain road which passed through the estate had not been used as a public road during the forty years necessary to found prescriptive use, *held* that in reckoning the years of prescription they were entitled to a deduction of that part of their minority which occurred subsequent to their father's death, and not of that part which preceded it, on the ground that prior to their father's death the pursuers had no vested right.

AN action of declarator was raised in the Court of Session by Miss Jessie Black, Heatheryknowe House, Lanarkshire, and Mrs Agnes Black or Scott, heritable proprietors of the lands of Heatheryknowe, situated in Old Monkland parish, county of Lanark, against Alexander Mason, farmer, heritable proprietor of the lands of Commonhead, to have it found and declared that there existed no public road for foot-passengers, carts, carriages, or cattle, leading from the parish road on the north of the farm-steading of Heatheryknowe, and thence eastwards to the parish road between Auchinloney and Cuilhill.

Issues were adjusted, and the evidence was led before a jury on 27th December 1880 and two following days.

The first issue, which was alone insisted in, was in these terms :—" 1. Whether for forty years prior to 16th October 1880, or for time immemorial, there existed a public road for foot-passengers, carts, carriages, and cattle, or any and which of said purposes, leading in, or nearly in, the direction of the red line on the plan No. 7 of process from the parish road on the north of the farm-steading of Heatheryknowe, in the parish of Old Monkland and county of Lanark, and thence eastwards to the parish road between Auchinloney and Cuilhill ?"

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The pursuers in the action were thus defenders in the issues, and the defender in the action pursuer in the issue.

In the evidence it was proved, *inter alia*, that the pursuer Miss Jessie Black was born on 19th May 1844, and that the pursuer Mrs Agnes Black or Scott was born on 13th August 1846; and that the said pursuers were the only children and the heirs of the body of Alexander Black, who died on 16th May 1856. It was also proved that Alexander Waddell of Stonefield, the pursuers' author in their said lands of Heatheryknowe, who died in 1830, by his trust-disposition and settlement directed his trustees to dispoise his whole lands and heritable estate in the parish of Old Monkland (being the said lands of Heatheryknowe and others) to the said Alexander Black, father of the pursuers, in liferent, for his liferent use only, and to the heirs of the body of the said Alexander Black in fee; whom failing, to Gavin Black, &c. The trustees of the said Alexander Waddell, after being infest, in accordance with the directions contained in the said settlement, disposed the said lands of Heatheryknowe and others to the said Alexander Black in liferent, for his liferent use only, and to the heirs of the body of the said Alexander Black in fee; whom failing, to the said Gavin Black, &c. The said Alexander Black was, under the precept of sasine contained in the said disposition, infest in the said lands, in liferent, for his liferent use only, by instrument of sasine in his favour dated 23d June, and recorded in the General Register of Sasines 9th July 1832. On the death of their father, the said Alexander Black, the pursuers made up their title to the said lands, by general service dated 7th October 1856, and instrument of sasine following upon the open precept of sasine in the said disposition of 1832 in favour of the pursuers, as the fiars in the said lands and others, recorded in the New General Register of Sasines 20th October 1856.

In his charge to the jury the presiding Judge (Lord Lee) directed the jury that the minority of the pursuers (defenders in the issues) could not be deducted in considering the issue, save in so far as it was subsequent to the death of their father in 1856. Whereupon the counsel for the pursuers (defenders in the issues) excepted to the direction, and moved his Lordship in lieu thereof to direct the jury as follows:—"That the period of the minority of Miss Jessie Black from 19th May 1844 to 19th May 1865 is not to be counted in reckoning the forty years' prescription required under the issues. Further, that the period of the minority of Mrs Agnes Black or Scott from 13th August 1846 to 13th August 1867 is not to be counted in reckoning the forty years' prescription required under the issues." This direction his Lordship refused to give, and the pursuers' counsel thereupon lodged the present bill of exceptions.

The jury having retired, delivered the following verdict:—"At Edinburgh, the 27th, 28th, and 29th days of December 1880, before the Honourable Lord Lee—Compeared the said pursuers and defender by their respective counsel and agents; and a jury having been empanelled and sworn to try the issues between the parties, say upon their oath, in respect of the matters proved before them on the first issue, they, by a majority, find for the defender that for forty years and upwards prior to 16th October 1880, whether there be discounted the whole period of the pursuers' or either of their minority, or only that subsequent to the death of their father on 16th May 1856, there has existed a public road for foot-passengers, carts, carriages, and cattle leading in, or nearly in, the direction of the red line on the plan No. 7 of process from the parish road on the north of the farm-steading of Heatheryknowe, in the parish of Old Monkland and county of Lanark, and thence eastwards to the parish road between Auchinloney and Cuilhill."

When the case came before the First Division the Court, after hearing counsel for the pursuers on a motion for a new trial in respect the verdict was against the evidence, granted a rule. Counsel were then heard on the rule and on the bill of exceptions together.

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Argued for pursuers (defenders in the issues) on the bill of exceptions;—In considering the issue the whole minority of the pursuers, whether prior or subsequent to the death of their father, fell to be omitted in reckoning the years of prescription. The pursuers were during the whole of that period the real proprietors of the lands, their father holding them in liferent only; but the title was in the trustees, and therefore the pursuers could plead a suspension of prescription.¹

Argued for defender (pursuer in the issues);—The only period of minority that could fairly be taken into account was that from the death of the pursuers' father till the minority ceased. Before his death the position of the pursuers was not one of *verus dominus*, as, if either of them had predeceased him, or if a son had been born, they would have had no interest in the property.²

At advising,—

LORD PRESIDENT.—The pursuers of this action are Miss Jessie Black, and her sister Mrs Agnes Black or Scott, who are joint proprietors of the estate of Heatheryknowe and others. The object of the action is to put down a claim of right of way through their estate advanced by the defender, Mr Mason, and these ladies stand, of course, as defenders in the issue sent to the jury for the trial of the question. The issue is in the ordinary form—"Whether for forty years prior to 16th October 1880, or for time immemorial, there existed a public road for foot-passengers, carts, carriages, and cattle, or any and which of said purposes, leading in, or nearly in, the direction of the red line on the plan, from the parish road on the north of the farm-steading of Heatheryknowe, in the parish of Old Monkland and county of Lanark, and thence eastwards to the parish road between Auchinloning and Cuilhill?" The first question which arises for consideration in this action is this, To what period is it necessary for the pursuer in the issue (the defender in the action) to go back in proving the existence of this right of way? It appears that Miss Jessie Black was born in 1844, and consequently she came of age in 1865. Mrs Agnes Black or Scott, again, was born in 1846, and she came of age in 1867. These ladies contended that the whole period of their minority must be deducted from the years of prescription, or, in other words, that the pursuer must go back in his proof, not for forty years only, but for forty years *plus* the whole period of their minority. On the other hand, it is contended that if the minority is to be deducted the deduction must be confined to the period since the death of the father of the ladies, Mr Alexander Black. The way in which this question arises depends upon the effect of the deed of settlement under which these ladies inherit this estate. The deed was made by Mr Waddell of Stonefield in 1830. He conveyed the estate to trustees, and he directed them to convey it to Alexander Black, father of the pursuers, and the nephew of the testator, "in liferent for his liferent use only, and to the heirs of the body of the said Alexander Black

¹ Ersk. iii. 7, 45; *Ferguson v. Ferguson*, March 19, 1875, *ante*, vol. ii. p. 627; *Crawford v. Menzies*, June 12, 1849, 11 D. 1127, 21 Scot. Jur. 446; *Blair v. Shedden*, Dec. 6, 1754, *Ross' Lead. Cas. (Land Rights)*, 3, p. 470.

² *Black v. Gordon and Others*, Feb. 5, 1794, 3 Pat. App. 317.

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in fee." Now, it is contended by the pursuers that as soon as they came into existence they became fiars of the estate, and consequently were in the position contemplated by the statute of prescription, and also by the common law of prescription in regard to the matter, and consequently that the whole period of their minority must be deducted. But it appears to me that this proceeds on an erroneous construction of the deed of settlement. The two ladies during their father's lifetime could not possibly be fiars of the estate, whether as directly interested in the estate or as holding the fee *qua* beneficiaries under the trust, because during their father's lifetime it was impossible to tell who would be entitled to succeed as the "heirs of his body," or as heirs of his body. No man can have an heir until he is dead, and it can never be ascertained who is to be a man's heir until he dies. That obvious rule was given effect to lately by the Court in the case of *Ferguson*, March 19, 1875, 2 R. 627. Therefore these ladies had no vested interest in this estate until their father's death.

Now, it is quite settled, I think, that the party whose minority is to be deducted in a question of prescription must be the *verus dominus* of the estate, not necessarily feudally vested, but holding the fee of the estate either directly or as a beneficiary under a trust. But these ladies had no vested interest at all. It was not at all certain that they or either of them would succeed to the estate, and it never could be certain until the death of their father. I am therefore of opinion that the direction which the learned Judge gave at the trial to the jury as to this matter was sound, and that the period of minority which falls to be deducted must begin only upon the death of Alexander Black, the father. The consequence of that is that the pursuer in the issues must go back in his evidence, not for forty years only, but for eleven years more—that is to say, he must go back to 1829—and shew that from that period the road now in question had been possessed by the public. If it had been necessary for him to go back for the longer period of sixty-three years—that is, back to a period anterior to 1820—the case would have presented certainly a very different aspect, and I do not propose to give any opinion as to what view I would then have taken of the evidence. But looking at the evidence, beginning at 1829 and downwards, I am not able to come to the conclusion that there is no evidence to go to the jury in favour of the claim of the pursuer in the issue. The case is undoubtedly a very narrow one, and if I had been on the jury I should have been in favour of giving a verdict for the defender in the issue. But I do not feel that I am at liberty to set aside the verdict, there being evidence both on the one side and the other.

I am therefore for disallowing the bill of exceptions, and discharging the rule.

LORD MURE and LORD SHAND concurred.

LORD LEE.—Of the two issues laid before the jury the defender ultimately gave up the claim of servitude, and elected to stand upon the allegation of a public right.

Against this allegation evidence was adduced to shew that the road in question was made by the proprietor of the lands through which it runs after the two properties came into the same hands, about the years 1819–20; and it was contended that any use which had been taken of the road was either ascribable to tolerance or was interrupted. It was further contended that the pursuers (defenders in the issue), being one or other of them in minority from the birth

of the elder in 1844 (19th May) to the date when the younger attained the age of twenty-one (13th August 1867), it was incumbent on the defender to prove public use for forty years irrespective of that period, i.e., to shew use of the road as a public road from 16th October 1817. Being of opinion that the minority of the pursuers ought not to be deducted save in so far as it was subsequent to the date when the succession opened to them by the death of their father in 1856, I so directed the jury. But, at the same time, I asked them, if they should find the issue established in that view, to answer it also on the assumption that the whole minority ought to be discounted, so that in the event of my direction being found erroneous, and of a different verdict being returnable upon a deduction of the whole period, the Court might have the means of applying the verdict according to the legal rights of parties.

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The jury by their verdict have affirmed the existence of the road as a public road, in either view, for the forty years. But, if my direction was right, it was only necessary, in disposing of the rule, to consider whether the verdict is contrary to evidence with reference to the period from 16th May 1828 to 16th October 1880.

Had it been necessary for the defender to prove the existence of the road from 16th October 1817, I should have thought it very difficult to support the verdict, for, in my opinion, the pursuers have shewn weighty grounds for holding that they have established the history of the road. . . .

I think that it ought to be determined first of all what is the period to which the issue properly applies. And upon that point I remain of opinion that the forty years ought to be counted without deduction of the period during which the pursuers' father held the estate as proprietor in liferent. During that period I think that the pursuers had no right to the estate. Until their father's death it could not be known who would succeed as heir of his body. The pursuers, had they been of full age, could not have granted the right of road; nor could they, in my opinion, have prevented the acquisition of a prescriptive right. If adverse possession upon an infeftment had been pleadable, I do not see how, upon the authorities, they would have excluded the operation of the statute 1617 by deducting their minority while not in right of the estate. The cases of prescription running against substitute heirs of entail upon whom the right of succession has not devolved—such as *Gordon v. Gordon*, M. 10,968, and 3 Ross' L. C. 471—appear to me to be against such a claim. In the present case the prescription is not upon an infeftment, but upon the exercise of a public right. And I am of opinion that the private interests of the estate, as against the public, were fully represented by the pursuers' father. He was infeft as liferent proprietor. The case of *Hardie v. The Magistrates of Port-Glasgow*, 2 Macph. 746, was founded on as shewing that the father had no title to resist encroachment. But the title in that case was not that of a proprietor in liferent. It was a mere personal right of occupancy, and was rejected on that ground, and not on the general ground that a liferent proprietor has no title to defend the estate against encroachments by the public. And with regard to the cases of prescription where the estate is held in trust, I think that it is only where the trust is for behoof of a particular person that the prescription is interrupted by the minority of the person for whose behoof the trust exists. This was the ground of decision in the case of *Baillie v. Menzies*, 1756, 5 Brown's Suppt. 847, and I am not aware that it has ever been gone back upon. . . .

(After dealing with the evidence his Lordship concluded)—On the whole,

No. 95. therefore, while I cannot help thinking that the present claim is not so much in vindication of the public right as in pursuance of a private dispute, I am of opinion that the question was fairly before the jury, and that while the evidence would have supported, perhaps more satisfactorily to my mind, a different verdict, there is no sufficient ground for setting aside the verdict as contrary to evidence.

LORD DEAS was absent.

THE COURT disallowed the bill of exceptions, and discharged the rule.

ALEXANDER WYLIE, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 96. JAMES M'LAREN AND ANOTHER (Lucas' Trustees), First Parties.—*Dickson*.
 Feb. 18, 1881. LAURENCE PULLAR AND OTHERS (Trustees and Patrons of "The
 Black v. Lucas Trust"), Second Parties.—*J. A. Reid*.
 Mason.

Succession—Payment, acceleration of—Widow's repudiation of settlement.—A testator directed his trustees, in the event of his leaving no issue, to pay to his widow a free yearly annuity of £200, and give her the life interest use of a house, "and whatever further interest and annual income my said estates shall yield . . . shall be accumulated during the lifetime of my said wife by my said trustees, and form part of my estates." The estate yielded a clear return of more than £300 a-year, after paying the widow's annuity, which, in the event, which happened, of the testator leaving no issue, was the only provision to be paid or provided for during her life. On her death the trustees were to pay to the children of J M "surviving at said period the sum of £100 each," and an annuity of £100 a-year to the brother of the testator's widow, "provided he return to this country and reside here, and provided my said trustees consider that he requires the same." The residue was to form a fund to be vested in certain persons *ex officio* for the establishment of a charitable foundation, to be styled after the testator "The Lucas Trust."

Held, on the widow's repudiation of the settlement, that the trustees and patrons of "The Lucas Trust" were entitled to an immediate conveyance of the residue, subject to existing and contingent interests.

2D DIVISION.
 M.

JOHN LUCAS, farmer, Corntown, Bridge of Allan, died on 4th April 1878, leaving a trust-disposition and settlement whereby he conveyed his whole estate, which consisted of heritable property to the estimated value of about £6000, and moveable estate to the value of about £8000, to James M'Laren and others, as trustees, for the purposes therein mentioned.

By the fifth and sixth purposes the testator provided that in the event of his leaving children his widow was to have a life interest of the whole free residue of his estate, under burden of the obligation of maintaining the children.

The ninth purpose was:—"On the death of my said wife, if she survive me, or at the first term of Whitsunday or Martinmas happening six months after my decease, if I be the survivor, I direct my said trustees to pay to the children of the said James M'Laren, surviving at said period, the sum of £100 each."

By the tenth purpose the testator directed the residue of his estate, "after paying and satisfying the purposes and provisions hereinbefore contained," to be divided among his children.

The eleventh purpose was:—"Failing children being procreated of my body, or surviving me, then I direct my said trustees, on my decease, should my said wife survive me, in place of the provisions conceived in

her favour by the fifth trust-purpose foresaid, to pay and allow her a free . No. 96.
 yearly annuity of £200 sterling during all the days of her life : . . .
 And also to dispose, assign, and convey to my said wife in liferent, for Feb. 18, 1881.
 her liferent use only, all and whole Napier House, Bridge of Allan, and Lucas' Trustees v. The
 pertinents, as particularly described in the title-deeds thereof : . . . Trustees and
 And whatever further interest and annual income my said estates shall Patrons of
 yield, after paying and satisfying the foresaid provisions and expense of "The Lucas
 the trust, shall be accumulated, during the lifetime of my said wife, by Trust."
 my said trustees, and form part of my estates."

The twelfth purpose was :—"Failing children as aforesaid, and on the death of my said wife, I direct my said trustees to pay to my wife's brother, Robert Donaldson, presently residing in New Zealand, or elsewhere abroad, provided he return to this country and reside here, and also provided my said trustees consider that he requires the same, and of which they shall be the sole judges, a free yearly annuity of £100 sterling during all the days of his life."

By the thirteenth purpose the truster, "failing children as aforesaid, or, if born, failing their surviving my said wife without issue, on the death of my said wife, if she survive me, or at the period of two years after my decease, if I be the survivor," directed his trustees, "after paying and providing for the other purposes of this trust, to pay, assign, and dispose" the residue of his estate to certain persons, as trustees *ex officio*, for the establishment of a fund for charitable purposes connected with Bridge of Allan and the neighbouring parishes, to be called "The Lucas Trust."

The truster left no issue.

Mrs Janet Donaldson or Lucas, the truster's widow, repudiated the provisions in her favour under her husband's settlement, and claimed her terce and *jus relictæ*.

In consequence of the failure of issue, and the repudiation of the settlement by the widow, the purposes of the trust, with the exception of the legacies and annuity directed to be paid on the widow's death, by the ninth and twelfth purposes, and the foundation of "The Lucas Trust" by the thirteenth, became inoperative.

In these circumstances, the trustees and patrons of "The Lucas Trust" demanded from Mr Lucas' trustees an immediate conveyance of the estate, subject to the burden of the widow's terce, and of the burden of paying and providing for the legacies and annuity under the ninth and twelfth purposes when they became due. This was resisted by Mr Lucas' trustees, and a special case was presented to the Court on the following questions :—" (1) Are the first parties (Mr Lucas' trustees) bound to retain the said residue and accumulate the balance of income accruing thereon until the death of the said Mrs Lucas ? or (2) are the second parties (the trustees and patrons of 'The Lucas Trust'), subject to the said existing and contingent interests, entitled to an immediate conveyance of the said residue ?" The second parties maintained that the only object of the truster in postponing the conveyance to them was to secure the widow's interest. The annuity to Robert Donaldson was postponed till the widow's death, but when that occurred the subsistence of the annuity was not to prevent a conveyance to them for the purposes of the charitable foundation. The conveyance was necessarily to be subject to that annuity. And there was no reason why it should not be made now, subject to the contingent burden of that annuity. The same might be said of the legacies to M'Laren's children. There was no reason why the conveyance to them should not be subject to the contingent burden of their legacies also. But there was another consideration—the widow's repudiation was held in questions of this kind as equivalent to her natural death, and it was open to the parties

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 "The Lucas
 Trust."

in right thereof to claim immediate payment, both of the legacies and annuity above referred to. In these circumstances matters were *in pari casu* as if Mrs Lucas were now dead, and they were therefore entitled to an immediate conveyance, that the truster's charitable object might be carried out without delay.¹

Mr Lucas' testamentary trustees maintained that they were bound to hold and accumulate the residue till the widow's death. The case was not parallel to those relied upon by the second parties. In those cases it could reasonably be inferred that postponement of the ulterior purposes was solely for the purpose of providing for the widow's security. But here the widow had, in the circumstances which had emerged, only an annuity of £200 a-year out of an estate which might be calculated to yield over £500 a-year, and the balance was directed to be accumulated during the widow's lifetime, and the accumulation to form part of the residue which was to form the fund for the foundation of "The Lucas Trust." The truster had directed such accumulation, and to make immediate payment would be to defeat, not to carry out, his intention. Moreover, accumulation would specially further his purpose in the circumstances which had occurred by helping to replace the capital lost to "The Lucas Trust" by the widow claiming her legal rights. As to the contingent annuity to Robert Donaldson, it could easily have been paid had the testator intended it during the widow's life, as well as the widow's annuity, without materially affecting the security of the latter. So could the legacies to M'Laren's children. But they were all postponed till the widow's death, because accumulation of the balance was preferred. To sustain the contention of "the Lucas trustees" would be to go against the plain intention of the truster, and hold that he had no meaning when he directed accumulation. As a farther argument against the view presented by them, the terms of the bequest to M'Laren's children must be considered. The trustees were directed to pay £100 each to such of his children as might be surviving at the date of the widow's death. Yet it was proposed to pay to those alive now, though some of them might die and others be born before that event.²

THE COURT pronounced this interlocutor:—"Find, in answer to the first question, that the first parties are not bound to retain the residue of the trust-estate and accumulate the balance of income accruing thereon until the death of Mrs Lucas, and, in answer to the second question, that the second parties are entitled to an immediate conveyance of the said residue, subject to existing and contingent interests, and subject to the provisions with reference to the annuity bequeathed to Robert Donaldson, that the first parties shall give intimation to the second parties if, in their opinion, the conditions under which the annuity is by the trust-deed bestowed on him have not been fulfilled."

DUNCAN & BLACK, W.S.—HENRY BUCHAN, S.S.C.—Agents.

¹ Alexander's Trustees, Jan. 15, 1870, 8 Macph. 414, 42 Scot. Jur. 193; Annandale v. Macniven, June 9, 1847, 9 D. 1201, 19 Scot. Jur. 529; Gordon, &c. in MP. Cameron (Young's Factor) v. Young, &c., Feb. 8, 1873, 45 Scot. Jur. 272.

² White's Trustees v. White, June 1, 1877, *ante*, vol. iv. p. 786.

SARAH GILLESPIE or GILLIES and ANOTHER, First Parties.—*R. Johnstone* No. 97.
—*Goudy.*

JAMES REID and OTHERS (Robertson Gillies' Trustees), Second Parties.—*Feb. 23, 1881.*
Jameson—C. N. Johnston. *Gillies v. Gillies' Trustees.*

Succession—Approbate and Reprobate—Causa improvisa—Clause of forfeiture—Repudiation by liferenter to exclusion of own issue.—A truster directed the residue of his estate to be held and retained by his trustees, who were to pay therefrom annual allowances to his children during their lives, and after their death to pay the capital, and any accumulations, to the lawful issue of his children, and, failing lawful issue of any of his children, then to the lawful issue of the survivors or survivor, equally among them *per stirpes*. He farther declared that any child repudiating the above provisions should forfeit for him or herself, and his or her issue, all right and interest under the settlement; and that the provisions made for the child or children so repudiating, and their issue, should pass to and be held for the child or children abiding by the settlement, and their issue.

The truster's only surviving child who attained majority, a daughter, while still unmarried, repudiated the settlement. *Held* (1) that, having done so, she was not entitled to found on the declaration as to the forfeiture of the right and interest of her possible issue, to the effect of throwing the dead's part into intestacy, and herself taking as heir *ab intestato*; and (2) that as the clause of forfeiture was in favour of children who did not repudiate, and their issue, and as no such persons existed, the clause did not take effect, and that the residue must be retained by the trustees for behoof of any issue that might be born to the daughter.

MR ROBERTSON GILLIES died on 12th October 1871, leaving a trust-2D DIVISION.
disposition and settlement, dated 26th January of the same year, by which M.
he conveyed his estate to James Reid and others as trustees.

After bequeathing an annuity to his widow, Mrs Sarah Gillespie or Gillies, and certain pecuniary legacies, the truster, in the fourth place, directed and appointed his trustees to hold and retain the whole residue and remainder of his means and estate, "as in reference to my only son, Thomas James Gillies, and my only daughter, Mary Margaret Gillies, and any other children I may hereafter have, in equal shares, in manner after-mentioned," and proceeded, "and I direct and appoint my said trustees to hold, pay, and apply such a sum as they may think proper, not exceeding during the lifetime of my said wife the sum of £160 yearly, and after the death of my said wife such a sum as they shall think proper, not exceeding the sum of £260 sterling yearly, out of the income or annual produce from the shares of said residue so held as in reference to my said children respectively, for the support, maintenance, upbringing, and subsistence of my said children respectively during their lives, and that at such times and in such way and manner as my said trustees may think fit; and after the death of my said children respectively I direct and appoint my said trustees to hold and retain the income or annual produce of the respective shares or portions of said residue so set apart or held as in reference to my children respectively, together with such accumulations, if any, as may have arisen thereon, and to pay and apply the said income or annual produce to and for behoof of the lawful issue of my said children respectively, equally among them *per stirpes*; and failing lawful issue of any of my said children, to and for behoof of the lawful issue of the survivors or survivor until the said issue shall respectively attain the age of twenty-one years, when the capital or fee of their respective shares shall be paid and conveyed to the said lawful issue of my said children respectively, and of the survivors or survivor of them as aforesaid, equally amongst them *per stirpes*."

These provisions to the truster's widow and children were declared to be in full of their legal rights.

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Toward the end of the deed there was added this declaration:—"And I declare that if any of my said children shall repudiate the provisions hereby made for and left to them, the child or children so repudiating the same, and the issue of such child or children, shall forfeit and lose all right and interest whatever under these presents, and in the estates hereby conveyed; and the said provisions hereby made for and left to the said child or children so repudiating, and his, her, or their issue, shall pass entirely to, and be held exclusively for, my other child or children abiding by or not repudiating these presents, and their issue, in the same manner and to the same effect as if the said provisions also had been made for and left to the said child or children abiding by or not repudiating these presents, and their issue alone."

The truster was survived by his widow, and by the two children mentioned in the deed, both of whom were in minority. The son, Thomas James Gillies, died a month after his father, without attaining majority. The daughter, Mary Margaret Gillies, attained majority in 1880.

There having been no antenuptial marriage-contract between Mr and Mrs Gillies, Mrs Gillies and Miss Mary Margaret Gillies (on her majority) repudiated the settlement, and betook themselves to their legal rights. Owing to the peculiar nature of the settlement questions arose between Mrs and Miss Gillies and the trustees as to the rights of the former, and a special case was submitted to the Court on the following questions:—" (1) Are the parties of the first part (Mrs and Miss Gillies) entitled to have now paid over to them the whole remaining residue of the estate of the deceased Robertson Gillies? (2) Are the parties of the second part (the trustees) entitled or bound to retain the whole or any part of the residue of the said estate for behoof of any issue that may be born to the said Mary Margaret Gillies? and, if a part, what part?"

Mrs and Miss Gillies having agreed between themselves in what proportion they should divide the estate, which was entirely moveable, claimed the whole residue, on these grounds:—That Mrs Gillies was entitled, in virtue of her *jus relictæ*, to one-third of the estate. That Miss Gillies was entitled, as legitim, to one-half of one-third. That Thomas James Gillies having died in minority, and without adopting the settlement, Mrs and Miss Gillies, as his representatives, were entitled to repudiate it, and to claim legitim on his behalf,¹ and were therefore entitled between them to another one-half of one-third. That as to the remaining one-third or dead's part, so far as not disposed of by the pecuniary legacies above-mentioned, there was resulting intestacy, in respect that whereas, by the fourth purpose of the trust-deed, in the circumstances which had emerged, the capital was to be held by the trustees for the issue of Miss Gillies, as the survivor of the truster's children, yet by the declaration at the end of the deed Miss Gillies' repudiation of the provisions in her favour forfeited all interest, not only of herself, but of her issue, under the settlement, and, therefore, left the residue, after paying the legacies, undisposed of; and that this undisposed-of residue of the dead's part fell to Miss Gillies in her own right, and to Mrs and Miss Gillies as in right of Thomas James Gillies, as heirs *ab intestato* at the truster's death.

The trustees maintained that though they might be bound to pay over to Mrs and Miss Gillies two-thirds of the estate they were bound to retain the residue of the remaining third for behoof of the issue of Miss Gillies, should she have any, in respect (1) that she could not repudiate the deed and at the same time found upon a particular provision of it to enforce a forfeiture for her own benefit, without at once reprobating and approbat-

¹ M'Murray v. M'Murray's Trustees, July 17, 1852, 14 D. 1048, 24 Scot. Jur. 639; Young v. Morison's Trustees, Dec. 3, 1880, *ante*, p. 205.

ing the settlement;¹ and (2) that the clause of forfeiture by its terms assumed that there was to be a child other than the one repudiating who, and whose issue, were to benefit by the forfeiture, and that it was therefore inapplicable to the case where the whole children or the sole survivor repudiated.

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At advising,—

LORD JUSTICE-CLERK.—The difficulty, which on the face of this deed seems formidable enough, is, I think, merely an apparent difficulty. Construing the instructions by the testator to his trustees as a whole, the result at which I have arrived is that the contention for the daughter is not sound.

Taken shortly, the case is this: The widow and daughter, who is the only surviving child, having for themselves, and as representing the deceased son, claimed their legal rights, the testator's settlement affects only the dead's part or one-third of his estate. The trustees have certain duties imposed on them by the trust-deed under which they hold the dead's part, and the question is how they are to dispose of that portion of the estate. They find that there are no beneficiaries in existence at present. The mother and daughter have repudiated the settlement for themselves and the deceased son. The provisions in their favour are therefore as if they had never been written. There is only one other class of possible beneficiaries, viz., the future and possible, but, as yet, non-existent issue of the daughter. There is no other possible interest for which the trustees can hold. The daughter herself is out of the deed altogether. She stands as if she had never been written into the deed. But then the daughter, who is thus written out of the deed by her own act, comes forward and says—"If you look at the deed you will find that my issue never can have any right. My repudiation of the deed has forfeited their eventual right. That forfeiture throws the fund into intestacy, and I, and my deceased brother, whom I represent, take as heirs *ab intestato*."

But it is clear to my mind that the daughter is not entitled to open her lips on the subject of the deed and its provisions. She can make no claim under that deed, and she can found no claim upon any application of the provisions of the deed to the circumstances which have emerged. That, I think, is a sufficient answer to her claim. I decline to consider what, with reference to the provisions of the deed, is the result of the daughter's repudiation. If she could say that there was no beneficiary at all, either existing or possible under the deed, her claim might be good. But that is quite a different thing from claiming under this clause of forfeiture.

But even if the clause of forfeiture were to be looked at, what is its effect? If you read the words of forfeiture alone, it is true that the repudiation of the child would appear to forfeit the interest of his or her issue. But, then, look at the object of the forfeiture as disclosed in the words which follow and dispose of the forfeited provisions. The forfeiture is to benefit the children and their issue who do not repudiate. Therefore, if there is no one to be benefited by the forfeiture, I hold that circumstances have not emerged and cannot emerge which would lead to such forfeiture. On this point the case of *Wilson v. Gibson*, 2 D. 1236, is a most apposite authority. I think the circumstances which have emerged are outwith the plain and obvious object of the clause of forfeiture,

¹ *Fisher v. Dixon*, Nov. 24, 1831, 10 S. 55, July 1, 1833, 6 W. & S. 431; *Wilson v. Gibson*, June 30, 1840, 2 D. 1236.

No. 97. and my opinion is that it has become inoperative. There is no legitimate interest under the deed in favour of which it is to operate or which it is to protect. I am therefore of opinion that the trustees must continue to hold the dead's part for the possible issue of the daughter, in terms of the fourth purpose of the settlement.

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LORD YOUNG.—I am of the same opinion. The will before us is perhaps as irrational and improvident a settlement as was ever executed, and I can only account for its terms by supposing that the testator had some eccentric views of his own to which he insisted upon effect being given. On the question with which we are more immediately concerned the case really comes to a short and clear point.

There are only three classes of beneficiaries under the will—the widow, the children, and the possible grandchildren. The first two have put themselves out of the will by repudiating the settlement. The widow and daughter certainly have, and I agree that the son, having died in nonage, and therefore without having adopted the settlement, his mother and sister, as in his right, are now entitled to repudiate for him and claim his legal right. The two first classes of beneficiaries are therefore out of the case. They can take nothing under the will. They take between them two-thirds of the estate under their legal rights, and the third set of beneficiaries alone remain to take under the will. Whatever the will carries must be held by the trustees for their behoof. They are to have the income during minority, and to receive their shares of capital on majority. There is nothing to interfere with this disposition of the dead's part except it be the clause of forfeiture, and the only question is whether the daughter repudiating the will is entitled to found upon the clause of forfeiture to the exclusion of her own issue. I think not. The provision in favour of the grandchildren is undoubtedly efficacious but for the clause of forfeiture. And I do not think that circumstances have emerged which bring the clause of forfeiture into operation. The circumstances which have occurred are a *casus improvisus*. And if the provision is good and effectual except with reference to a clause of forfeiture, which has no reference to the circumstances, then the provision is good and effectual in the circumstances which have emerged.

I am, indeed, of opinion that the daughter is not entitled to plead her own repudiation of the will for her own benefit and the disappointment of her issue. But I am of opinion also that the meaning and purpose of the clause of forfeiture was to give what a repudiating child forfeits for itself and its issue to another child who does not repudiate and its issue, and that if there is no child or issue in right of a child not repudiating who can take benefit by the forfeiture then the forfeiture does not come into operation. It was not intended to produce intestacy. The provision in favour of the grandchildren must therefore have effect in the circumstances which have occurred. The clause of forfeiture is not pleadable by the daughter, and even if it were it would not have the application for which she contends.

I am therefore for answering the second question in the affirmative, so far as regards the dead's part. But I would add that circumstances may emerge hereafter to which our judgment must not be held to apply. In the event of this lady not having issue within the statutory period from her father's death in 1871, then the Thellusson Act will come in and stop farther accumulations, and the subsequently accruing income will fall into intestacy.

LORD CRAIGHILL concurred.

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THE COURT pronounced this interlocutor:—"Find, in answer to the first question, that the parties of the first part are not entitled to have now paid over to them the whole residue of the estate of the deceased Robertson Gillies; and, in answer to the second question, that the parties of the second part are entitled and bound to retain for behoof of any issue that may be born to Mary Margaret Gillies, and to be administered by them, the parties of the second part, in terms of the directions of the trust-deed, and according to law, so much of the said residue as shall be equivalent to one-third part thereof, *minus* the legacies and annuities bequeathed by the truster, and the expenses of the special case incurred by both parties thereto, as such expenses shall be taxed, and remit," &c.

Feb. 23, 1881.
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J. C. & A. STEUART, W.S.—SCOTT, BRUCE, & GLOVER, W.S.—Agents.

HUNGERFORD TUDOR BODDAM AND OTHERS (Reid's Trustees), AND OTHERS, Pursuers.—*Guthrie Smith—Blair.*

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DUCHESS OF SUTHERLAND, Defender.—*Mackintosh—Dundas.*

Feb. 25, 1881.
Reid's Trustees v. Duchess of Sutherland.

Superior and Vassal—Obligation to relieve of stipend—Right of redemption, whether open to superior as well as to vassal.—Certain lands and teinds were disposed in 1673, the superior undertaking to relieve the vassal of bypast burdens, "and yearly and termly in all time coming, of all teynd-duty, minister's stipends, and annuity of teynds allenarly." The superior further bound himself "that in case the teind sheaves of the said lands, with the crofts and pertinents thereof, or any part or portion of the said teinds, should be evicted from them, or that the same lands and teinds be burdened and affected with any minister's stipend in time coming, whether present or supervenient, then and in that case, and immediately after the said eviction or burdening of the said lands and teind, as said is, to content and pay to the said Andrew Ross and his foressaids, in liferent and fee respective, the sum of £1200 Scots money for each chaldier that should be so evicted, whether of stock or teind, with the annualrent of the said sums, yearly and termly during the not-payment thereof after the said eviction."

Held that by the terms of these clauses the option of fixing the mode of relief by redemption or by an annual payment was conferred on the vassal, and not on the superior.

Observed that a right of redemption is *res meræ facultatis*, which no prescription can take away.

By disposition dated 24th January 1673, and recorded 8th April 1679, Sir George Mackenzie of Tarbat, afterwards Earl of Cromartie, sold the lands of Drumgillie, afterwards called Shandwick, "with the teinds sheaves and parsonage teynds of the saids three-quarter lands, crofts, and pertinents thereof included, with the stock, and not to be separate therfrae in all time coming," to Andrew Ross of Shandwick and spouse in liferent, and their son in fee.

1st DIVISION.
Ld. Curriehill.
M.

There was this clause, in which the disponent bound himself "to exoner relieve, harmless and skaithless keep the said Andrew Ross, his sd. spouse, their said son, and his forsd., of feu-duties, teynds, tack-dutys, minister's stipends, cess, taxations, annuities, excise money, and other private and publick imposts of whatsoever nature, due and payable furth of the lands, teynds, and others hereby disposed, wt. the pertinents, at the hands of those having, claiming, or pretending to have interest therto in any sort, and that of all moneys, crofts, years and tearms preceeding the

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and my opinion is that it has become inoperative. There is no legitimate interest under the deed in favour of which it is to operate or which it is to protect. I am therefore of opinion that the trustees must continue to hold the dead's part for the possible issue of the daughter, in terms of the fourth purpose of the settlement.

LORD YOUNG.—I am of the same opinion. The will before us is perhaps as irrational and improvident a settlement as was ever executed, and I can only account for its terms by supposing that the testator had some eccentric views of his own to which he insisted upon effect being given. On the question with which we are more immediately concerned the case really comes to a short and clear point.

There are only three classes of beneficiaries under the will—the widow, the children, and the possible grandchildren. The first two have put themselves out of the will by repudiating the settlement. The widow and daughter certainly have, and I agree that the son, having died in nonage, and therefore without having adopted the settlement, his mother and sister, as in his right, are now entitled to repudiate for him and claim his legal right. The two first classes of beneficiaries are therefore out of the case. They can take nothing under the will. They take between them two-thirds of the estate under their legal rights, and the third set of beneficiaries alone remain to take under the will. Whatever the will carries must be held by the trustees for their behoof. They are to have the income during minority, and to receive their shares of capital on majority. There is nothing to interfere with this disposition of the dead's part except it be the clause of forfeiture, and the only question is whether the daughter repudiating the will is entitled to found upon the clause of forfeiture to the exclusion of her own issue. I think not. The provision in favour of the grandchildren is undoubtedly efficacious but for the clause of forfeiture. And I do not think that circumstances have emerged which bring the clause of forfeiture into operation. The circumstances which have occurred are a *casus improvisus*. And if the provision is good and effectual except with reference to a clause of forfeiture, which has no reference to the circumstances, then the provision is good and effectual in the circumstances which have emerged.

I am, indeed, of opinion that the daughter is not entitled to plead her own repudiation of the will for her own benefit and the disappointment of her issue. But I am of opinion also that the meaning and purpose of the clause of forfeiture was to give what a repudiating child forfeits for itself and its issue to another child who does not repudiate and its issue, and that if there is no child or issue in right of a child not repudiating who can take benefit by the forfeiture then the forfeiture does not come into operation. It was not intended to produce intestacy. The provision in favour of the grandchildren must therefore have effect in the circumstances which have occurred. The clause of forfeiture is not pleadable by the daughter, and even if it were it would not have the application for which she contends.

I am therefore for answering the second question in the affirmative, so far as regards the dead's part. But I would add that circumstances may emerge hereafter to which our judgment must not be held to apply. In the event of this lady not having issue within the statutory period from her father's death in 1871, then the Thellusson Act will come in and stop farther accumulations, and the subsequently accruing income will fall into intestacy.

LORD CRAIGHILL concurred.

No. 97.

THE COURT pronounced this interlocutor:—"Find, in answer to the first question, that the parties of the first part are not entitled to have now paid over to them the whole residue of the estate of the deceased Robertson Gillies; and, in answer to the second question, that the parties of the second part are entitled and bound to retain for behoof of any issue that may be born to Mary Margaret Gillies, and to be administered by them, the parties of the second part, in terms of the directions of the trust-deed, and according to law, so much of the said residue as shall be equivalent to one-third part thereof, *minus* the legacies and annuities bequeathed by the truster, and the expenses of the special case incurred by both parties thereto, as such expenses shall be taxed, and remit," &c.

Feb. 28, 1881.
Gillies v.
Gillies' Trustees.

J. C. & A. STEUART, W.S.—SCOTT, BRUCE, & GLOVER, W.S.—Agents.

HUNGERFORD TUDOR BODDAM AND OTHERS (Reid's Trustees), AND OTHERS, Pursuers.—*Guthrie Smith—Blair.*

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DUCHESS OF SUTHERLAND, Defender.—*Mackintosh—Dundas.*

Feb. 25, 1881.
Reid's Trustees v. Duchess of Sutherland.

Superior and Vassal—Obligation to relieve of stipend—Right of redemption, whether open to superior as well as to vassal.—Certain lands and teinds were disposed in 1673, the superior undertaking to relieve the vassal of bypast burdens, "and yearly and termly in all time coming, of all teynd-duty, minister's stipends, and annuity of teynds allenary." The superior further bound himself "that in case the teind sheaves of the said lands, with the crofts and pertinents thereof, or any part or portion of the said teinds, should be evicted from them, or that the same lands and teinds be burdened and affected with any minister's stipend in time coming, whether present or supervenient, then and in that case, and immediately after the said eviction or burdening of the said lands and teind, as said is, to content and pay to the said Andrew Ross and his foressaids, in liferent and fee respective, the sum of £1200 Scots money for each chaldar that should be so evicted, whether of stock or teind, with the annualrent of the said sums, yearly and termly during the not-payment thereof after the said eviction."

Held that by the terms of these clauses the option of fixing the mode of relief by redemption or by an annual payment was conferred on the vassal, and not on the superior.

Observed that a right of redemption is *res meræ facultatis*, which no prescription can take away.

By disposition dated 24th January 1673, and recorded 8th April 1679, Sir George Mackenzie of Tarbat, afterwards Earl of Cromartie, sold the lands of Drumgillie, afterwards called Shandwick, "with the teinds sheaves and parsonage teynds of the saids three-quarter lands, crofts, and pertinents thereof included, with the stock, and not to be separate therfrae in all time coming" to Andrew Ross of Shandwick and spouse in liferent, and their son in fee.

1st Division.
Ld. Curriehill.
M.

There was this clause, in which the disponent bound himself "to exoner relieve, harmless and skaithless keep the said Andrew Ross, his sd. spouse, their said son, and his forsd., of feu-duties, teynds, tack-dutys, minister's stipends, cess, taxations, annuities, excise money, and other private and publick imposts of whatsoever nature, due and payable furth of the lands, teynds, and others hereby disposed, wt. the pertinents, at the hands of those having, claiming, or pretending to have interest therto in any sort, and that of all moneys, crofts, years and tearms preceeding the

No. 98. feast and tearm of Whitsunday last bypast Jajvic threescore twelve years
 Feb. 25, 1881. and cropt rexive after assigned, and yearly and tearmly in all time comeing
 Reid's Trus- of all teynd-duty, minister's stipends, and annuity of teynds allenarly,
 tees v. Duchess and to make the acquitances and discharges therof furthcomeing to them
 of Sutherland. at all occasions necessar when necessarlie they shall have to do therwith,
 wherin if the sd. Sir George Mackenzie and his forsds. failzie, and that
 the said Andrew Ross and his forsds. be distressed for and forced to pay
 any of the sds. dutys throw the want of the saids discharges, then and in
 that case he binds and obliges him to reimburse the said Andrew, his
 said spouse, their sd. son, and his forsds. therin, *cum omni damna.*"

This clause followed:—"And in effect that the teynd sheaves and the
 parsonage teynds of the sds. three-quarters land, with the pertinents, were
 disposed alswell as the stock to the sd. Andrew and his forsds., to make
 up to them the rent of fourty-two bolls victuall, and that by and attour
 the forsd. yearly feu-duty sua payable to his Majesty and the sd. Sir
 George Mackenzie in manner above expresst, and that the sume of £1200
 Scots money was paid be the said Andrew to the said Sir George Mac-
 kenzie alswel for ilk chalder teynd as stock: Therfor the said Sir George
 Mackenzie binds and obliges him and his forsds. to the said Andrew Ross,
 his spouse, and their sd. son and his forsds., that in case the teynd sheaves
 of the sd. lands, with the crofts and pertinents yrof, or any part or portion
 of the sds. teynds, be evicted fra them be whatsoever person or persons,
 or yt. the samen lands and teynd be burdened and affected wt. any minis-
 ter stipend in time comeing, whether present or supervenient, then and
 in that case, and immediately after the sd. eviction or burdening of the
 said lands and teynd as sd. is, to content and pay to the said Andrew
 Ross and his forsds. in liferent and fee rexive the sum of £1200 money
 forsd. for ilk chalder that shall be sua evicted, whether of stock or teind,
 wt. the @rent of the sds. sumes yearly and tearmly dureing the not-pay-
 ment therof after the said eviction: And it is hereby declared and
 speciallie provided that in case any action shall happen to be commenced
 and persued against the sd. Andrew Ross and his forsds. for evicting of
 the said lands and teynds, or any part therof frae them, or burdening of
 the sds. teynds as said is at any time hereafter, that then and in yt. case
 they make due and lawfull intimation of any such actions when moved
 or persued befor litiscontestation be made in the cause to the sd. Sir
 George Mackenzie, . . . to the effect he and his foresaids may compear
 and defend them in liferent and fee rexive against all such pursuits."

This was an action by (1) the trustees of Captain Andrew Gildart Reid;
 and (2) the trustees of John Ross Duncan, proprietor each of a *pro*
indiviso half of the estate of Shandwick, against the Duchess of Suther-
 land and Countess of Cromartie, and the Duke of Sutherland, K.G., as
 her administrator-in-law, for repayment and relief of the stipend localled
 upon these lands for the years 1876, 1877, 1878, and 1879, being in all
 the sum of £155, 8s. 4d.

Various augmentations had been imposed subsequently to the date of
 the disposition, and previously to 1877 (being crop and year 1876) the de-
 fender and her predecessors had relieved the proprietors of Shandwick from
 payment of stipend, but in that year she claimed to be allowed to redeem
 the obligation in terms of the clause above quoted, and tendered a sum
 equal to the annual value of victual, calculated at the rate of £1200 Scots
 per chalder. The pursuers refused the offer, and this action was brought.

The pursuers pleaded;—1. The defender, as the representative and
 successor of the late Sir George Mackenzie, Earl of Cromartie, being
 bound to implement the obligation in the disposition of the three-quarter
 lands of Drumgillie to relieve the said lands of the stipend localled thereon,

the pursuers are entitled to decree for the amount thereof which has been paid by them. 2. The defender, on a sound construction of the said disposition, not being entitled to redeem the said obligation, *et separatim*, not being entitled to redeem on the terms proposed by her, the tender alleged is no bar to the pursuers' claim, and they are entitled to decree. No. 98.
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The defender pleaded;—1. The defender having offered and being willing to redeem the obligation of relief founded on in the manner prescribed by the said disposition, is entitled to absolvitor, with expenses.

The Lord Ordinary gave decree in terms of the conclusions of the summons.*

The defender reclaimed.

LORD PRESIDENT.—I entirely agree with the judgment of the Lord Ordinary, and I do not think that the disposition on which the question turns will bear any other construction than that which his Lordship has given to it.

The lands disposed were conveyed "together with the teinds sheaves and parsonage teynds of the saids three-quarter lands, crofts, and pertinents thereof included, with the stock, and not to be separate therfrae in all time coming;" the meaning and effect of this clause of course being, not that Sir George Mackenzie could give a right to the teinds *cum decimis inclusis*, or anything equivalent to that, but only to show that the lands and teinds were given out to the vassal together, and that the duty was a *cumulo* duty for the lands and teinds. Now, undoubtedly it was the intention of parties that the superior should relieve the vassal not only of all past burdens, but as regards certain other burdens in all time coming. This is very clearly expressed in the disposition. The superior is to relieve the vassal "yearly and tearmly in all time comeing of all teynd duty, minister's stipends, and annuity of teynds, allenarly." With regard to these and the burdens preceding the term of entry, the superior is taken bound "to make the acquitances and discharges thereof furthcomeing to them at all occasions necessar when necessarlie they shall have to do therwith, wherin if the sd. Sir George Mackenzie and his forsd. faillzie, and that the said Andrew Ross and his forsd. be distressed for and forced to pay any of the sds. dutys throw the want of the saids discharges, then and in that case he binds and obliges him to reimburse the said Andrew, his said spouse, their sd. son, and his forsd. therin, *cum omni damna*."

Now, nothing can be clearer and more complete than the obligation thus undertaken by the superior. That it is an unfair arrangement is nothing to

* "NOTE.— . . . The defender admits the validity and subsistence of the obligation, but maintains that by its terms she is entitled to redeem the obligation by paying the pursuers at the rate of £1200 Scots for each chaldar evicted or burdened with stipend. The defender maintains that the option of redemption is vested in her. The pursuers maintain that the obligation of relief is twofold—(1) A general obligation to relieve the purchaser of all stipend; (2) an obligation, in the event of and immediately after eviction of teinds or land or imposition of stipend, to repay a corresponding portion of the price at the rate specified in the clause of relief. It appears to me that according to the sound construction of the deed, the option lay with the purchaser and his successors, and not with the seller. The deed has been so interpreted by all concerned ever since the teinds began to be burdened with augmentation in 1720,—although during the greater part of that time it would have been greatly to the advantage of the defender and her predecessors to have asserted and vindicated their alleged option. On the whole, I have little difficulty in adopting the pursuers' construction of the deed."

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the point. Indeed, I may say that it is one of the most foolish undertakings that a man can enter upon, because by it he binds himself and his successors to make indefinite payments, the amount of which he cannot foresee. But such undertakings have been given effect to in previous cases, and I see no reason for denying effect to such an obligation as the present. Nor do I understand that the Duchess of Sutherland disputes this. But she says that though the burden has been laid upon her effectually, and has been discharged by her and her predecessors ever since the execution of the disposition, she has the power of redeeming it under a subsequent clause of the disposition upon payment of a certain sum. If that is so, then this is a right which she is now entitled to exercise, although during the intervening period she has not taken advantage of it. I do not think that the circumstance that she continued to pay burdens under the clause of relief would deprive her of the right or power of redemption if it has been conferred. It is *res meræ facultatis*. No prescription takes it away. It is in the power of parties to exercise it *quandocunque*. The sole question therefore is, whether there is such a power of redemption in the present case?

It is to be found, if anywhere, in that clause of the disposition which begins with the words "And in effect that the teynd sheaves and the parsonage teynds of the sds. three-quarters land, with the pertinents, were disposed, alswell as the stock, to the sd. Andrew and his forsd., to make up to them the rent of fourty-two bolls victuall, and that by and attour the forsd. yearly feu-duty sua payable to his Majesty and the sd. Sir George Mackenzie in manner above expresst, and that the sum of £1200 Scots money was payd be the said Andrew to the said Sir George Mackenzie alswell for ilk chalder teynd as stock." Now, on that narrative the clause proceeds, and it is remarkable, and certainly very important, that the clause consists entirely of an obligation. And on whom is this obligation laid? It is laid on the superior, and on nobody else. No right is conferred on anyone except on the person in whose favour the obligation is conceived, and it would certainly be very peculiar if we could spell out of the clause of obligation a right or power in favour of the person who is taken bound, unless such a right is expressly conferred. The operative part of the clause is in these terms—"Therfor the said Sir George Mackenzie binds and obliges him and his forsd. to the said Andrew Ross, his spouse, and their sd. son, and his forsd., that in case the teynd sheaves of the sd. lands, with the crofts and pertinents yrof., or any part or portion of the sds. teynds, be evicted fra them be whatsoever person or persons, or yt. the samen lands and teynd be burdened and affected wt. any minister stipend in time coming, whether present or supervenient, then and in that case, and immediately after the sd. eviction or burdening of the said lands and teynd as sd. is, to content and pay to the said Andrew Ross and his forsd. in liferent and fee rexive the sum of £1200 money forsd. for ilk chalder that shall be sua evicted, whither of stock or teind, wt. the @rent of the sds. sumes yearly and tearmly dureing the not-payment thereof after the said eviction."

As I said before, that is a clause of obligation merely, and the only obligation imposed is an obligation on the superior, Sir George Mackenzie. Of course no one supposes in the event of an augmentation of stipend becoming a burden on the estate that the vassal is entitled to insist on being relieved by the superior, and on the superior's at the same time paying the stipulated equivalent for each chalder. That is out of the question. The simplest rules of construction

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make that impossible. Therefore in one sense the two clauses of relief here are alternative. If the vassal is content to take relief by reimbursement, then the other clause cannot be enforced—he cannot insist on an annual payment. It is in the option of the vassal to take relief in the one way or the other. But as far as the superior is concerned, where is there anything to imply that he is entitled to this option? The argument amounts to this, that this second clause imports an option, and that it resolves itself into a right of redemption of the annual burden at the rate specified in the clause. But I am very clear that it is a right of option, not a right of redemption, and that the right of option is in favour of the vassal only. The superior has no such right. The only obligation imposed on the vassal is that found in the end of the clause, which requires that when any action is brought against him for evicting him from the lands or teinds he shall make intimation to the superior before litiscontestation, that the superior may appear and defend.

LORD DEAR.—One observation has been made in which I entirely agree, namely, as to the hardship which attaches to the construction of the various clauses which are to be found importing an obligation for all futurity, when no one can tell what that future may bring forth. But I am afraid that it matters not what these hardships may be where the meaning of the words themselves is clear. We must take them according to their terms, and nothing else. Looking at this case in that light I cannot read this clause as a clause of redemption, either on the one side or the other. It was quite plain that in the natural course of things there would be augmentations, and the agreement is that wherever there are augmentations there is to be a corresponding relief. Now, the difficulty I have had is, this being a mutual contract, how far this is not an alternative in the option of the seller, and how far it is not part of the bargain between both parties, that if the seller does not choose to do the one thing he shall be entitled to do the other.

But though I have more difficulty in getting to the result at which your Lordships and the Lord Ordinary have arrived I have no such clear opinion as to entitle me to differ.

LORD MURE concurred.

LORD SHAND.—I am of opinion that the judgment of the Lord Ordinary is sound. I would willingly read the clause as conferring a right of redemption upon the seller. For as the deed bears that “£1200 Scots money was paid by the said Andrew to the said Sir George Mackenzie als well for ilk chaldar teynd as stock,” it would have been most reasonable that the liability of the seller should be limited, and therefore that the future liability should be redeemed at the rate of £1200 Scots for each chaldar. Probably a provision to that effect was not inserted because it was not contemplated that this rate would ever be exceeded. This is no solitary case of the kind. We have had cases in which the burdens came in the end to exceed the amount payable to the superior by the vassal. The last is the case of *Dunbar's Trustees v. The British Fisheries Society*, in the House of Lords, 5 Rettie, 221.

But while I would gladly give to the deed the meaning which the reclamer asks, I find myself unable to do so. I cannot read the clause as giving a power of redemption. In the first place, it is not only absolute, but it contains an obligation upon the superior to relieve the vassal of certain duties yearly and termly in “all time coming.” If the deed had stopped there, there would have

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been no room for the argument submitted. In its very terms (to look no further) it is an obligation upon the seller. It is not a right with an option which is conferred upon the seller. In the subsequent part of the deed the seller binds himself that, when the burdens reach a certain amount, he shall pay a capital sum in lieu of them in place of an annual amount as he had provided in the earlier part. The result is that he incurs an additional obligation, and gives the purchaser an additional right. The seller binds himself to pay the annual burdens year by year, and to redeem them at the rate of £1200 Scots per chaldier if demanded. I read this as a second obligation, which the person in whose favour it is granted may treat alternatively.

In order to give room for the argument which has been maintained, something very express would have been required. There is not enough to create a right of option on the part of the seller, and so I think the Lord Ordinary's judgment is sound.

THE COURT adhered.

PHILIP, LAING, & Co., S.S.C.—MACKENZIE & BLACK, W.S.—Agents.

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THE DUCHESS OF SUTHERLAND, Pursuer.—*Mackintosh—Dundas.*
HUNGERFORD TUDOR BODDAM AND OTHERS (Andrew Gildart Reid's Trustees) AND OTHERS, Defenders.—*Guthrie Smith—Blair.*

Servitude—Thirlage—Act 39 George III. cap. 55, secs. 1 and 4—Registration of abbreviate of decree of commutation.—Held (1) that the provisions of the first section of the Act 39 George III. cap. 55, dealing with registration of the abbreviate of a decree of commutation of thirlage is merely directory, and that there is no implied nullity where it has not been recorded within sixty days after the verdict of the jury; and (2) that the words of the fourth section protect against challenge any verdict that may be recorded, although after the lapse of sixty days.

1st Division.
Ld. Curriehill
M.

The predecessors of the Duchess of Sutherland, under the Act 39 George III. cap. 55, obtained in the year 1804 a decree or verdict commuting certain thirlage services, to which certain lands called Drumgillie, belonging to John Cockburn Ross of Shandwick, were subject, to a payment of a fixed annual amount of victual. The verdict was registered in the Register of Sasines, but not till after the lapse of sixty days from its date. The multures, as commuted under that decree, were paid annually up to 1877, but in that year, and subsequently, no payment was made. This was an action by the Duchess of Sutherland calling upon the owners of the lands of Drumgillie for payment of £80, 14s. 3d., the equivalent in money value of the alleged obligations according to the fiars prices.

The defence, *inter alia*, was that the decree of commutation was ineffectual, as the provisions of the Act 33 George III. cap. 55, had not been complied with, in respect (1) that the abbreviate of the decree prepared in terms of the statute had not been recorded within sixty days of the decree, as required under sec. 1 of the statute; and (2) that John Cockburn Ross, upon whom the petition for commutation was served, was not the true owner of the estate of Shandwick, his wife being at that time heiress of entail.

The pursuer admitted that the abbreviate had not been recorded within sixty days of the decree.*

* The following were the sections of the statute founded on (Act 39 George III. cap. 55):—

Sec. 1 directed that after the amount of the commutation had been ascer-

The defenders pleaded :—(1) The abbreviate founded on not having been recorded in terms of the statute 39 George III., cap. 55, is ineffectual to instruct the pursuer's claim. (2) The proceedings founded on by the pursuers, as ascertaining the amount of commuted multures, not having been carried out in terms of the said statute, *et separatim*, not having been directed against the proprietor of the lands mentioned, are insufficient to instruct the present claim against the defenders.

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The Lord Ordinary, on 25th November 1880, repelled the first and second pleas in law for the defenders, and found them bound to pay the sum concluded for.*

tained by the verdict of a jury an abbreviate of the decree or verdict "shall be registered by any of the parties in the General Register of Sasines at Edinburgh, or the Particular Register for the said county or stewartry, within sixty days after the pronouncing of such verdict or determination."

Sec. 4 provided that "After the expiry of three years from the registration of the verdict of the jury the said verdict and the proceedings had relative thereto shall not be reduced, set aside, reviewed, altered, or amended by the Court of Session, or any other judicatory, for any neglect of the provisions herein contained, or for any informality or error, or for any other reason or pretext whatever."

Sec. 5 provided that "The servitude and thirlage, and all services, prestations, and restrictions pertaining or any way incident thereto, so valued by the said jury, shall cease to be exigible from or binding upon either or any of the parties; but in lieu thereof the said proprietor or proprietors, occupier or occupiers, of the thirled lands or tenement shall be bound and obliged to pay, and the proprietor of the mill to which the said lands or tenements are thirled shall be bound and obliged to receive annually at the mill where the multures under the former servitude of thirlage were in use to be paid, or at some other convenient place to be fixed by the jury, such quantity or amount of corn or grain of such kind or sort, kinds or sorts, as the said jury shall in manner aforesaid determine to be a just compensation, or equivalent for such right of thirlage."

* "NOTE.— . . . Now, reading all these clauses together, I think it is clear the decree or verdict was to take effect, and was to operate as a commutation of the thirlage and services from its date, irrespective altogether of the registration of the abbreviate. But unless and until the abbreviate was recorded, the decree was to remain open to challenge or review on any competent ground. The object of the Legislature in prescribing the registration of an abbreviate, and in directing the registration to take place within sixty days, was not only to provide for the publication of the commutation in the public records of the country, but to induce the parties to make the publication without delay, and thereby secure the finality of the decree at the earliest possible period, *i.e.*, after the lapse of three years from the registration. Until the registration was made, the decree, whether acted upon by the parties or not, might be challenged, in a reduction or otherwise, not only on the merits, but on the grounds of failure to comply with the statutory forms, and the right of challenge would probably subsist until extinguished by prescription or barred by homologation. But so soon as the abbreviate is recorded the statutory period of limitation (three years) begins to run, and on its expiration the decree is to become absolutely unchallengeable on any pretext whatever.

"In these circumstances, the direction to record the abbreviate within sixty days appears to me to be not imperative, not only because there is no penalty attached to failure to comply with that provision, but because the provision is just one of those statutory provisions failure to comply with which is expressly declared to be ineffectual as a ground of challenge after three years from the date of registration. It is important to observe that, in the case of sasines and inhibitions, where registration within sixty days and forty days respectively is by statute made matter of express enactment, the penalty of nullity is attached to failure to comply with the direction; whereas, in the case of adjudication,

No. 99. The defenders reclaimed.

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LORD PRESIDENT.—This is an action for the recovery of a sum of £80, 14s. 3d., which is the equivalent for four years of certain quantities of grain payable from the estate of Shandwick to the Duchess of Sutherland in respect of a decree of commutation obtained by a predecessor of the Duchess in 1804. The first objection taken to this decree of commutation is, that it was not recorded in terms of the statute within sixty days from its date, and I understand that this objection is pleaded to two effects. It is in the first place said that the failure to record within the sixty days makes the decree null to all effects; and secondly, even supposing that its effect does not go so far as this, it is said that it, at all events, deprives the party holding the decree from obtaining the benefit of the 4th section of the Act.

X Now, the first question is, what is the effect of failure to record the decree within sixty days? Is the direction imperative, and with an implied sanction of nullity, for no such sanction is expressed? It is important, I think, that this is in the highest sense a remedial statute. It is intended to put an end to a highly disadvantageous relation between the owners of a barony mill and of the lands thirled to it. We are therefore bound to give it a liberal interpretation in favour of the object proposed to be obtained by the statute. The words of the statute are, that an abbreviate of the decree or verdict "shall be registered by any of the parties in the General Register of Sasines at Edinburgh, or the Particular Register for the said county or stewartry, within sixty days after the pronouncing of such verdict or determination;" and there the provision stops. It is not said that the verdict shall be so recorded under pain of nullity, nor are there any equivalent expressions. In these circumstances, I am not prepared to hold that the provision is imperative; I think it is merely directory. In such a statute, I think that unless a sanction of nullity be expressed, it will not be assumed to have been intended. This impression is confirmed by the other clauses referred to by the Lord Ordinary, to which I need not refer in detail.

But the defenders contend further, that if the party fails to record the decree within sixty days he cannot avail himself of the provisions of the 4th section of the statute. I am not prepared to affirm that view either, because I think the words of the fourth section are inconsistent with it. That section provides that, "after the expiry of three years from the registration of the verdict of the jury, the said verdict and the proceedings had relative thereto shall not

where an abbreviate is by statute directed to be recorded within sixty days, failure to comply with that direction does not create a nullity, but has merely the effect of postponing the adjudication of which an abbreviate is not timeously recorded to an adjudication which, although subsequent in date, has been timeously recorded. . . .

"In conclusion, on this branch of the case I have only further to observe that this is a highly remedial statute, and is to be interpreted liberally, and not in the judaical manner contended for by the defender. It was passed not for the purpose of imposing a burden upon lands, but of substituting a moderate fixed annual payment for a burden uncertain in amount, and oppressive in the mode of exaction; and I think it would be absurd to hold that it was intended that the whole benefit of the lengthened and laborious inquiry directed by the statute was to be entirely lost, if the parties, from any cause, however innocent, should allow even one hour more than the sixty days to elapse without recording the abbreviate." . . .

be reduced, set aside, reviewed, altered, or amended by the Court of Session, or No. 99.
 any other judicatory, for any neglect of the provisions herein contained, or for Feb. 25, 1881.
 any informality or error, or for any other reason or pretext whatever." Now, *Duchess of Sutherland v. Reid's Trustees.*
 the condition upon which the verdict and proceedings are protected against all subsequent challenge, is, that three years shall have expired from the registration of the verdict. It is not said that the three years are to be counted from registration sixty days after the date of the verdict. It is not even said after the verdict "has been recorded as aforesaid," referring to the preceding requirement regarding the sixty days. The words are a great deal more general—"after the expiry of three years from registration of the verdict of the jury." Now, if I am right in holding that a verdict may be recorded after the lapse of the sixty days, and be a good registration, then these words are sufficient to cover any verdict that may be recorded, although after the lapse of the sixty days. So that upon this first ground on which the defender relies I have no hesitation in agreeing with the judgment of the Lord Ordinary.

The other objection is that the party who was called, and who appeared as owner of the estate, was not in fact the owner of the estate. But this is denied by the pursuer, and if any effect is to be given to the argument, it can only be after an inquiry into the fact whether in 1804 John Cockburn Ross was or was not owner of the estate of Shandwick—that is, heir of entail in possession of the estate. Now, in regard to this, I am very clearly of opinion that it is not a matter which can competently be tried in this action. It is quite out of the question that a party should be allowed to maintain such a plea, *ope exceptionis*, in an action for payment of the commutation. It can only be raised in a reduction of the decree of commutation, because that decree must first be taken out of the way. It was a decree obtained, not in absence, but after a defender had been called and had appeared, in a petition under the statute.

Suppose that such a reduction is raised, then I think that the reasons of reduction must be very carefully libelled to set aside a decree after the lapse of so many years since 1804. And there would arise, on behalf of the defender in such an action, very formidable pleas of which no notice has been given at present—which indeed could hardly be competently referred to in this action. I need not go further than to mention the plea of the negative prescription. In short, the question whether the true owner was called or not is not before us for determination. We have no materials at present to determine either on the one side or on the other, and, therefore, I think the second objection is quite inadmissible.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT recalled the Lord Ordinary's interlocutor of 25th November 1880, "and, in respect the defenders did not insist in their third plea" (which related to a claim of relief), "repelled the other defences, and decerned," &c.

MACKENZIE & BLACK, W.S.—PHILIP, LAING, & Co., S.S.C.—Agents.

No. 100. JOSEPH AUGUSTUS SHEPHERD (Pursuer), Appellant.—*Asher—C. J. Guthrie.*
 JOHN HENDERSON (Defender), Respondent.—*D.-F. Kinnear—Jameson.*

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 Henderson.

Insurance, Marine—Construction—Total loss—Notice of abandonment—Date of action—From which does liability of underwriters date—Ship.—The “Krishna” was stranded on the west coast of India on 23d May 1879, about a fortnight before the usual commencement of the south-west monsoon. Every possible effort was made by the captain and crew before the breaking of the monsoon to get her off, but without success. The south-west monsoon usually prevails from June till October, and during its continuance any farther effort to relieve the vessel was admittedly impracticable. The owner being advised that the vessel would break up during the monsoon, gave notice, on 7th June 1879, of abandonment, as for a constructive total loss, to the underwriters, with whom she was insured, for full value. This notice they refused to accept. The owner raised an action on the policy on 1st October 1879. The underwriters having subsequently succeeded in salving the vessel, pleaded in defence that there was no constructive total loss either at the date when notice was given, or when the action was raised; and alternatively that in determining the question of constructive total loss the point of time to be looked to was the raising of the action, at which date there was no constructive total loss, whatever view might be taken of the state of matters at the date when notice of abandonment was given.

Held (1) that though the total loss of the “Krishna” might, at 7th June 1879, be probable, still, in the circumstances, and looking to the possibilities, a prudent uninsured owner would not at that date have dealt with her as a total loss, but would have waited, and that therefore the notice of abandonment given was premature; (2) that still less was there a constructive total loss at the date of raising the action; and (3) that the underwriters had not, by sending out to save the ship, by implication accepted the notice of abandonment.

Question whether the date of notice of abandonment or of raising action is the point of time at which the question of constructive total loss is to be determined, and the rights and liabilities of parties *hinc inde* fixed.

2D DIVISION.
 Sheriff of
 Lanarkshire.
 M.

ON 23d September 1878 a policy of insurance for one year from that date was effected through Messrs William Ewing & Co., insurance brokers, Glasgow, on the steamer “Krishna,” belonging to the pursuer, Joseph Augustus Shepherd, of Austin Friars, London. The policy was for £8000, and was underwritten for various sums by about fifty Glasgow underwriters, of whom the defender, John Henderson, was one.

The “Krishna” was of 198 tons register, and was one of a fleet of small steamers belonging to the pursuer plying from Bombay along the west coast of India. On 23d May 1879, while on the return voyage from Panjim, the port for Goa, to Bombay, with passengers, having little or no cargo on board, she was overtaken by a violent storm, in which she nearly foundered. To save life the captain was obliged to run her ashore, and succeeded in beaching her on a tract of sandy shore near Fort Redi, ten miles from Vingora, and about 200 miles south of Bombay. The storm which the “Krishna” encountered occurred shortly before the setting in of the south-west monsoon, which usually commences about the beginning or middle of June, and continues till October. During that period navigation along this part of the coast ceases. For about a fortnight after the stranding of the “Krishna” the captain (Powell) made every effort to haul off the vessel, by means of his steam power and the ship’s anchors and hawsers. Another of the pursuer’s vessels, the “Gunga,” was sent to his assistance, but the surf was running so high that she could not approach within a mile of the shore, where she lay.

* Interlocutor signed March 15, 1881.

Having exhausted all his appliances, and the regular monsoon having set in, the captain, on 5th June 1879, wrote to the pursuer's representative in Bombay :—" I have to inform you that I tried to get this vessel off the shore by the aid of steam and a bower anchor, carried well out into the surf, and during the whole of yesterday's tide, though a high one, I was not successful. There appears to be a sand-bank formed outside of her, which increases each time the tide makes up. I tried again with the night's tide, with the like result, the cable having parted. At low-water I had all hands out, relaid the cable, and tried again. This morning the ship was bumping so heavily and causing the engines and boiler to work so much that I did not consider it safe to keep steam on, so blew down the boiler. However, she was tumbling about so heavily that the cable parted again, the vessel driving much higher up the beach, the sand-bank still forming up outside her. The whole of her cables are so much damaged by the very heavy strain—links broken, started, and studs gone, that now it is only fit to be condemned. Under all these circumstances I have wired you to-day that every effort having failed I am compelled to give her up as lost. In the same telegram I have asked for instructions regarding the disposition of the ship's stores, &c. Though I have virtually given up the ship as lost, I think the crew had better remain until I hear from you about the stores. In the meanwhile I have given the engineers orders to carefully coat with white lead and tallow all bright portions of machinery, and cover the cylinders over with the remnants of old awnings. The funnel will also be covered over to protect the tubes from rain water. All portable gear about the decks, such as binnacle tops, lamps, boats, oars, masts, sails, buckets, cooking-houses, doors, &c., will be put below, and all the ventilating cowls taken off and put below, and the wood plugs placed in and secured from below. When all the work is finished the crew, I suppose, had better go to Vingorla, there to await shipment to Bombay, as you may advise me hereafter."

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The captain thereafter remained by the vessel to take charge of her and her stores and equipment for behoof of whom concerned.

On 7th June 1879 the pursuer, who had been communicated with by telegraph from Bombay, gave notice to William Ewing & Co., on behalf of the underwriters, of abandonment of the " Krishna," as for a constructive total loss. In reply, Messrs Ewing on same day wrote :—" We have tendered to the underwriters the abandonment of this vessel, as you instructed, but they have, as is usual, declined to accept it."

From June till October it was admittedly impossible to do anything farther for the vessel. Her situation in the beginning of June was this—She did not appear to have been materially injured in the hull by stranding, though her fittings, steering gear, &c. were much destroyed. How far she was strained could not be ascertained. She was lying in soft sand, nearly broadside to the sea, and about high-water mark of neap tides; and the surge had formed a small bank of sand between her and the sea. She was light, as she had no cargo, and her ballast had been unshipped. It was matter of speculation what effect the heavy monsoon sea would have upon her during the next four months, but if she lived through it, and the storms with which it usually ended, without any farther injury, there was no reason why she should not be got off when the monsoon was at an end and the weather moderated.

In point of fact the monsoon of 1879 was unusually light, and unaccompanied by violent storms, and instead of the " Krishna " breaking up she was merely lifted further up the beach, out of reach of the surf, and being light apparently received no further damage. The underwriters sent out a Captain Burns, one of their agents in salving operations, who reported

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in August that as the breaking of the monsoon had not farther injured the ship, there was every probability of getting her off when it was over. Captain Burns accordingly commenced work on 15th October 1879, and got the vessel off on 16th November. She was towed into Bombay, and there, having been overhauled and repaired at the expense of the underwriters, was tendered to the pursuer's representative.

In the meantime the pursuer, adhering to his notice of abandonment as for a constructive total loss, given on 7th June previous, raised this action in the Sheriff Court of Lanarkshire to try the question of the underwriters' liability. The petition was presented on 1st October 1879. The pursuer concluded for £50, the amount underwritten by the defender, together with £6, 5s., being his rateable proportion of the charges incurred and disbursements made by the pursuer in his endeavour to save the vessel.

He pleaded ;—(1) The said vessel having become a total loss by the perils insured against, and having been timeously abandoned by the pursuer, he is entitled to decree against the defender as one of the underwriters on the said policy of insurance for the sum underwritten by him, and for his proportion of the charges incurred under the "sue and labour clause" therein. (2) The underwriters upon the said policy having accepted the pursuer's abandonment, decree should be granted as craved.

The defender denied liability as for a total loss, though admitting his liability to pay his proportion of the loss which the pursuer might have sustained by the perils insured against by him.

He pleaded ;—2. The pursuer's statements, so far as material, being unfounded in fact, the pursuer is not entitled to decree as concluded for. 3. The defender having always been and being willing to settle with the pursuer, so far as he has any claim under the policy founded on, the present action is unnecessary, and ought to be dismissed, with expenses. 4. The defender has not accepted abandonment in respect of Captain Burns' actings in salving the ship, because—(1) He acted in conjunction with underwriters who had special powers so to act.* (2) He acted only as a salvor, and the pursuer knew this. (3) He acted in accordance with the usual practice in such cases.

The Sheriff-substitute (Guthrie), on 8th December 1880, pronounced this interlocutor :—"Finds that on 23d May 1879 the pursuer's steamship 'Krishna,' being then insured in terms of the policy founded on, and the defender being an insurer to the extent of £50, was stranded during a violent storm on the coast of Hindostan, between Panjim and Bombay : Finds that on or about the 7th day of June following the pursuer intimated to the underwriters in said policy that he abandoned the 'Krishna,' and claimed as for a total loss : Finds that the underwriters did not accept the abandonment : Finds that the pursuer brought this action for indemnification of his loss upon the 1st day of October 1879 : Finds that shortly after the stranding of the 'Krishna' the south-west monsoon began upon the coast of India, and continued till the end of September or beginning of October, and that during its continuance it was impossible to get the 'Krishna' afloat : Finds that in August and September, and at the date when this action was raised, the 'Krishna'

* This plea referred to a clause in a concurrent policy which the pursuer had effected with two English insurance associations for £1000 over the "Krishna," and which was to the following effect :—"And it is hereby declared and agreed that no acts or actions of the insurers or insured in recovering, saving, or preserving the property shall be considered as a waiver or acceptance of abandonment." No similar clause occurred in the Scotch policy.

was not in any risk of sustaining farther injury where she lay, and that, No. 100.
 regard being had to the usual course of the monsoon, there was then a
 reasonable prospect of her being got off the sandy shore where she lay, Feb. 25, 1881.
 without greater expense than a prudent uninsured owner would reason- *Shepherd v.*
 ably incur: Finds, therefore, that there was not at that date a construc- *Henderson.*
 tive total loss of the ship, such as to entitle the pursuer to abandon her
 to the underwriters: Therefore assoilzies the defender from the first
 craving of the petition, and decerns: Finds, with regard to the claim
 made under the suing and labouring clause of the policy (No. 88/7 of pro-
 cess) by the pursuer for disbursements made in regard to the 'Krishna,'
 that the charge for the employment of the 'Gunga' is excessive, and
 that the pursuer is entitled to be paid therefor at the rate only of 500
 rupees per day: Finds that the other charges have been duly incurred,
 and ought to be allowed; and therefore decerns against the defender for
 £4, 6s. 5d., being his proportion of the said charges: Finds the defender
 entitled to expenses," &c.*

* "NOTE.—The pursuer's steamer was driven ashore while on a voyage from Panjim to Bombay on the 23d May 1879, and after some attempts by the master and crew to get her afloat, the pursuer, on 7th June, acting on the information he then had, gave notice of abandonment to the underwriters. The south-west monsoon was beginning, and the knowledge that all efforts to get the vessel afloat must consequently cease for some months, during which, moreover, the vessel, if exposed to the action of the sea, must run a great risk of being further damaged and possibly broken up, was doubtless one of the principal elements in determining the pursuer to take this course. If the legal effect of the abandonment were to be judged of according to the facts as they stood at the 7th of June, when notice was given, it would be difficult to say that the vessel, though then existing in fact, was not lost so far as any beneficial use to the owner was concerned. The validity of abandonment, as at the date of notice, is not, however, a point which must be decided here, because I think that by the law of this country it is necessary to the pursuer's success that the circumstances should have continued to be such as to involve a constructive total loss down till the raising of the action. There was an attempt by the pursuer to shew that it is an open point in the law of Scotland whether the validity of an abandonment is to be determined by the state of matters existing at the date of the notice, or by that existing at the time when action is brought; and the doubts expressed by Lord Eldon in the Scotch case of *Robertson v. Stewart and Smith*, 10th Feb. 1809, F.C. rev. 2 Dow, 474, were referred to in support of this view. But there is no authority in our law except the doubts of Lord Eldon, and the judgment in the Court of Session in that case, in support of the American and French doctrine on this subject, as distinguished from the English; and there is no sufficient ground for holding that our law and practice is not, as Professor Bell indicates in his 'Commentaries,' vol. i., p. 655, the same as that which obtains in England, and which has been settled by a series of English cases subsequent to *Robertson v. Stewart and Smith*, and all confirming the rule of *Bainbridge v. Nelson*, 10 East. 329, which Lord Eldon doubted. The principle to be extracted from the decisions is, that abandonment is a *quasi* offer, which grows into a contract or transaction fixing the rights of parties only (1) by the insurer's acceptance, or (2) by a judicial determination of its validity, which, like other judicial decisions, deals with the state of facts at the inception of the action in which it is given. 'Notice of abandonment,' says Bayley, J., in *Brotherston v. Barbour*, 5 M. and S., 418, 'is no more than a proposal on the part of the assured which the underwriters may accept, and then there will be a new agreement binding on both parties. But while the transaction rests in abandonment only on one side, the underwriter's responsibility may vary, and cannot amount to a total loss, if by subsequent events it has become otherwise at the time of action brought.'

"This point being fixed, the determination of the principal question of fact

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Argued for him ;—On 7th June 1879, when notice of abandonment of the “*Krishna*” was given by the pursuer, there was a constructive total loss. In the circumstances in which she was stranded there was at that date no reasonable hope that she would be got off at all. She was lying broadside to the sea, on an open beach, exposed to the whole force of the monsoon gale and the heavy sea, which, according to all experience, would continue for the next four months. According to reasonable deduction from all prior experience, the pursuer was warranted in acting on the supposition that nothing would be left of the vessel when the monsoon subsided. Had he been uninsured he would therefore have at that date sold her for what she would fetch, if he could have found any one venturesome enough to purchase the wreck. He was therefore entitled to abandon the ship to the underwriters, and was not bound to wait four months without his ship, to see what the chapter of accidents might bring forth. This being the state of matters at the date when notice of abandonment was given, it was at that point of time that the question of constructive total loss and the rights and liabilities of parties, *hinc inde*, were to be determined. Such was the rule of law in America, Germany, and France, and in fact in all mercantile countries except England.¹ In

under adjudication becomes comparatively simple ; for it seems to me, that however hopeless the recovery of the ‘*Krishna*’ may have been at the beginning of June 1879, the prospect was very different at 1st October. The monsoon was then over, the ship was uninjured, or at least as little injured as it was possible for her to be after lying for four months on the beach, and there was no reasonable doubt to those acquainted with the position of the vessel, as indeed the event proved, that she could be got of without undue expense. The vessel was got off and repaired for a total cost of about £1400, and the pursuer’s own witness, Captain Cooper, places her value when offered to the owner at £6000, or about two-thirds of her original cost. We have not in this country adopted the American rule that a loss is total wherever the insured subject is deteriorated to the extent of half its value, or the cost of its restoration would exceed half its value. But if even that were our law the evidence does not lead to such a result. It would be useless to analyse the evidence on the subject, the mass of which irresistibly leads to the conclusion that at the 1st of October, when the claim for indemnity was judicially made, and the right to indemnity under the contract of insurance falls to be ascertained, there was no constructive total loss upon which the pursuer could rest his demand.

“But even if there were not a constructive total loss, it might be that a notice of abandonment having been given at an earlier date the insurers had so acted as to be barred from repudiating that abandonment, and the pursuer, somewhat late in the day, was allowed to add to the record a plea to this effect. It does not appear to me that there is even a plausible ground for this contention. The insurers at once declined to accept the abandonment when it was made ; a distinct notification to the same effect was made on their behalf early in August, and it is impossible to refer to any words or acts of theirs suggesting that they proceeded to float the ‘*Krishna*’ on any other footing than as salvors. I find nothing in the authorities to suggest that where insurers save an abandoned vessel, all the time protesting that they do not accept the abandonment, they are to be taken as accepting the abandonment. The judgment in *Provincial Assurance Co. of Canada v. Ledue* (43 L. J., P. C. 49 ; L. R. 6, P. C. 224) certainly does not support any such view, which would simply mean that where an owner abandons and the insurers repudiate the abandonment the subject insured must be left to perish utterly, because neither party can interfere for its protection or recovery without forfeiting his legal rights.”

¹ *Copelin v. The Phoenix Insurance Co.*, 1870, 2 Grant Thomson, Am. Rep., 504 ; *Snow v. Union Mutual Marine Insurance Co.*, 1876, 20 Grant Thomson,

England, from an early period, the date of raising action had been taken as the point of time at which the question was to be determined. And though many opinions had been expressed against the advisability, in point of principle, of looking at subsequently emerging circumstances prior to raising action, and refusing to look at those occurring prior to decree, the rule having once been fixed had been adhered to. In Scotland the question might be said to be new. But such authority as existed was in favour of the view that the more rational law of foreign states had been adopted in Scotland, and the law of England not followed. In *Smith v. Robertson*, Feb. 10, 1809, F. C.,¹ it was so decided by the Court of Session. On appeal, a very noticeable course was taken by the House of Lords, that House (2 Dow, 474) affirming the judgment on the ground of acceptance of abandonment to avoid determining whether the prior English authorities should be applied in Scotland, and the Lord Chancellor (Eldon) specially reserving his opinion as to whether the principle of these authorities was sound. In Scotland, therefore, the general rule must be held to prevail. But even if the contrary rule were adopted, still at the date of raising the action the evidence shewed that the ship, though floated off, was so much strained that she never could be used for the pursuer's trade again. He was not therefore bound to accept her when tendered by the underwriters, and merely claim for a partial loss. Further, the underwriters had, by their actings, impliedly accepted the abandonment.

Argued for the defender;—The point of time, with reference to the circumstances, at which the question of constructive total loss was to be determined, was not, as contended, the date of notice of abandonment, but of raising action on the policy. Even if Lord Chancellor Eldon might be said, in deciding the case of *Robertson v. Stewart and Smith*, 2 Dow's Ap. 474, to have reserved for reconsideration the point of principle involved in the earlier cases of *Bainbridge v. Neilson*, 10 East. 329, and *Faulkner v. Ritchie*, 2 Maule and Selwyn, 290, these cases had been followed in a multitude of subsequent English cases,² which adopted the principle on which they proceeded, and fixed the rule of law for England. In the absence of any authoritative decision to the contrary it could not be held, in a mercantile question, that that rule was not the law of Scotland also. But, in point of fact, the state of matters at 7th June was not such as satisfied the criterion precedent to the right to abandon, viz., that a prudent uninsured owner would have abandoned further exertions, and sold the wreck for what it would fetch.³ And if such was the case on 7th June nothing which happened subsequently altered matters, except for the better. The ship was an average, not a

Am. Rep., 349; *Bradley v. the Maryland Insurance Co.*, 1838, 12 Curtis, Am. Rep., 745 (Justice Storey's opinion, p. 751); *Marshall v. The Delaware Insurance Co.*, 2 Hare and Wallace, Leading Cases, 665; *Peele v. The Merchants Insurance Co.*, 2 Hare and Wallace, L. C., 676 and 701.

¹ See also Buchanan's Rep. of Remarkable Cases, p. 73.

² *Patterson v. Ritchie*, 4 M. and S., 394; *Brotherston v. Barber*, 5 M. and S., 418; *Hamilton v. Mendes*, 2 Burrows, 1198; *Naylor v. Taylor*, 9 B. and C., 718; *Kattenbach v. Mackenzie*, June 4, 1878, L. R., 3 C. P. D., 467; *Arnold on Mar. Insurance*, ed. 5th, pp. 14 and 15; *Crump on Mar. Insurance*, sec. 22; see also Bell's Com., M'Laren's ed. 1, 654; *Stewart v. Greenock Marine Insurance Co.*, Sept. 1, 1848, 1 Macq. 328; *Scottish Marine Insurance Co. of Glasgow v. Turner*, March 3, 1863, 1 Macq. 334, 25 Scot. Jur., 274.

³ *Roux v. Salvador*, 3 Bing. New Cases, 266, and *Tudor's Mar. Cases*, 139; *Kemp v. Halliday*, 6 Beet and Smith, 723; *Rankine v. Potter*, May 5, 1873, L. R., 6 E. and I., App. 83.

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No. 100. total loss.¹ The underwriters were entitled to salve the ship without thereby by implication accepting abandonment.²

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At advising,—

LORD CRAIGHILL.—(After stating the facts)—1. The first question to be considered and decided is whether there was on 7th June, the date of the notice of abandonment, a constructive total loss. The Sheriff-substitute does not answer this question directly; but in his interlocutor he finds that shortly after the stranding of the “Krishna” the south-west monsoon began to beat upon the coast of India, and continued until the end of September or beginning of October, and that during its continuance it was impossible to get the “Krishna” afloat. In his note he adds—“The pursuer on the 7th June, acting on the information he then had, gave notice of abandonment to the underwriters. The south-west monsoon was beginning, and the knowledge that all efforts to get the vessel afloat must consequently cease for some months, during which, moreover, the vessel, if exposed to the action of the sea, must run a great risk of being further damaged, and possibly broken up, was doubtless one of the principal elements in determining the pursuer to take this course. If the legal effect of the abandonment were to be judged of according to the facts as they stood at the 7th of June, when notice was given, it would be difficult to say that the vessel though then existing in fact, was not lost, so far as any beneficial use to the owner was concerned.” Limiting this conclusion to the time when the notice of abandonment was given, and to the next three, or it may be four, months, its soundness can hardly be impeached. The weather was and would be an obstacle to the floating of the vessel, even if she did not break up, which could not be overcome. But the bad weather would, according to all experience, come to an end in October, if not sooner; and unless broken up in the interval, which, as a bank of sand had been formed between her and the sea, was unlikely, there was ground for a reasonable expectation that the “Krishna” might then be got off. This was not doubted at the time, and the result proved its accuracy.

There were thus only two elements by which a constructive total loss as on 7th June could be said to be established. One was the contingency that the vessel, before she could be removed from the strand, might in fact become a total wreck, or be so much injured that the cost of removal and repairs together would be more than her value when released and repaired; and the other was the length of time that must elapse before she could be removed.

With reference to the second element, that certainly was not such as, of itself, would warrant abandonment. Detention, or loss of the beneficial use of a vessel for such a period as the interval in question, will not convert what is in its own nature only a partial into a constructive total loss.

The first element, however, is more material. There was risk that the vessel while exposed on the strand might become a wreck, that is to say, only a congeries of planks, which, though it might still bear the semblance of a vessel, would not be worth more than the value of the materials; or, if not reduced to this condition, that she might be so much injured that the cost of getting her off and of the necessary repairs would exceed what would be her value when again afloat and repaired.

¹ Park on Mar. Insurance, i., 365.

² Provincial Insurance Co. v. Leduc, June 26, 1874, L. R. 6, P. C. App. 224.

What right did these contingencies confer on the insured? The law upon this subject is not doubtful, and may be presented in the words used by Lord Abinger in *Roux v. Salvador* (3 Bingham, N.S., 266; *Tudor's Marine Cases*, Feb. 25, 1881. *Shepherd v. Henderson*. 140) :—"There are intermediate cases,—there may be a capture which, though *prima facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable without any reasonable hope of repair, or by which the goods are partly lost or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all those or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit as well as that of the underwriter, treat the case as one of total loss, and demand the full sum insured." Would, then, a prudent man not insured have dealt, on 7th June, with the "Krishna" as a wreck,—that is to say, as a congeries of planks; or as a vessel, the floating and repair of which would exceed her value when again afloat and repaired? I think he would not. He would have waited. And why? Because even if the worst were to happen he could not be worse off than he would be were he immediately to act on the assumption that the vessel in the end would become a wreck. He might gain by holding on, but he could not lose; whereas disposing at once of the property as a wreck he might lose, and could not gain. The position of matters appears to have been this. It was not improbable that, stranded as she was, and exposed to the south-west monsoon, the "Krishna" might become a wreck; but it was possible, to say the least, that she might remain unbroken, that she might be got off when the south-west monsoon came to an end, and that she might be repaired at an expense far within her value. No prudent uninsured owner would, in the circumstances, as I think, have abandoned either hope or his ship. He could act otherwise only by sacrificing a possible advantage without any corresponding consideration, because his vessel at the beginning was not in fact a wreck, and this at the worst would only be its character when it came to be disposed of at the end.

These considerations have brought me to the conclusion that there was not as on the 7th of June, when notice of abandonment was given, any more than at any subsequent period, a constructive total loss, and this of itself would be a ground, though a different ground from that on which the Sheriff proceeded, for giving judgment for the defender.

2. But it may be that the notice of abandonment given to the insured was accepted by the underwriters, and if so, the latter, of course, will be bound by the agreement thus concluded. And this, the appellant says, is what happened; but in this part of the case I agree with the judgment of the Sheriff. There appears to me to be no reasonable ground for such a contention. Upon receipt of the notice, intimation was made on the part of the underwriters that "they, as is usual, declined to accept it." And to this, so far at least as protestation went, they uniformly adhered. But having in the month of August learned from persons sent to inspect the "Krishna" that when the south-west monsoon ceased she might be got off, they sent in the following October the men and the materials thought to be necessary for this undertaking, with the result that after four weeks' labour she was again afloat. This was done by the

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underwriters, as they say, simply in the character of salvors, and such, I think, is the fact. The underwriters, it may be, as they had rejected notice of abandonment, had not a legal title to do what they did, and certainly they might have been prevented by the appellant had he chosen to resume his right in the "Krishna" which had been abandoned; but this does not bring with it as a corollary the conclusion that their conduct was equivalent to acceptance of the notice of abandonment. No doubt, if in acting without title they injured the owner, they must make reparation, but all idea of injury is excluded on the present occasion, for on the one hand if there was, as on the 7th June, a constructive total loss, and if that is the date with reference to which the rights and obligations of parties are to be determined, the appellant will, notwithstanding the subsequent salving of the ship, recover the full sum insured, while if, on the other hand, the loss is to be held as having been only a partial loss, the getting off of the ship could not be an injury, but rather would be a benefit to the owner. If, indeed, the "Krishna" had been left uncared for on the shore where she was stranded, the result, sooner or later, would necessarily have been not a constructive but an actual total loss, but on the assumption that doing nothing himself the owner prevented others from doing what was necessary for getting her off, it is hardly conceivable that upon a claim as for a total loss the appellant could have recovered.

3. On the view that on the 7th June the circumstances were such as to entitle the insured to give notice of abandonment, and that this notice was not accepted by the underwriters, which is the view upon which the Sheriff has proceeded, the question whether the date of the notice or the date of the action is the point of time with reference to which the rights and obligations of parties are to be determined, is next presented for consideration. This, in truth, has all through been dealt with as the great question in the cause. Being purely a question of law, and therefore of general application, it is one of interest and importance; not, however, because it need have much influence upon insurers and the insured in time to come, for once the point is fixed, parties may so contract that the effect of the decision may be almost neutralised. If action should be raised simultaneously or nearly simultaneously with the giving of notice, the importance of a question like the one now awaiting decision is plainly diminished. That question, nevertheless, is one which has long been debated, and it is one upon which not only jurists but legal systems have differed. England, although the rule has not been applied, so far as appears, to a case like the present, or to other cases than loss from capture or restraint, if the *dicta* of Judges and the statements of institutional writers should be taken as conclusive, has chosen the date of action; while France and America have chosen the date of the notice of abandonment.

In Scotland the question has only once been before the Court, and the decision both of the Judge of the Admiralty Court and of the Judges in the Court of Session, was in favour of the view adopted in France and America (*Robertson, Forsyth, & Co. v. Stewart, Smith and Others*, Buchanan's Reports, p. 73, 2 Dow, H. of L., p. 474). Judgment, however, was given on a different ground in the House of Lords, and the case is almost more memorable for the protest entered by the Lord Chancellor (Eldon) against being thought to concur in or to differ from the previous decisions in England which had been cited as authorities than for what was decided either in the Court of Session or in the House of Lords. The same question has not, until the present action was raised,

been again submitted for the consideration of the Courts in Scotland. Professor No. 100.
 Ball, however, in treating of the subject, has brought into prominence what, ^{Feb. 25, 1881.}
 since the days of Lord Mansfield, has been decided in England, and almost ^{Shepherd v.}
 suggests that the English rule may be taken to be the rule in Scotland. But ^{Henderson.}
 in so doing he is influenced not by any favour for the English rule, but by the
 consideration that it is not likely, and certainly would not be desirable, that
 what has long been taken for law on a mercantile question in England should
 be found not to be the rule recognised in Scotland.

Dealing with the point as one of principle, more, I think, may be said for the
 French and American than for the English rule. The assumption is that, at
 the date of the notice of the abandonment there was a constructive total loss,
 in consequence of which the insured were entitled to give notice of abandon-
 ment and claim for the sum set forth in the policy as by agreement the value
 of the vessel. Then why are the rights and obligations of the parties thence-
 forward to remain uncertain? It is said that contingencies may occur by which
 what at the time was constructively a total loss will be reduced to a partial loss.
 This reason, however, operates as much against the selection of the date of
 action as of the date of notice. Things relative to the condition of the vessel may
 change as well after the one as after the other, and, therefore, there is, so far
 as I can see, no consideration of principle which affects the first more than
 the last. But of the converse this cannot be predicated. Once notice is given,
 the ship is ceded by the insured, though the exact connection between her
 and the insurers consequently established has never been clearly, or, I may say,
 satisfactorily defined. The insured thenceforward cannot meddle, his power as
 owner is surrendered, and whatever may be apprehended he has no title upon
 which he can interfere and endeavour to guide the course of events. This being
 so, there would appear to me to be expediency in dealing with the contract
 in such a way that things as they were when notice was given should deter-
 mine the measure of the rights of the insured and of the liabilities of the
 insurer. The truth is that in any case except the first to which the rule is
 applied, there can be no pretext for a complaint of hardship, whatever may be
 the rule which is the subject of application, because both parties when they
 contract know, or at least may know, what as regards constructive total loss
 is involved in their contract, and must therefore be held to have realised their
 respective positions.

These being my views, I should be disposed to hold, if there was no
 countervailing consideration, that the date of the notice of abandonment was
 the date with reference to which the question whether a constructive total loss
 had occurred was to be determined. But there is, in my opinion, such a con-
 sideration, and that is the opposite rule which has been recognised in England
 for more than a century. We are not bound by decisions which have been pro-
 nounced in another country, but in a mercantile question it would be unfortunate
 were we called upon to give a judgment by which a different rule would be set
 up here from that which has been established in England. But on this occasion
 we are not pressed by any such necessity, because if there was a constructive
 total loss as at 7th June 1879, the date of the notice of abandonment, the right
 to recover for the full value of the ship was not extinguished by anything which
 occurred previous to the 1st of October, when the action was instituted. At
 the later date, just as much as at the earlier, the "Krishna" was a wreck,
 assuming that at any time she could be so regarded. She still lay on the strand

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upon which she had been cast on the 23d of May, and whether she could be got off, and what if got off would be her condition, were matters merely of opinion or of speculation. But the underwriters, when sued as for a constructive total loss, could not satisfy the owners' demand by presenting them with a contingency even had that been one more hopeful than formerly could have been offered. Satisfaction of the owners' claim, if not by payment of the value of the ship, at least by the delivery of the ship herself, was what was required. This is the rule in England. The decisions of the Courts of that country established the principle, that if once there has been a total loss this is construed to be a permanent total loss, unless something shall afterwards occur by which the assured either has the possession restored, or has the means of restoring such possession. (*Vide Maciver v. Henderson*, 5 M. & S., p. 447; *Deans v. Hornsby*, 3 E. & B., p. 186.) Nor will the restoration of the hull be enough, for it has also been held that the insured were not bound to be satisfied by the mere restitution of the ship's hull under conditions which make it doubtful whether they would not have to pay more for its repair than it was worth. As the rule was expressed by Mr Justice Bayley in *Houldsworth v. Wyse* (7 B. & C., 794), "to reduce the loss once total to a particular loss, the subject of the insurance must be in existence under such conditions that the insured may, if they please, have possession," for they may reasonably be expected to take possession of it. The strength of the principle in question is even more fully exhibited in the language used by Lord Ellenborough in deciding *Paterson v. Ritchie* (4 M. & S., p. 393). The principle of the decision in *Bainbridge v. Neilson* (10 East, p. 329), he said is a general one, and is this, "I have a right of action for the non-payment of money; the party pays me before action brought; that takes away my right of action." Thus what is offered or given is the ship in such a condition that she is counted as money for the value insured, which necessarily excludes the idea of contingency in the matter either of restitution or of the ship's value when restored. But here there was at the raising of the action contingency as to both particulars, and therefore I think that assuming there was a constructive total loss at the date of the abandonment the liability of the underwriters who did not accept of the notice when given was not extinguished as at the 1st of October by any supervening change in the condition of the ship.

Upon this view of the case, the interlocutor of the Sheriff would have to be altered, and decree for the full sum covered by the policy be pronounced.

LORD YOUNG.—The Sheriff was of opinion that on the 7th June, when notice was given by the owners to the underwriters, there was a constructive total loss, but that, on 1st October, when this action was raised, the circumstances had changed, and did not involve a constructive total loss. He was of opinion, in fact, that at the first date there was, and at the second date there was not, a constructive total loss, and being of opinion, in point of law, that the date of action ruled the liability, he decided that the underwriters were not due as for a total loss.

I think the question of fact, as to whether there was a constructive total loss at 7th June—that is to say, whether the circumstances as at that date warranted the inference that a total loss had constructively occurred—I think that question of fact is attended with difficulty. Though the Sheriff is of opinion that the circumstances, as existing at 7th June, involved a constructive total loss, he arrives at that opinion with some hesitation. I share that hesitation, but I am

inclined to agree with Lord Craighill that the better view is that they do not. No. 100.

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In point of fact, the vessel was stranded at the commencement of the monsoon. She was driven on to a soft sandy beach, but suffered no material damage thereby. The question was whether she was to be got off in safety. She was all right, but in the wrong place. She was ashore instead of afloat. There did occur a chance of getting her off very shortly after she grounded—after the violence of the storm had subsided, and before the monsoon had regularly set in. But she was not then got off, and, those in charge of her having failed in their attempt, it was needless to make any farther efforts until the monsoon was over.

Accordingly, when the underwriters got notice from the owners on 7th June, they, in effect, replied,—“This is all nonsense. The ship, so far as appears, at least as to her hull, is as yet uninjured. She is not a total loss. The probability is that she will be got off without material damage if you wait till the monsoon subsides.” I think that was a reasonable answer. The result might not have justified the expectation of the underwriters. The ship might have broken up during the monsoon. But, in point of fact, the result did justify their expectation. And I think that the balance of evidence, not judged of *ex post facto*, but from the point of time, of the 7th June, and with regard to the then future contingencies, is in favour of the reasonableness of these expectations. I think the owners, if they had taken the more reasonable course, would not have given up the ship as a gone thing, but would have waited, and renewed their efforts at a more favourable opportunity.

I am inclined, though with a good deal of difficulty, to adopt that view. And that disposes of the whole matter so far as this case is concerned, for the ship was got off by the underwriters, acting as salvors, was completely repaired by them at a cost of £1400, and was offered to the owners on 5th December. She was then valued at something like £6000, or £3000 less than her value before she went ashore. That being so, and regarding the contract of insurance as really a contract of indemnity, I think that the insured are entitled to indemnity for that partial loss, though not as for a total loss.

What strikes me with surprise is that the case has never been regarded at any of its stages as a case of partial loss. There has been damage, and the underwriters must pay. The only question is whether they are to pay for a partial or a total loss, yet the case is directed to the recovery as of a total loss only. Partial loss never seems to have been thought of. There are no materials for its ascertainment, even supposing the summons would cover it. The case might quite well have been stated alternatively as for a total or a partial loss. But it has not been so, and the parties must have recourse to other proceedings, unless they can agree on a sum, to ascertain what is the amount of the partial loss.

If the conclusion at which I have arrived is correct, the question which the Sheriff has decided, and to which much of the argument was addressed, does not arise, viz., whether there must be total loss at the date of giving notice or of raising action. But I may say that my opinion on that question, taking it hypothetically, rather inclines to that expressed by my brother Lord Craighill. I do not wish to express myself more decidedly. There are, I think, grounds for distinguishing between cases of capture and cases of damage by perils of the sea. There may be an analogy, but I think cases of capture, which are specially insured against in every policy, may be distinguishable from such cases as the present. But I should desire to reserve my opinion on the point.

No. 100. LORD JUSTICE-CLERK.—I concur in the judgment of your Lordships, and have nothing to add.

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On the last point mentioned by your Lordships, if we were obliged to give a decision, I think much consideration would be necessary. But, in my opinion, specific restitution must always exclude a claim for reparation at whatever date specific restitution is made. And that is possibly a principle that may distinguish the case of capture from a case like the present.

THIS interlocutor was pronounced:—"Find that on 23d May 1879 the pursuer's steamship 'Krishna,' being then insured in terms of the policy founded on, and the defender (respondent) being an insurer to the extent of £50, was stranded during a violent storm on the coast of Hindostan, between Panjim and Bombay: Find that, on or about the 7th day of June following, the pursuer (appellant) intimated to the underwriters in said policy that he abandoned the 'Krishna,' and claimed as for a total loss: Find that the underwriters did not accept the abandonment: Find that the pursuer brought this action for indemnification of his loss upon the 1st day of October 1879: Find that shortly after the stranding of the 'Krishna' the south-west monsoon began upon the coast of India, and continued till the end of September or beginning of October, and that during its continuance it was impossible to get the 'Krishna' afloat: But find that there was on the 7th of June, and continued thereafter to be, a reasonable prospect of her being got off the sandy shore on which she lay, without greater expense than a prudent uninsured owner would reasonably incur: Find, therefore, that there was not, at that date, a constructive total loss of the ship: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and decern: Find the defender entitled to expenses in this Court, and remit to the Auditor to tax the same, and the expenses found due in the inferior Court, and to report."

MACNOCHIE & HARE, W.S.—J. & J. Ross, W.S.—Agents.

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SHOTTS IRON COMPANY, Pursuers.—*R. Johnstone.*

Sir GEORGE DEAS, Defender.—*Asher—J. P. B. Robertson.*

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Lease—Mineral—Lease to terminate if minerals became "not worth expense of working"—Fall in market price of mineral.—In a lease of gas coal for twenty-nine years from Whitsunday 1867 it was provided that if at any time during the subsistence of the lease it should be "judicially found, upon a report by arbiters, that the gas coal, from no fault, neglect, or irregularity on the part of the lessees, has become not worth the expense of working, this lease shall come to an end at the first term of Whitsunday or Martinmas after it shall be so found." In 1880 the lessees obtained a report from the arbiters setting forth that, from no fault on the part of the lessees, the mineral had become not worth the expense of working, the arbiters stating that the grounds on which they had arrived at this conclusion had reference "solely to the state of the market for gas coal at the time." In an action subsequently raised by the lessees, concluding for declarator that the gas coal, from no fault of the pursuers, "has become not worth the expense of working," and that said lease shall come to an end at Martinmas 1880, *held* (1) that the clause in question was to be construed as applicable, *inter alia*, to the case of the mineral becoming not worth the expense of working in consequence of a continued depression of market prices, although the produce of the mines had not deteriorated in quantity or quality; (2) that the

report by the arbiters was to be regarded as proceeding on a due consideration of the existing state and future prospects of the market for gas coal; and therefore (3) that the lessees were entitled to bring the lease to an end. No. 101.

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2D DIVISION.

Lord Ruth-

ford Clark.

M.

By lease, dated 6th and 12th January 1869, Sir George Deas let to trustees for the behoof of the Shotts Iron Company "All and Whole the seam of gas coal or parrot coal situated in the lands and others therein described, said gas coal being known in the neighbourhood by the name of the Shotts or Shottsburn gas coal, and sometime partially wrought by George Simpson, as tenant thereof; together also with what common coal and ball ironstone, and musselband ironstone, may be found to be associated with the said gas coal or parrot coal, and falling to be wrought therewith in the ordinary course of working, but no other coal, minerals, or substance whatever, and that for the space of twenty-nine years from and after Whitsunday 1867."

The lease excluded assignees, legal and voluntary, and also subtenants, "except on condition of the said lessees, the Shotts Iron Company, remaining liable for the rent and prestations, and implement of all the stipulations in the lease, on which footing the lessees may sublet, and not otherwise."

The subjects let were situated in or under the lands of Hartwoodhill and others, in the county of Lanarkshire.

The fixed rent payable under the lease was £300 per annum, or, in the option of the landlord, certain lordships, the lordship on the gas or parrot coal being 1s. per ton for the first five years of the lease, and thereafter at the rate of one-seventh part of the price thereof for the time being, after deducting the expense of taking the same to market.

During the first five years of the lease the stipulated lordship was paid in place of the fixed rent.

The lease further proceeded—"Declaring that if in the course of any year, from time to time, after the lapse of the said five years, the working of the said gas or parrot coal shall not be to an extent sufficient to yield a lordship equal in amount to the said fixed rent, the lessees shall be entitled to make up the difference from subsequent lordships at any time during the next three years immediately following the year in which the deficiency occurs; and if at any time during this lease, inclusive of the said first period of five years, it shall be judicially found, upon a report by an arbiter or arbiters nominated in the manner hereinafter provided for, that the said gas coal, from no fault, negligence, or irregularity on the part of the said lessees, has become not worth the expense of working, this lease shall come to an end at the first term of Whitsunday or Martinmas after it shall be so found, without prejudice to the subsistence and effect of this lease to every effect in so far as thus not legally terminated."

Then followed provisions for the working of the mines, among which occurred the following:—"And the said lessees bind themselves to work the said minerals and others by the longwall system only, or other complete system of excavation, and that in a regular, proper, and systematic manner according to the best practice, and to keep the whole mines and workings at all times in good order and repair, and to keep secure, upred, and patent all levels, roads, wall-faces, rooms, and air-courses of going pits or inclined planes, so far as may be necessary for the proper working thereof, and to leave the going pits and works, and the levels and air-courses, and rooms and wall-faces of the going pits at the natural expiry, or sooner termination, partial or total, of this lease, in good order and condition, and without any accumulation of water in the rise workings, and generally in such condition as shall enable the landlord or incoming tenant advantageously to pursue and carry on the same, or other workings therefrom, of the minerals in his lands."

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By sublease, of date August and September 1870, the Shotts Iron Company sublet to L. U. La Cour and Anthony Watson, coal-masters and coal-exporters, Leith, and G. P. Simpson, coal-master, a part of the subjects let to them by Sir George Deas under the above lease.

This sublease was to endure for the same period as the original lease, and a clause in the same terms as that quoted above from the principal lease, relative, *inter alia*, to the circumstances and manner in which the lease might be brought to an end before the stipulated time, was inserted in it.

Sir George Deas was not a party to this sublease, and was not consulted as to its being granted.

Messrs La Cour, Watson, & Simpson entered upon the subjects, and worked the coal until August 1875, when they alleged that it became not worth the expense of working. They continued, however, to pay the rent fixed by the sublease to the Shotts Iron Company. At no time did they have any communication directly with Sir George Deas, all the states of output, &c., rendered to him being signed and certified by the manager of the Shotts Iron Company.

On 9th May and 4th August 1879 the sublessees intimated to the Shotts Iron Company "that the gas coal, from no fault, negligence, or irregularity on their part, had become not worth the expense of working," and, in terms of the sublease, nominated Mr Alexander Simpson, mining engineer, as their arbiter.

On 4th June 1879 the Shotts Iron Company sent a similar intimation to Sir George Deas, who, on 7th June, in replying to their letter, called upon the Shotts Company "to state from what cause the gas coal had become not worth the expense of working,—whether in respect of anything, and, if so, from what, in the state of the mineral, or from what other cause, as upon that it depended whether the question was one for skilled engineers, or one of relevancy to be determined by the Court."

Thereupon the Shotts Company made a call upon the sublessees in precisely similar terms, but to neither call was any answer returned.

Following upon these intimations, La Cour, Watson, and Simpson presented a petition against the Shotts Iron Company in the Bill-Chamber, repeating the substance of their letter of 4th May 1879, and calling upon the respondents to nominate an arbiter to represent them.

Thereupon, the Shotts Company presented a similar petition against Sir George Deas. Records were made up in both petitions, and were subsequently laid before the arbiters nominated by the parties.

From the proceedings in the Bill-Chamber it appeared that the Shotts Iron Company had declined to appoint an arbiter unless La Cour, Watson, & Simpson averred in their record that there was involved in the case a question of deterioration in the mineral fields which properly fell to be decided by men of skill. This the sublessees did, and the averment having been repeated by the Shotts Company in their record, Sir George Deas, who had taken a similar objection, nominated Mr Landale as his arbiter, and the Shotts Company chose the same gentleman to represent them.

These nominations, and that of Mr A. Simpson for the sublessees, having been approved by the Lord Ordinary on the Bills, the records made up in the Bill-Chamber were laid before the arbiters as pleadings for the parties.

During the proceedings before the arbiters a proof was allowed to the parties of their respective averments, and on 16th July 1880 the arbiters issued their final report, which, after a narrative of the proceedings taken before them, concluded as follows:—"The arbiters have now duly considered the whole papers, productions, and notes of evidence, and farther they have visited and inspected the lands, and made inquiries as to the working of

the gas coal in adjoining lands, and having submitted to the parties a draft of this report, and considered their observations thereon, and being now well and ripely advised in the whole matters referred to them, they hereby report that from no fault, negligence, or irregularity on the part of the tenants, the Shotts Iron Company, the gas coal let to them by the said lease has become not worth the expense of working.

"The arbiters think it right to add, that the grounds on which they have arrived at this conclusion have reference solely to the state of the market for gas coal at the time the tenants gave notice to the landlord of their intention to terminate the lease; and indeed the tenants, in the evidence laid before the arbiters, did not attempt to rest their case on any other grounds. Neither did they dispute, nor in the opinion of the arbiters could they have successfully disputed, either the existence of gas coal in the lands let to them, other than those out of which the coal has been already wrought, or the fact that there is no physical difficulty in working the coal in said lands.—All which is humbly reported by

"D. LANDALE.

"A. SIMPSON."

"16th July 1880."

"Additional Report by D. Landale.

"While my co-arbiter and I have arrived at the conclusion that the gas coal in question is not worth the expense of working in the present state of the market it is impossible for any one to predict that it will continue so up to the end of the lease in 1896, or any specified period, as it is found whenever the better class of gas coal gets plentiful, and comes to be sold at or under 20s. per ton, second-class coal such as this cannot be sold, as is the case just now. When the prices of the better ones rise to 25s. and upwards per ton there is a demand for second-class, and they occasionally become highly remunerative. The working of such coal is therefore intermittent, and tenants, in using ordinary foresight, should be ready to meet the market, when it is favourable to them, which the sub-tenants in this case have not done. They have not fulfilled the following clause in their lease, viz., 'and the said lessees bind themselves to work the said minerals and others by the longwall system only, or other complete system of excavation, and that in a regular, proper, and systematic manner, according to the best practice, and to keep the whole mines and workings at all times in good order and repair, and to keep secure, upred, and patent all levels, roads, wall-faces, rooms, and air-courses of going pits, or inclined planes, so far as may be necessary for the proper working thereof, and to leave the going pits and works, and the levels and air-courses, and rooms and wall-faces of the going pits, at the natural expiry, or sooner termination, partial or total of this lease, in good order and condition, and without any accumulation of water in the rise workings, and generally in such condition as shall enable the landlord, or incoming tenant, advantageously to pursue, and carry on the same, or other workings therefrom, of the minerals in his lands.' On the contrary, they have worked out the easiest got portions of the field by the pits Nos. 1 and 2, taken out the pillars, partially dismantled the pits, let the water rise to its natural level, and left the workings inaccessible, without open roads or air-courses, to any wall-faces. They have also left about six acres of coal lying in a shallow trough between the pits unwatered, and have not left the workings 'in such condition as shall enable the landlord, or incoming tenant, advantageously to pursue and carry on the same, or other workings therefrom, of the minerals in his lands,' when the state of the market permits of the coal being wrought to profit, which I consider to be all-important, as by no exertion on the part of the tenants, or an incoming tenant, could the works be restored, or got ready to produce

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No. 101. coal, or to take advantage of a rise in the market, within half a year or more.

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"All which is humbly reported by

D. LANDALE.

"16 July 1880.

"*P.S.*—I wish to explain that by nothing in the joint report did I intend to express or to indicate an opinion as to the legal construction of the words 'owing to no fault, negligence, or irregularity on the part of the tenants,' or any other question of legal construction of the lease, all which questions I consider to belong to, and to be left for, the decision of the Court.

D. L."

Following on this report, which was issued by the arbiters as applicable both to the lease and sublease, La Cour, Watson, & Simpson, on 26th October 1880, raised an action of declarator against the Shotts Iron Company concluding to have it "found and declared, by the Lords of our Council and Session, that the gas-coal let by the trustees of the Shotts Iron Company, unincorporated, to the pursuers, by lease betwixt the said trustees and the pursuers, dated 10th and 26th August and 22d and 23d September 1870, from no fault, negligence, or irregularity on the part of the pursuers, has become not worth the expense of working, and that the said lease shall come to an end at the term of Martinmas 1880, or at such other date as shall be fixed by our said Lords in the course of the process to follow hereon, without prejudice to the subsistence and effect of said lease to every effect in so far as thus not legally terminated."

Thereupon, on 2d November 1880, the Shotts Iron Company raised the present action with precisely similar conclusions as those quoted above against Sir George Deas.

Records were made up and closed in both actions, the Shotts Company in their answers to the action brought against them by La Cour, Watson, & Simpson, repeating, *mutatis mutandis*, the pleas and averments advanced by Sir George Deas in the action at their instance against him.

Cond. 6 of the action raised by the Shotts Iron Company was in the following terms:—"The pursuers, soon after their term of entry, proceeded to explore the field, and expended a considerable amount of capital in doing so, by sinking pits and otherwise. Thereafter by sublease, dated 10th and 25th August and 22d and 23d September 1870, they sublet a considerable portion of the field to Messrs La Cour, Watson, & Simpson, coal-masters and coal-exporters in Leith, which sublease contained the same clauses in every respect (except that the royalties stipulated for were slightly higher) as those contained in the lease foresaid between the pursuers and defender, and soon after Messrs La Cour, Watson, & Simpson's entry to said field they expended capital to the extent of £5607, 7s. 3d. in acquiring and erecting machinery, sinking shafts, and providing plant for working the said coal-field. In the course of a few years they found the seam of coal become thinner, while the cost of working had increased, and the coal, from its inferior quality, had become unsaleable. The said gas coal, from no fault, negligence, or irregularity on the part of the said subtenants or of the pursuers, had become and continues to be not worth the expense of working, and on or about 9th May 1879 the said subtenants gave intimation to the pursuers, in terms similar to the intimation thereafter given by the pursuers to the defender." The pursuers further set forth the proceedings before the arbiters.

In his answer to this condescendence the defender denied all knowledge of the negotiation for a sublease or of the alleged expenditure in working the minerals. He further explained that the quality of the coal was known to the pursuers from the first, and had never varied.

The pursuers pleaded;—(1) It having been judicially found, upon a

report by arbiters nominated in manner provided in said lease, that the gas coal let to the pursuers by said lease has become not worth the expense of working, the said lease is thereby terminated as at the term of Martinmas 1880, and the pursuers are entitled to declarator as concluded for. (2) Or otherwise, the pursuers are, in respect of the terms of the report of the said arbiters, entitled to have it judicially found that the said coal, from no fault, negligence, or irregularity on the part of the pursuers, has become not worth the expense of working, and to obtain decree of declarator as concluded for.

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The defender pleaded;—(1) According to a sound construction of the lease in question it is not contracted that a fall of market prices shall in any way affect the endurance of the lease, and the defender is therefore entitled to obtain a finding to that effect, and to be assoilized from the conclusions of the action. (2) Even assuming that a fall in market prices might in some circumstances affect or limit the endurance of the lease, it could not be held to do so where the arbiters have not affirmed the fall, except at the particular date of the pursuer's notice, and there is nothing to shew that the fall will continue throughout the future years of the lease. (3) The pursuers not having obtained, and not being entitled to obtain, a judicial finding terminating the lease, the defender is entitled to absolvitor, with expenses.

(The defender's pleas were, as already stated, adopted by the Shotts Iron Company in the action against them at the instance of La Cour, Watson, and Simpson.)

On 16th December 1880 the Lord Ordinary, having heard counsel, issued the following interlocutor in the case against Sir George Deas:—
“Finds, declares, and decerns in terms of the libel, to the effect that the lease libelled terminated at Martinmas 1880: Finds the defender liable in expenses: Allows an account thereof to be lodged, and remits the same to the Auditor to tax, and report.” *

* “NOTE.—The chief question in this case is, whether the pursuers are entitled to put an end to the lease on the ground that the coal has become unworkable to profit, or whether it is necessary, in order to the exercise of this right, that there should be some change in the condition of the coal, either as regards quantity, quality, or accessibility, so that thereby it ‘has become not worth the expense of working.’ In either form of the question it is assumed that there has been ‘no fault, negligence, or irregularity on the part of the lessees.’

“The Lord Ordinary is disposed to think that the pursuers are in the right, and that the clause was inserted in the lease in order to enable them to free themselves from the obligations of the lease, when the coal had, from any cause not due to their fault, become unworkable to profit. It appears to him that the question whether the ‘coal is worth the expense of working’ cannot be dissociated from any of the considerations which would determine any ordinary judgment in continuing or abstaining from working it. The expense of working necessarily introduces elements beyond the mere condition of the coal itself. In the sense of a commercial contract, nothing, it is thought, can be worth the expense of working which yields no profit, whether the absence of profit is due to the fall in value of the article or to the actual expense of working it.

“It is said that this construction of the lease gives the tenant the whole benefit of high prices, and throws on the landlord all the loss resulting from low prices. This is not true. The landlord gets the advantage of a prosperous time through the royalties which are stipulated for. On the other hand, when no profit is to be made, the landlord retains his minerals, which by a change in the market may become valuable, and the tenant merely avoids a loss in circumstances when it would be absurd to work them.

“Farther it was urged that the arbiters merely find that the coal was not

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1st. As to the effect of a fall of prices.—In a mineral lease the landlord was understood to warrant the existence of the mineral and its being physically workable. The risk of market prices was in all cases presumed to be upon the tenant. If this risk was intended in the present case to be laid upon the landlord a stipulation so unusual would have required to be expressed in the most distinct and unmistakable language. The onus of so expressing it lay on the party who was to claim benefit from it. The construction of the words used in the clause under consideration was not a question for the arbiters any more than the analogous question in *Dixon v. Campbell* (2 S. App. 177), where, although the arbiters had found the coal was “incapable of being wrought to advantage,” the Court and the House of Lords found the reverse. In the present case the import of the clause had been under the notice of the arbiters, but they rightly refrained from giving or expressing an opinion upon it. It was left for the Court to determine what the legal construction of this clause was.

2d. Under a lease and sublease, each binding the lessees absolutely for twenty-nine years, and having still seventeen years to run, could it be held that such a period of depression as had been affirmed by the arbiters entitled a tenant or subtenant who had realised large profits to be forthwith free from his lease? Past profits fell to be taken into view whatever be the ground upon which a mineral tenant attempted to get rid of his lease—whether it be obstructions in the mine, short of absolute sterility, or coupled with a fall of prices and increased expense of working, or whatever else it might be—Lord Reston’s opinion in *Dixon v. Campbell*. In their joint report in the present case the arbiters said they had arrived at their conclusion with reference “solely to the state of the market for gas coal at the time the tenants gave notice to the landlord of their intention to terminate the lease.” In *Dixon’s* case the fixed rent was £900 a-year, and apparently the coal during several years of the lease, which was only for nineteen years in all, had not been wrought to advantage. Still, because it might be so in future, it was ultimately held that the lessees could not abandon. It was the duty of the arbiters in the present case to have instituted a comparison between profits and fixed rents, past and prospective, without which neither they nor the Court had the requisite data for considering the effect which ought to be attributed to the alleged depression, and still less for holding it conclusive. Words similar to those of the House of Lords’ judgment in *Dixon’s* case might not be inappropriate to the present case, viz., to find that *in hoc statu* it is not in the power of the tenants and subtenants to give up the lease and sublease.

Argued for the Shotts Iron Company ;—The words of the clause in the lease were too comprehensive to admit of being affected by any

worth the expense of working at the time when the pursuers gave notice of their intention to terminate the lease, and that this finding may be referred to a state of the market which might be of short duration, and which had already passed away. But, in the opinion of the Lord Ordinary, it is not the fair meaning of the award. He thinks that it must be read as referring to a state of the market of indefinite—not of temporary or even measurable—duration. This is the only sense in which men of intelligence could address themselves to the question which they had to decide. It is worth notice that the defender does not aver that even now there has been a change, or even an indication of change, in the condition of the market.”

* * In the case against the Shotts Company, at the instance of La Cour, Watson, and Simpson, his Lordship issued a similar interlocutor, and referred to the above note as giving his grounds of judgment.

of the views urged for the landlord. They applied to all causes, whether in the state of the mine or the state of the markets, which could not be attributed to fault, negligence, or irregularity on the part of the lessees. As to the length of the period of depression, it must be presumed that the arbiters were of opinion that it could not be held as merely temporary, otherwise they would have said so. And as to the argument founded on past profits the subtenants were entitled to these in consideration of capital expended and the risk they ran in a precarious trade.

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At advising,—

LORD JUSTICE-CLERK.—I have considered this reclaiming note with attention and anxiety, and I have found the question not unattended with difficulty. It embraces some legal principles of importance to the extensive branch of commerce to which it relates. I need not recapitulate the facts—indeed there are no facts which would require recapitulation. The whole question lies in two points—first, the construction of the disputed clause in the mineral lease before us, and second, the proceedings of the arbiters.

The mineral lease between Sir George Deas as proprietor, and the Shotts Iron Company as tenants of the mineral field embraced in it, commenced in 1867, and was intended to have a currency of twenty-nine years, terminating therefore in 1896. The fixed rent stipulated was £300 a-year, and certain royalties or lordships were also contracted for. There is nothing peculiar or distinctive in the general provisions of this lease. It was certainly intended to be of long duration, and the defined term could only be interrupted by the clause on the interpretation of which this question turns. That clause is in the following terms:—“And if at any time during this lease, inclusive of the said first period of five years” (a period referred to in the immediately preceding clause, and to which no importance can be attached), “it shall be judicially found, upon a report by an arbiter or arbiters nominated in the manner hereinafter provided for, that the said gas coal, from no fault, negligence, or irregularity on the part of the said lessees, has become not worth the expense of working, this lease shall come to an end at the first term of Whitsunday or Martinmas after it shall be so found, without prejudice to the subsistence and effect of this lease to every effect in so far as not thus legally terminated.” It is maintained on the part of Sir George Deas that this clause was intended to provide only against one contingency, viz, the deterioration of the mineral field itself, which was the only subject of the lease, and that either by a change in the quality of the mineral which could be extracted from it by proper and skilful working, or by unknown and unforeseen obstructions in the course of its excavation. On the other hand, it is contended that the provision is quite general, and that its terms are unambiguous, and that its true as well as its popular meaning is, that if from any cause not attributable to the tenants themselves the mineral fields should prove not worth to the tenants the cost of working, taking one year with another, they should be at liberty to terminate the contract. I cannot say that I can cast the balance between these two constructions without hesitation. It is said by the landlord that his contention is supported first by the phraseology of the clause, second, by the substance of the remedy which it provides, and, generally, by the legal character or nature of the right conferred by it and the evil intended to be remedied. The words, it is said, refer only to the mineral itself. The clause is to take effect when the gas coal becomes not worth the cost of working. That denotes, it is said, as a condition preliminary to the provision coming into operation, some

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change for the worse on the mineral itself or in the mineral field let, and is not consistent with a state of things in which the coal might be of better quality or the workings easier than they ever were. It is further contended that the provision that this result must proceed from some cause other than a fault on the part of the tenants indicates that the contemplated failure must be such as might arise from such a cause. Lastly, it is said—and this is by much the most weighty consideration in the case on that side of the question—that the true object of the clause was to apply to this mineral lease the principle of sterility which obtains in agricultural leases, and to introduce into this bargain the equitable doctrine which was found in the case of *Baird*¹ to have no place at common law in a mineral lease. It is argued that while the landlord may be fairly held to guarantee that the subject of the lease is worth the cost year by year of cultivation so far as its productive power and quality are concerned, it is out of the question to hold him responsible for fluctuation or depreciations in the market which depend on elements and contingencies which no one can foresee or control. I have stated these views as they were argued to us, and as they occur to myself, because I think the views deserving of respect, and I am not inclined to treat them lightly. That these considerations may have occurred to the landlord in executing this lease is certainly not excluded by its terms. Nevertheless its scope, in my opinion, is too wide and its tenor too general to be so limited. It seems to me to provide, in language sufficiently precise and intelligible, for a condition of things in which it would not be reasonable to hold the tenant bound. That the tenant should be compelled year after year to expend his capital in fruitless labour, to a period which is almost co-extensive with the century, is a result not reasonable, nor is it unfair that the landlord should, on such an event occurring, simply resume his property, with power to turn it to any advantage which its nature or the times will permit. In regard to the structure of this clause, while the criticism on the phraseology has some grammatical force, I would remark that if it had been intended that it should only take effect when the result contemplated arose from certain specific causes, it would have been easy, and, as I think, necessary, so to have expressed it. What the gas coal was worth could only be ascertained from knowing what it would bring in the market, and the moment its worth was introduced as the test on the occurrence of which the clause was intended to operate the state of the market would be an essential feature. The causes which might lead to depreciation are innumerable, external and internal, and it would have required stipulations much more precise to have excluded this inference from the words employed. In regard to the analogy derived from the principle of sterility in agricultural leases, I should not have been surprised, after our judgment in the case of *Baird*, to have found a corresponding clause in such a case as this; and although the terms are materially different, the argument on this head did derive some support from the case of *Dixon v. Campbell* which was referred to in the debate. I may, however, remark that that case itself did not involve any general principle which it would be altogether easy or safe to follow. But from the views expressed in that case I think it was all the more desirable that the words employed in this clause, if that was the real contemplation of the parties, should directly have expressed their intention. I am therefore constrained to read this clause according to its more apparent meaning, and the only other ques-

¹ *Fleeming v. Baird & Co.*, March 18, 1871, 9 Macph. 730.

tion is, whether the event contemplated has been found by the arbiters to have occurred. No. 101.

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In regard to the award of the arbiters, I certainly cannot say that it is a very favourable specimen of its class. It contains some things that are perfectly clear, and other things which are exceedingly obscure—at least I have been totally unable to comprehend the note which Mr Landale, after signing the award, has added to the opinion which he there expressed. I can neither understand its terms nor its object. But when I come to the award itself it is perfectly precise in the only matter that is of the slightest consequence. The question was, whether the gas coal let by the lease had become not worth the expense of working, and the arbiters find that the gas coal has become, and had become at the date which they fixed, not worth the expense of working, from which it necessarily follows that the lease comes to an end. It is quite true that the arbiters also say that they proceeded exclusively upon the market rate. Of course if the effect or result was produced solely and entirely by the fact that a commodity of that description no longer brought a price which would make it worth the expense of working, there was no alternative in arriving at that result but to go exclusively upon the market rate. But if I am right in my construction of the clause, that was exactly the proceeding which the arbiters were bound to follow. They have found that the gas coal is not worth the expense of working. The mode in which they arrived at that result is not essential, provided they were entitled to arrive at it on these grounds. They have explained that they arrived at it thus—the price or the worth of the gas coal, which must necessarily depend on the market price, had gone down to a degree which made it wholly unremunerative. It is said—and that part of the award I am not altogether satisfied with—that the arbiters should have told us how they arrived at the market rate, and whether they proceeded only on the present or on the prospective rate which was likely to rule the market one year with another. The Lord Ordinary has held, however—and I entirely concur with him—that the only meaning of the expression used by the arbiters must be presumed to be, not that the market rate on the particular day would have made the coal not worth working, but that, taking one year with another, the prospects of the market as well as its existing condition enabled them to say that permanently, and in a chronic sense, this gas coal is not now worth the expense of working. They necessarily were obliged to consider the market rate in any view of the meaning of the clause, and I therefore assume that the arbiters in the explanation which they give are referring to their practical knowledge as applied to the existing and past and probable rates to enable them to arrive at the only result submitted to them, viz., whether the gas coal was worth the expense of working. And therefore I am of opinion that the Lord Ordinary's interlocutor should be adhered to, and of course the same result will follow in the corresponding reclaiming note for the Shotts Company.

LORD YOUNG.—I am of the same opinion, and, I confess, without any doubt or difficulty. The only question, as your Lordship has pointed out, is, whether or not the arbiters have misapprehended the meaning of the clause in the lease which your Lordship has read. If they have not, then their report to us is conclusive, for they report in terms that, "from no fault, negligence, or irregularity on the part of the tenants, the Shotts Iron Company, the gas coal let to them by the lease has become not worth the expense of working." But it is said that the

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arbiters have misapprehended the true meaning of the clause in the lease with reference to which they were to report; and the misapprehension alleged, as your Lordship has pointed out, is, that whereas according to the true meaning of the clause (as the landlord maintains) the result of becoming not worth the expense of working thereby provided for must be brought about by some change in the mineral field—exhaustion of the coal, or the occurrence of troubles which render it impossible to work it, or less easy to work it,—the arbiters have, misunderstanding the true meaning and import of the clause, thought that the same consequence under the clause would follow if the result of becoming not worth the expense of working was brought about by a fall in the market, the worth of the article when wrought and produced not being equal to the expense of working and producing it. If the latter view of the true meaning of the clause, which it sufficiently appears from the report was the view taken by the arbiters, be the right one, then the defender has no case, and I am of opinion, with your Lordship, that it is the right one. The clause in question was introduced for the protection of the tenant. It is in his favour and for his protection. Protection against what? Against its turning out at any time that the mineral of which he had a long lease was not worth working. He wanted to be protected against that possible future event—that he should not in that case be saddled with a lease under which he should have to pay, not lordship, because he would not work the mineral that was not worth the cost of working, but a fixed rent of £300 a-year. He desired to be protected in that possible event against paying £300 a-year for nothing. But if that event, for his protection against which the clause was introduced, occurred—that he could take nothing by his lease, because the mineral which was the subject of it was not worth the expense of working it—what could it signify to the interest which he desired to be protected how that result was brought about? The suggestion that the tenant requires protection if it is brought about from a change occurring in the mineral field, but does not require it if it is brought about in any other way, as, for example, from a rise in the cost of labour or a fall in the market price, is a suggestion which I do not understand. There is no fault in any case. It is no fault of the landlord or the tenant that a change occurs in the mineral field. It is no fault of the landlord or the tenant that the price of labour rises, or that the market price of coal falls, or that it ceases to be marketable altogether. But the protection which the tenant desired was against the possible event of his mineral lease becoming of no worth to him—that he should not in that event have to pay the landlord £300 a-year. A change in the coal will not *per se* bring about the result without reference to something else. There are two things given to you—the one is worth, that is, worth of the article when produced, and the worth of the article when produced is just its value in the market, and the other is the cost of working it. If the latter does not exceed the former, then the thing is worth the cost of working, and otherwise not. You must have the two things before you and compare them, and see whether the one equals or exceeds the other, and which is in excess of the other, before you can answer the question whether the mineral is worth the expense of working or not. If you ask anybody, “Is that mineral field worth the expense of working it?” he would say, “I must know the price of coal in the market, and I must know the cost of producing it in this field.” Without knowing these two things he could not answer you. And I take leave to say that a change in one respect may counteract a change, or the effect of a change, in

another. For if the coal had become greatly exhausted, or troubles had occurred in the mineral field, the effect of that might be counteracted by a fall in the cost of labour or a rise in the market price of the article. A change in the mineral field which without any change in the price of labour or the market price of the article would lead to the result provided against by this clause may be entirely counteracted by diminished price of labour or increased market price of coal. Again, a fall in the market price of coal which *per se* would lead to the result that this mineral field was not worth working might be effectually counteracted by a fall in the price of labour, or by the coal in the field becoming more abundant, affording a richer and more easily worked seam. In short, you must take account of all those things, and the prudent tenant, considering whether the mineral is worth working or not, has to take all these things into account, and if, taking them into account, he comes to the conclusion that it is not worth the expense of working, he comes to a conclusion which, in his opinion at least, would bring him within the operation of this clause, and will do so if his conclusion be well founded. But the landlord very properly protects himself against the tenant hastily and upon insufficient grounds coming to that conclusion, for he requires that it shall be supported by the report of arbiters.

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We were told that the tenant gave up working the field some five or six years ago, because in the state of the market it was not worth working. But the market might have come round, and then the case entitling him to relief, or inducing him to desire relief, would have ceased to exist. But at last he desires a report of the arbiters, and they report that he is right—that the mineral is really not worth the cost of working; there is plenty of it, and physically there is no difficulty in working, but it is not worth the cost, because when worked it would not produce a price which would cover the cost. Well, the arbiters report upon that, and is not that the very case in reason and in common sense which is provided for by the clause. To say to the tenant—It is quite true the coal is not worth the expense of working, it would be foolish to work it, for you would be laying out more money than you would get when you produced it, and so you must leave it unworked, but this clause is not meant to protect you in that case—is a proposition which I cannot assent to. I think it is against law, and frustrates the object which both parties had in view in agreeing to the clause. I have, therefore, no hesitation in concurring in the judgment of the Lord Ordinary. I assume that without the clause in question the tenants would have been held to the lease for better or worse, and so must have paid the rent while it endured, although they had and could have no return for it. But the clause, as I construe it, is a very reasonable bargain with reference to the legitimate interests of both parties, for it only stipulates that the lease shall end when ascertained, by arbiters mutually chosen, to be worthless—not momentarily, or only for a season, the end of which can be reasonably foreseen, but indefinitely, that is, for a period which has endured for a long while, and the end of which cannot be foreseen; for I assume with the Lord Ordinary that no arbiter would terminate the lease upon a merely temporary depression of the market. It was not formally established, but nevertheless it was admitted at the bar, that the mineral was not worth the cost of working, and was not in fact worked for several years before the arbiters were appealed to.

LORD LEX.—I have come to the same conclusion, but I desire humbly to confess that I have felt the same difficulty with your Lordship in the chair. Your Lord-

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ships are asked by this summons to find and declare that from no fault on the part of the tenants or their workings this gas coal has become not worth the expense of working, and your Lordships are, upon that ground, asked to find and declare that, at a date to be fixed by the Court, this lease came to an end. The action at the instance of the Shotts Iron Company (the principal tenants) is substantially a defence against the action raised by La Cour & Watson, to whom they granted a sublease containing a clause in the same terms as that referred to by your Lordships; and the defence stated by Sir George Deas to the action at the instance of the Shotts Iron Company appears to be in substance identical with the defence stated by the Shotts Iron Company to the original action. The pleas stated upon the construction of the lease are the same. It is necessary, however, the question having been raised, to construe the clause according to its legal import, and it is not possible to put a different construction upon it as between the parties to the original lease from that which it bears in the sublease to La Cour & Watson. Now, the question raised depends on the terms of the report which has been obtained from the arbiters, and the question is whether, upon that report, the Court can judicially find in terms of the conclusions of the summons. Two points have been raised by the reclaimer upon the terms of that report. A third point was raised in argument, which I think has not yet been adverted to, about the date which should be fixed, but that is a subordinate matter. The two points which were argued were, in the first place, that the state of the market by itself cannot justify a finding that the coal has become, within the meaning of this lease, not worth the expense of working; and the second point was, that in any view the state of the market at the time the tenants gave notice is not sufficient to support such a finding with reference to a lease for twenty-nine years from Whitsunday 1867. Now, on the first point, my opinion is that the worth of coal in a particular field necessarily depends on the state of the market, because it depends on the market in that neighbourhood whether that coal can be brought into use at such a cost as will pay working expenses. I think this is illustrated by supposing that at the time when the lease was entered into there had been no coal of that kind in the district which could be supplied without working a mine of equal depth and difficulty, and that subsequently a similar coal of equal quality had been discovered near the surface of the ground and in the same locality. In that case it is obvious that the coal in the lease must become and be not worth the expense of working so long as the more accessible coal should last, and that if there is enough of that coal this state of matters must endure for the remainder of the lease. Thus, without any change on the subject of the lease or in the expense of working, and simply by reason of the outside circumstance of other coal being attainable, and capable of being brought into the market without the trouble and expense of working such a mine as was required here, the coal in the lease ceases to be worth the expense of working. I think that all contingencies affecting the value of coal in the district must be held to have been in view of the parties to this lease, and that, therefore, it must have been contemplated as possible that the coal might come to be not worth the expense of working, although everything in the way of proper working has been done, and no change has taken place except in the state of the market. I agree, therefore, with the Lord Ordinary on this point.

On the question whether the report sufficiently shews that the coal had become not worth the expense of working, I assent to the proposition contended

for by the reclaimer, that the fact to be ascertained is not merely the worth of the coal with reference to the state of the market at a particular time, but that it is absolutely, so far as this lease is concerned, not worth the expense of working. But although I agree with the view which your Lordship has expressed upon the ambiguous and even apparently contradictory character of the report in some parts of it, I think the reporters in referring to the date at which the tenants gave notice cannot be held to have qualified the absolute terms of their report as made in the previous paragraph. They appear to have thought it necessary to fix some time at which to bring their calculation to a point; but it is not consistent with a fair construction of their report, in my view, to hold that they did not take into consideration, in arriving at the conclusion as at that date, the whole circumstances of the lease, including the length of it. I do not think that they could have reported as they have done in the second last paragraph of their joint report if they had confined their attention to a particular month or year. I concur, therefore, on both points, and I am of opinion that the Lord Ordinary's interlocutor should be affirmed. In my view, the case of *Dixon v. Campbell* is really not applicable here at all. I have examined that case with some care, and it appears to me that the clause in the lease and the report which was before the Court in that case were both different. The terms of the lease related to unforeseen accidents, occurrences, dykes, or troubles not occasioned by irregular or improper working. These expressions were construed as having reference to something within the mine, and as requiring that the Court should be able to find that from some cause arising within the mine, or at least partly from some cause arising within the mine, the coal in question had ceased to be capable of being worked to advantage. That ground does not apply here, for the lease is different. It does not refer to anything of that kind, but is quite general in its terms. Further, the view on which the case was decided was that the report shewed only a temporary fluctuation in the market, and did not shew a permanent change. In both of these respects, therefore, the case of *Dixon v. Campbell* is clearly distinguishable from the present.

With reference to the date which should be fixed by the Court as that at which this lease should be declared to be at an end, I do not see that there is any occasion to alter the Lord Ordinary's interlocutor.

THE COURT adhered.

HOPE, MANN, & KIRK, W.S.—H. B. & F. J. DEWAR, W.S.—Agents.

JOHN CAMPBELL AND ANOTHER (Rankine's Tutors-Nominate), Petitioners. No. 102.
—*Kirkpatrick*.

Feb. 26, 1881.
Campbell.

Nobile Officium—Minor and Pupil—Tutors and Curators—Authority to accept reconveyance of feu where feuwar unable to pay feu-duty.—In circumstances creating a case of high expediency amounting in law to necessity the Court authorised tutors-nominate to accept a re-conveyance of subjects which had been feued out by the father of the ward.

(*Vide ante*, vol. vii., p. 1032, under date June 26, 1880.)

By feu-disposition, dated 4th April 1876, William Macbean Rankine of Dudhope disposed to David Bremner certain areas of ground upon the Dudhope estate, extending to 4 acres 3 roods and 24½ poles, at a *cumulo* feu-duty of £313, 16s. The disponee was taken bound to erect buildings of the value of £6000, at least, upon the ground, within

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four years from the date of the disposition. The disponent proceeded to erect dwelling-houses upon the ground so feued, and, under a power of allocation in the deed, the feu-duty payable for the houses so built, which had been sold or were heavily bonded, amounted to £174, 15s., thus leaving £139, 1s. unsecured.

At Mr Rankine's death, on 28th October 1879, large arrears of feu-duty were due to him, and the tutors-nominate to Mr Rankine's heir craved in this petition to be allowed to discharge the disponent's obligations under his feu-disposition to the extent of £139, 1s., upon payment of arrears to Martinmas 1879, and upon their getting a reconveyance of the ground, extending to 347 poles 19 yards, which had not been built upon.

The petition set forth that in consequence of the great depression in the trade of Dundee the building trade had suffered likewise, and that there was no prospect of laying out money to advantage in the erection of houses on the ground feued; further, that the feuar felt unable to pay the annual feu-duty for which he was still liable, and was unable to give any security for the future payment of the feu-duty for the ground still unbuilt on. It was further stated that the feuar had found security to pay the arrears of feu-duty; that the petitioners were satisfied that he could not pay the annual feu-duty for the portion of ground which he wished to reconvey; and that it would be for the benefit of the estate that such reconveyance should be accepted.

The First Division of the Court, upon 19th March 1880, remitted the petition to the Junior Lord Ordinary to inquire, and report. Mr A. F. Adam, W.S., was appointed curator *ad litem* to the two pupil children other than the heir.

The Junior Lord Ordinary (Adam), on the petition coming before him, remitted it to Mr Patrick Adam, S.S.C., to "inquire into the circumstances set forth in the petition, and to report."

Mr Patrick Adam reported that, as the First Division had already authorised the petitioners to grant feu-rights in their administration of Dudhope (*ante*, vol. vii., p. 1032), and as the petitioners were satisfied that the feuar could not implement his obligations for the reasons stated, he was of opinion "that it would be for the benefit and advantage of the estate if the petitioners were authorised to accept of the reconveyance offered."

The Junior Lord Ordinary (Lee), upon 13th July 1880, pronounced an interlocutor reporting the proceedings to the First Division,* who, on 17th

* "NOTE.— . . . It appears to the Lord Ordinary that it would have been desirable, if possible, to obtain, before reporting upon the application, more distinct evidence that loss must be caused to the estate if the application be not granted. The petitioners, however, desire a judgment on the matter as it stands; and, as tutors-nominate, the Lord Ordinary thinks they are entitled to have the case reported for the purpose of enabling them to ask a judgment.

"Notwithstanding the doubts which have been expressed as to the competency of authorising tutors-nominate to exercise such powers, the Lord Ordinary thinks that it may be taken as now settled that there is no incompetency if a case of necessity be made out. The cases of *Mackenzie*, January 27, 1855, 17 D. 314, *Morison*, July 19, 1861, 23 D. 1313 (previously reported under date February 20, 1857), and *Turner*, March 1, 1862, 24 D. 694, are illustrations of such powers being granted to tutors-nominate; and a tutor-at-law was authorised to accept a renunciation of a lease in the case of *Brown*, December 11, 1846, 9 D. 250. In the case of *Berwick*, November 13, 1874 (2 R. 90), the Court, while refusing as incompetent an application by trustees for power to accept a renunciation, indicated an opinion that in the case of tutors-nominate such powers might have been granted.

"It is only, however, on the ground of necessity that the Lord Ordinary

July 1880, remitted back to his Lordship to direct further inquiry, and No. 102. to report.

Under a second remit, Mr Adam reported that the feuar was a builder in large business in Dundee, and owned house property to the value of £16,288, burdened to the extent of £15,763, and that he was at present engaged in two large building contracts. He referred to a letter from his agent,* and concluded by saying that, with reference to that letter, "and to the fact that it might be the petitioners' duty to take proceedings against the feuar for recovering the arrears and future feu-duties, it would seem to merit consideration whether, in order to avoid a crisis in his affairs, and probable loss to the pupil's estate, it might not be expedient to grant the prayer of the petition." Feb. 26, 1881.
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The Lord Ordinary (Lee), on 15th January 1881, of new reported the proceedings to the First Division, adding in a note that he could not report that "any necessity for the intervention of the Court had been established."

After a hearing, on 19th February 1881, the Court allowed the petitioners to state in a minute "whether there is any immediate prospect of refusing the ground in question at a lower rate of feu-duty than that stipulated in the feu granted to the present feuar, and if so, at what reduction of rate; and to furnish the Court with such evidence as may be possible of the probability of so disposing of the ground."

The petitioners accordingly obtained a certificate by Messrs Salmond, land-valuator, and Alexander, architect for the burgh of Dundee, to the effect that a feu-duty of 8s. per pole, or £64 per acre, "is an excessive rate in present state of the building trade, and that such a rate is unlikely again to be obtained, at least for a very considerable time: And we are further of opinion that if under the authority of the Court, the tutors and curators nominated by the late Mr Rankine are authorised to receive a reconveyance of this ground from the feuar, they will in all probability be able, between this and the term of Martinmas next, if the ground in question is properly advertised, to get the whole or a portion of it feued off at the rate of from 4s. to 5s. per pole, and that offerers would probably have presented themselves ere this had the ground been in the market at the above rate."

Two letters were also produced, one offering at the rate of 4s. 6d. per

understands such applications can be entertained. If no necessity for the interposition of the Court can be shewn the tutors-nominate will be left to act on their own responsibility. In the present case Mr Adam reports that 'it would be for the benefit and advantage of the estate if the petitioners were authorised to accept of the reconveyance offered by the feuar.' He also reports that 'the petitioners are satisfied that he is not in a position to be able to pay the annual feu-duty of the portion of ground he now wishes to reconvey to them.' The question is whether this is enough to enable the Court to grant the powers craved."

* The letter bore, *inter alia*,—"Unfortunately, property in this locality is, and has been for a very long period, practically unsaleable. The incoming sums barely meet the outgoing amounts. Were the feuar to abandon the management, which is his only alternative if the unproductive ground, bearing 8s. per pole, is to remain a burden, I am satisfied that a sale of the properties would, irrespective of the costs, entail a heavy loss on the bondholders, more especially on Mr Rankine's tutors, under their postponed security for the past-due feu-duty; and should the bondholders, under an action of mails and duties, enter on possession, judicial management implies heavy costs, and if both ends met, it would be with difficulty."

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— offering at the rate of 4s. 9d. per pole for from 90 to 100 poles of the east-
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LORD PRESIDENT.—This is a case of a very unusual kind, and is attended with a good deal of difficulty in point of principle. The Court have not been in the habit of granting extraordinary powers to tutors in the administration of the estates of their ward on the mere ground of expediency, or from a consideration that the exercise of the powers sought for will enhance the value of the estate, or be of advantage to it. These are not sufficient grounds. But, on the other hand, the expediency of a certain course of management may be so high as to amount to what the Court holds to be necessity. The question is whether this is a case of that nature, and whether there are circumstances which justify us in holding that there is a necessity entitling us to deal with the subjects as is proposed.

It is pretty clear that the feuar is not in a condition to fulfil his obligations as feuar. So far from that being the case, it is obvious that he will not and cannot do anything in the way of building on this ground. His own circumstances are such as to preclude any such prospect. That of itself undoubtedly creates a great difficulty in dealing with this ground. It is now totally unproductive, and if it remains in the present feuar's hands it will remain unproductive for an indefinite time. There is a possibility that his circumstances may improve, and there is also a chance that the value of such ground will rise. The prospect of an improvement in the feuar's circumstances is not very rose-coloured, and as regards the value of the ground the estate need not lose if the tutors are authorised to accept the reconveyance, because it does not necessarily follow that the ground is to be feued out at a much lower rate than that for which they have stipulated with the present feuar. The tutors will retain it in their own hands if there is a rise or a prospect of a rise in the value of building ground in Dundee. The acceptance of the reconveyance may possibly not expose the estate to any immediate loss if offers can be got from other quarters of nearly the same amount as the present feu-duty. If there is no prospect within a reasonable period it will be for the consideration of the tutors whether they ought not to accept a lower value; and on this point it is not to be thrown out of view that the Court have already authorised the tutors to feu other portions of this estate at a much lower rate.

The only other question is whether it is necessary to hold the feuar to his agreement without any prospect of getting anything from it, or whether we may empower the tutors to take it back and submit to the probability of a depreciation in the amount of feu-duty they will realise from it. The position of the estate is not so embarrassed that in order to extricate it from its difficulties there is any necessity in the sense of a very high expediency that we should grant the prayer of this petition. But I am disposed to think, though not without a great deal of difficulty, that we should grant the powers asked, reserving to the tutors their right to bye-gone feu-duties, and leaving it to them to sue for damages owing to the feuar's breach of contract.

LORD MURE.—I have come to the same conclusion. The Court grant such powers as are here asked only when the expediency of doing so is so great as to

amount substantially to a necessity. Now, the feu-duty is irrecoverable at present, and there is no prospect of its ever being recovered, for the feuar cannot fulfil his obligations, and there is evidence to shew that his affairs are in such a state that, if he is pushed for payment, the necessary result will be bankruptcy. The state of the building trade, moreover, in Dundee at present is such that the rate of feu-duty payable under Mr Bremner's contract cannot be got; for we know that the petitioners have been forced to feu portions of the adjoining ground at a lower rate, and that there is little immediate prospect that the rate of feu-duty will rise. In the whole circumstances, therefore, I agree in thinking that there is here a case of such extreme expediency as amounts substantially to a necessity for authorising the petitioners to take the feu off Mr Bremner's hands, and that this entitles us to grant the prayer of the petition.

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LORD SHAND.—The state of the ground in question is that it is entirely unbuilt upon. There is no security for the payment of the feu-duty. Mr Bremner has become liable in past feu-duties which he is unable to pay, and the tutors who now make this application have been compelled to enter into a transaction in regard to the arrears, but all that they have been able to get is a fifth bond over certain properties in Dundee, which are probably not able to meet the debt. Since 1879, when this transaction was entered into, the same thing has gone on just as before. Mr Bremner professes himself unable to meet his liabilities, and I am quite satisfied that this is the fact. If the tutors are left in this position there must be a continuing loss to the estate. The feu-duties will remain unpaid. It is true that the tutors may make Mr Bremner bankrupt, which will involve them in questions with the trustee, or they may wait and bring an action of irritancy of the feu *ob non solutum canonem*, but they would thereby lose the chance of recovering the feu-duties. It appears to me therefore that it would be highly expedient to grant this petition. Certain loss to the estate will thereby be averted. The Court has the power and ought to grant it to the extent of allowing the petitioners to accept a reconveyance, and to feu out the ground again at such rates as they can obtain.

LORD DEAS.—I have read the papers in this case with great attention, and it appears to me that the application is attended with difficulty. What your Lordships propose to sanction seems to me to be rather a case of strong expediency than one of necessity. The principle of all the authorities is that nothing will justify the Court in sanctioning an alienation of a pupil's heritage except necessity, and that is so far founded on good reasons. The pupil is incapable of having any say in the matter, and, long before he comes of age, circumstances may have been so changed that it may be for his advantage that the property should have remained in the state in which his guardians found it. So much is this the case that powers of this kind have been granted, based upon strong expediency, which have been subsequently found not to be binding on the pupil when he came of age. We have had strong instances of that. It is therefore a very serious thing to assume that to be necessity which is nothing more than strong expediency. It would be very unsafe therefore, to my mind, to admit any relaxation of a principle upon which the Court has immemorially proceeded. At the same time, your Lordship has pointed out, what is an important distinction, that it is not proposed to feu this ground at a lower rate

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than 8s. per pole, the sum payable by Mr Bremner, but merely to cancel the existing feu-right, because there is no reasonable prospect of getting it fulfilled. It would have been a very strong thing to sanction the acceptance of a lower feu-duty. But the tutors will be under no obligation to grant a new feu-right until and unless they can obtain the former feu-duty. The existing bargain is simply to be cancelled because of the impossibility of getting it implemented. It is that consideration only which reconciles me to your Lordships' proposal, as not changing the principle upon which the Court has hitherto gone, and, although I have still great difficulty, I am not prepared to differ from your Lordships.

THE COURT pronounced this interlocutor:—"Grant the prayer of the petition to the effect of authorising the petitioners to accept a reconveyance from A B of the subjects mentioned in the petition, and that at the term of Whitsunday next, but reserving to the petitioners all recourse for recovery of the feu-duties payable by the said A B down to the said term of Whitsunday, and the said A B's personal liability therefor, and decern."

PEARSON, ROBERTSON, & FINLAY, W.S., Agents.

No. 103.
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Fleming v.
Smith & Co.

JAMES FLEMING, Pursuer.—*J. G. Smith—A. J. Young.*
A. C. SMITH & Co., Defenders.—*D.-F. Kinnear—Mackay.*

Sale—Retention—Sale on credit—Resale, intimation of—Retention against sub-purchaser on bankruptcy of original purchaser.—S. & Co., on 9th and 10th February, sold certain lots of sugar to M. & Co., taking their acceptance, dated 14th February, at one month. The sugar remained with the refiners subject to S. & Co's. control, but was entered in the stock-book of the latter as sold to M. & Co.

On 11th February M. & Co. sold the sugar to F, and gave him a delivery-order (dated 17th February) in his favour addressed to S. & Co., which he transmitted to them with a request to hold to his order. S. & Co. did not acknowledge the receipt of this order, but in their stock-book, of date 17th February, they entered against the parcels of sugar,—"Transferred by M. & Co. to F."

M. & Co. became bankrupt on 13th March, and their bill for the sugar was dishonoured. On 19th March F demanded delivery of the sugar, which was refused by S. & Co. on the ground that they were entitled, on the bankruptcy of M. & Co., to retain till the price was paid.

Held that S. & Co., having sold on credit, were bound to deliver at the date when the delivery-order in favour of F was transmitted to them, the term of credit not having then expired, and the original purchasers, M. & Co., being still solvent; and that, having at that date received F's intimation of the resale and request to hold to his order, they were to be regarded as holding for F, and that they were barred from retaining against him on the bankruptcy of M. & Co.

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M.

ON 9th February 1880, Macnaughtan & Co., sugar-merchants, Edinburgh, purchased from A. C. Smith & Co., sugar-merchants and brokers, Greenock, eleven casks sugar, and again on 10th February two lots, one of ninety-five bags, and the other of seventy-six bags sugar. On 11th February they resold the whole eleven casks, ninety-five bags and seventy-six bags to James Fleming, sugar-merchant, Leith.

At the dates of these transactions, the lots of sugar in question were

(as was customary in the Greenock sugar trade) in the refiners' ware- No. 103.
houses to the order of A. C. Smith & Co.

A. C. Smith & Co. drew upon Macnaughtan & Co. at one month. Feb. 26, 1881.
This bill for £758, 17s. 1d., due 17th March, Macnaughtan & Co. Fleming v.
accepted. Smith & Co.

Fleming gave Macnaughtan & Co. his acceptances at three months for the price of the sugar purchased by him.

On 17th February 1880, Fleming received from Macnaughtan & Co. a delivery-order for the eleven casks, ninety-five bags and seventy-six bags, and forwarded it to A. C. Smith & Co. on 18th February, adding "which please hold to my order." A. C. Smith & Co. did not acknowledge this intimation, but entered the transference in their stock-book thus—"Transferred by F. J. M. & Co. to J. Fleming, Leith, eleven casks," &c., "17/2/80."

On 13th March 1880 Macnaughtan & Co. stopped payment.

On 17th March Macnaughtan & Co.'s bill for £758, 17s. 1d. fell due, and was dishonoured. It was subsequently retired by A. C. Smith & Co.

On 19th March Fleming sent to A. C. Smith & Co. an order to deliver the eleven casks, ninety-five bags and seventy-six bags. To this A. C. Smith & Co. replied:—"We hold no sugars belonging to you. The sugars you refer to were sold to Messrs F. J. Macnaughtan & Co., but they have not been paid for, and the transaction has been cancelled by their failure. Yrs., &c. A. C. SMITH & Co."

A. C. Smith & Co. having refused to deliver this lot of sugar, this action was raised against them by James Fleming for delivery or damages.

The pursuer pleaded;—1. The pursuer having purchased the sugar in question, and duly intimated the purchase to the defenders by forwarding his delivery-order, they were and are under obligation to give delivery on demand. 2. The defenders having accepted the delivery-order for the sugar at a time when they had no right of retention as against the original purchasers, the pursuer is entitled to insist on delivery.

The defenders pleaded;—2. The defenders were entitled to retain the sugar in question at the time when delivery was demanded, in respect it had not been paid for, and the purchasers had become insolvent.

The Lord Ordinary, on 20th December 1880, after finding in fact in accordance with the above narrative, found, as matter of law, "that the defenders by their silence during the period between the receipt of the pursuer's letter of 18th February 1880, and accompanying delivery-order by F. J. Macnaughtan & Co. in favour of the pursuer, must be taken to have consented that the sugars in question were to be held by them to the order of the pursuer as required; and that after F. J. Macnaughtan & Co.'s insolvency they were not entitled, and are not now entitled, to refuse delivery of said sugars to the pursuer: And before further answer, appoints the cause to be enrolled that these findings may be applied, and an interlocutor exhausting the cause may be pronounced, reserving all questions as to expenses of process." *

* "NOTE.—If the matter in question were to be determined according to the law of England it was hardly disputed on the part of the defenders that the pursuer would be entitled to judgment. Even, however, had this view been resisted, the Lord Ordinary thinks that the authorities cited by the pursuer (*Hawes v. Watson*, 2 Barnwell and Cresswell, p. 540; *Houston on Stoppage in transitu*, pp. 78 and 79; *Benjamin on Sale*, 2d ed., p. 640; *Pearson v. Dawson*, 27 L. J., Q. B. 248; *Woodley v. Coventry*, 32 L. J., Exchequer, 185; *Knights v.*

No. 103. The defenders reclaimed.

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Argued for them;—Though the sale was on credit, still on the bankruptcy of the purchaser, or on the expiry of the credit, a right of retention arose to them, if and so far as delivery had not actually been made. A sub-sale, even if intimated, did not interfere with this right of retention. On receiving such intimation they became bound not to deliver to the original purchaser, and for that reason, and that alone, they had properly entered a notice of the sub-sales or transfer in their stock-ledger, but the sub-purchaser took subject to all the conditions under which the original purchaser lay. The sub-vendee was in no way bound to them, he did not become their debtor for the price, and they were not bound on mere intimation of the sub-sale to give up their right of retention, which was good against the original purchaser who had contracted with them, and thereafter to hold the goods for behoof of a third party with whom they had no contract, and from whom they could not obtain payment. The Mercantile Law Amendment Act, 1856, sec. 2, not only specially reserved their lien, but made payment of the price a condition of delivery to a second purchaser, in the circumstances which had emerged.¹

Wiffen, L. R. 5 Q. B., 660) would have been conclusive of the controversy. But the law of Scotland, and not the law of England, must govern the decision as to the rights and liabilities of the parties in the present action.

"The defenders' contention is that they remain undivested of the property in the sugars, and that they are not bound to give delivery to the pursuer while the price for which these had been sold by them to F. J. Macnaughtan & Co. continues unpaid. But for the effect due to their silence subsequent to the receipt of the delivery-order and pursuer's letter of 18th February, this claim probably could not be resisted; and the point on which the case turns truly is, whether such silence is, in the circumstances shewn in the proof, to be regarded as acquiescence. Had the defenders written, in answer to the pursuer's letter, that in terms of his request the sugars would be held for the pursuer, the Lord Ordinary thinks it plain they could not have resiled from the consequences of this undertaking. Is the result different when, in place of returning an answer, they keep the delivery-order and letter of request, and remain silent? That they might have refused to hold except upon the condition that any rights they had, or might have in the sugars, should be preserved, may be true. But when they say nothing in answer to a request which obviously was made upon the assumption that what was asked would be granted, they must, the Lord Ordinary thinks, be held to have acquiesced in or consented to what was required. To hold otherwise would be hard upon, not to say unfair to, the pursuer, as in a question with the defenders. They could not at the time have refused delivery to the pursuer, had immediate delivery of the sugars been asked, because they had taken a bill for the price, which was still current, and F. J. Macnaughtan & Co., the acceptors, were still solvent, as they continued to be for some time afterwards. The pursuer, by the course followed by the defenders, was put off his guard, and led to refrain from insisting for what at the time could not, and indeed would not, have been refused. To sustain the plea now put forward by the defenders would be in effect to sustain their right to a benefit which they never could have obtained if they had answered the pursuer's letter, and thus warned the pursuer that other measures than the request to hold the sugars for him must be adopted for his protection against contingent or possible claims upon the sugars at the instance of the defenders."

¹ Bell's Pr., sec. 116; Bell's Com., M'Laren's ed., 1, 243, note 5; Mathison v. Alison, Dec. 23, 1854, 17 D. 275, 27 Scot. Jur. 111; Wyper v. Harveys, Feb. 27, 1861, 23 D. 606, 33 Scot. Jur. 298; Anderson v. McCall, June 1, 1866, 4 Macph. 765, 38 Scot. Jur. 405; Black v. Incorporation of Bakers, Dec. 13, 1867,

Argued for the pursuer;—The defenders were barred by their silence, No. 103. which, even apart from the entry of transference in their stock-book, was equivalent to acceptance of the notice of sub-sale. By such acceptance they undertook to give delivery to the pursuer as sub-vendee. Had they not so undertaken, the pursuer would at once have insisted on delivery, which at that date the defenders could not have refused, as the sale was on credit, and the credit had not expired.¹

At advising,—

LORD YOUNG.—This case raises an important question of mercantile law. The facts lie in small compass. Smith & Co. sold a quantity of sugar to Macnaughtan & Co., and sold it on credit, in the usual sense of the word—that is to say, on the terms that the sugar should be delivered immediately or on demand, and that the credit be one month, a bill being given by the buyers Macnaughtan & Co. at one month's currency. That is truly, and in the ordinary sense of the words, a sale on credit. Within the month Macnaughtan & Co., the buyers, having granted their bill for the price, sold the sugars to the pursuer Fleming. Fleming intimated the sale to Smith & Co., the sellers, who did not acknowledge the intimation by answering the communication of Fleming, but they assented to it and acted on it by entering the sub-sale in their stock-book of the date mentioned in the communication thus—"Transferred by F. J. M. & Co. to James Fleming, Leith, 17/2/80." Within the month Macnaughtan & Co. became bankrupt, and were unable to pay the contents of their bill, and thereupon Smith & Co. refused to give delivery of the sugar to Fleming, on the ground that they were entitled to hold it in respect that the purchaser had become bankrupt, and the price was unpaid. Fleming, on his part, says that the sub-sale having been acknowledged, the seller must be regarded as holding the sugar on his account, and cannot now be heard to plead the bankruptcy of the original purchaser against his demand for delivery. The Lord Ordinary has decided in conformity with this contention, and I am humbly of opinion that his judgment should be adhered to.

We have no information on the record as to the exact position of the sugar, but in answer to inquiries made during the debate we were told that it is still in the warehouse of the refiners from whom Smith & Co. bought it, but on what contract it remains there we do not know. If in the refiners' possession on the contract of sale, and to be delivered to Smith & Co. on demand, then, according to the principle of our law which requires delivery in order to pass the property, it has never become the property of Smith & Co. at all. If, again, as is more probable, it is in the refiners' possession on a contract under which warehouse rent is paid to them by Smith & Co. for its deposit,—that is, in their hands, though they were sellers, on another contract than that of sale, they receiving warehouse rent for it,—why, that would be esteemed sufficient delivery to pass the property. I think that, as the case is presented to us, we must take it as

6 Macph. 136, 40 Scot. Jur. 77; New v. Swain, 1828, 1 Danson & Lloyd, 193; Dixon v. Yates, June 7, 1833, 5 Barn. & Adolph., 313; Griffiths v. Perry, Feb. 4, 1859, 1 EL & EL, 680; Benjamin on Sale, 2d. ed., p. 632, et seq.

¹ Serruys & Co. v. Watt, Feb. 12, 1817, F. C.; Stoveld v. Hughes, June 28, 1811, 14 East. 308; Pearson v. Dawson, May 28, 1858, 27 L. J., Q. B., 248; Woodley v. Coventry, Ap. 17, 1863, 32 L. J. Ex. 185.

No. 103. if the sugar is in the possession of Smith & Co. by being at their order in the refiners' stock-book, they paying warehouse rent.

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Now, there is no doubt that by our law the undivested seller, unless he bargains otherwise, is entitled to retain for the price. If he sells on credit he is of course bound to deliver according to the contract to the buyer, having waived his right to payment of the price before delivery. But if during the currency of the credit, whether a bill has been granted for the price or not, the buyer became bankrupt, the sellers' right to withhold delivery until he is paid revives if the goods be still undelivered, notwithstanding the sale upon credit. That is substantially the law of England also, though there the seller's right to withhold is attributed to seller's lien, whereas with us it is attributed to his undivested right of property. The result is the same in both cases. But it is the law of England, and I think the law of Scotland also, that if a seller has received intimation of a sub-sale, and has assented thereto, that deprives him of all right to retain as against the original purchaser. In this case it is almost conceded that if Smith & Co., the original sellers, had acknowledged receipt of the pursuer's letter, and undertaken in terms of the requisition contained therein to hold the sugars to his order, they could not have afterwards on Macnaughtan & Co.'s bankruptcy refused delivery to Fleming on his order and demand. That acknowledgment was not made, and no reason is given for it not being made. But, as I have stated, the letter was received, and was assented to and acted upon, for a transfer by sub-sale thereby intimated was entered in the sellers' stock-book. We have the entry made of the date of the delivery-order in the print before us. When Fleming received no answer from Smith & Co.,—no repudiation of the transfer, which he was entitled to expect if assent was not given to it,—it is, I think, reasonable to deal with the matter on the footing of that having been done which in point of fact was done, though the fact that it had been done was not communicated to Fleming, namely, that a notice had been received and assented to, and the transfer entered in the books accordingly. There is no doubt that if Fleming had applied for the sugars within the following month—for nearly a month elapsed before Macnaughtan & Co.'s bankruptcy—delivery could not have been withheld. But when he applied after the month had expired he was applying to the party who within the month undertook, as I assume from their actings Smith & Co. did undertake, to hold to his order. That is exactly according to the authority quoted from the law of England, according to sound principle, and, as I think, for the convenience of commerce. Macnaughtan & Co. were entitled to demand immediate delivery. They transferred their right, as they were entitled to do, to Fleming, and Fleming communicated the fact to Smith & Co., who had no answer to the demand, with a request to hold to his order. My opinion is, that although Smith & Co. did not acknowledge receipt of the letter, yet they must be dealt with on the footing of assent, which is exactly in accordance with the fact of the order to hold for Fleming having been entered in their stock-book.

LORD CRAIGHILL concurred.

LORD JUSTICE-CLERK.—This case raises a question of some interest, and one attended, as I have found it, with considerable difficulty. The sugars in question were the property of the defenders, and were, at the date of the sale alleged,

stored on their account with sugar-refiners in Greenock. They were sold on No. 103. the 9th and 10th of February 1880 to Macnaughtan & Co. on credit, and a bill at one month's date was granted for the price by the purchasers. The pursuer, ^{Feb. 26, 1881.} Fleming v. Smith & Co. on the 11th of February, purchased these sugars from Macnaughtan & Co.,—also on credit,—and obtained from them a delivery-order on the defenders. This was intimated to the defenders on the 18th of February, who noted the transfer in their books; and it is not disputed that although no answer was returned to the intimation the defenders held the goods for delivery to the sub-vendee instead of the original purchaser.

Before the bill granted for the price to the defenders was paid Macnaughtan & Co. on the 13th of March stopped payment, the sugars still remaining in the possession of the defenders. The sub-vendee has brought this action for delivery to him of the goods. The question is, whether the defenders are bound to deliver the goods without receiving payment of the price.

The condition of this question is that the property of the goods remained with the original sellers, who were under an obligation to the purchaser to deliver them in terms of his contract. The purchaser was simply a creditor for delivery, and, had this been a ready-money transaction, could never have demanded delivery without payment of the price; nor could he by assigning the obligation place his assignee in any better position than himself. That could only have been accomplished either by a new contract with the original seller, or by some act on his part equivalent to delivery.

In the present case I am of opinion that nothing took place between the sub-vendee and the defenders which either amounted to delivery or to a new contract. The first is not maintained, nor, indeed, could it be so; but it is contended, and the Lord Ordinary has in substance held, that the conduct of the defenders in not replying to the pursuer's intimation, while they noted the transference in their books, amounted to an obligation to deliver absolutely to the purchaser, or at least misled him with the result of inducing him not to demand delivery.

Had the sale been one for ready money I do not think that the defenders did anything but what they were entitled and bound to do, consistently with all their rights reserved by the original contract, and resulting from their continued possession. The want of an acknowledgment of the intimation was immaterial; and, the assignation being intimated, they were bound to hold for and deliver to the assignee on the same terms as they had held for and were bound to deliver to the cedent.

This, however, was a sale on credit, one consequence of which was that the seller was bound to deliver the goods sold when demanded, within the period of credit, although the price remained unpaid. There is not much authority in our law on this subject, and no light, in my opinion, can be obtained on it from English cases. By the law of England, if the property of the thing sold has not passed to the vendee, a sub-vendee has no higher right than the original purchaser. Such cases occur where the goods sold require identification, or separation, or the like. From this it would follow that as with us the property only passes on delivery, an assignee cannot acquire a higher right. But in regard to an ordinary sale the English analogy necessarily fails, because, when the contract of sale is completed, the property of the subject of the sale passes to the vendee, and the whole fabric of case law which has been built up on this

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head rests entirely on this foundation. The right of the seller is not a right of property, but merely a lien over the property of another, which is held to be waived or to revive under varying circumstances, but always on the assumption that the property has passed to the vendee or his assignee or sub-vendee. Mr Benjamin in his work on Sale has these remarks (p. 626),—"When the goods have not yet left the actual possession of the vendor he has at common law at least a lien for the unpaid price, because he is always presumed to contract unless the contrary be expressed, on the condition and understanding that he is to receive his money when he parts with his goods. But he may agree to sell on credit,—that is, to give to the buyer immediate possession of the goods, and trust to his promise to pay the price *in futuro*. Such an agreement as this amounts plainly to a waiver of the lien, and if the buyer then exercises his rights and takes away the goods nothing is left but a personal remedy against him. But if we now suppose that after a bargain in which the lien has been thus unequivocally waived, the buyer for his convenience, or any other motive, has left the goods in the custody of the vendor, until the credit has expired, and has then made default in payment, or has become insolvent before the credit has expired, what are the vendor's rights? He has agreed to relinquish his lien, and the goods are not yet in transit. Does his lien revive, on the ground that the waiver was conditional on the buyer's maintaining himself in good credit? Or can the vendor exercise a *quasi* right of stoppage *in transitu*—a right that might perhaps be termed a stoppage *ante transitum*? The true nature and extent of the vendor's rights in this intermediate state of things have not yet, perhaps, been in all cases precisely defined; but they have been considered by the Courts under such a variety of circumstances that in practice there is now but little difficulty in advising in cases as they arise." But the rules thus established,—and some of them are technical enough,—to which Mr Benjamin afterwards refers, proceed on the initial assumption that the unpaid vendor's right is one of lien, and the vendee's right one of property, and the result is reached, generally, by inquiring whether the seller is or is not estopped or personally barred from using his lien.

We have no materials in our different, and, as I think, simpler system, on which these rules can be specifically applied. The rights of the parties are exactly the converse. The seller remains proprietor. The purchaser is only creditor for delivery. There is no lien of any kind vested in any of the parties, and these principles of waiver, lien, and personal bar seem entirely inapplicable and inextricable.

I arrive, however, at the same result on a simpler ground. When the sale is for ready money then there is no obligation to deliver except on condition of payment of the price. If the sale is on credit the seller is bound to deliver on demand during the currency of the credit, but if the buyer become insolvent before delivery then his breach of the contract will prevent him from enforcing it. But if, while things are entire, he assign this obligation to deliver on demand to a third party, who intimates his assignation before the seller become bankrupt, I think this right to delivery on demand becomes absolute in the person of the assignee, and the seller's right for payment is only a personal claim against the original purchaser.

THIS interlocutor was pronounced:—"Adhere to the interlocutor reclaimed against: Find the defenders liable to the pursuer in

damages; of consent assess the same at £569, 13s. 7d., and decern No. 103.
 against the defenders for payment to the pursuer of that sum,
 with interest thereon from the 19th day of March 1880 till paid : Feb. 26, 1881.
 Find the pursuer entitled to expenses in the whole cause, and Fleming v.
 remit," &c. Smith & Co.

MACGREGORS & ROSS, S.S.C.—ADAM SHIELL, S.S.C.—Agents.

JOHN ROBERTSON, Pursuer.—*R. Johnstone—J. A. Reid.*
 HUGH M. ALEXANDER AND OTHERS (Driver's Trustees), Defenders.—
Macdonald—Rhind.

No. 104.

Mar. 2, 1881.
 Robertson v.
 Driver's Trus-
 tees.

Contract—Liquidate damages—Penalty—Time bargain.—In an action by a contractor for the balance of the contract price, the employer pleaded that he was entitled, in terms of the contract, to a deduction from the contract price of £2 per day for each day the work had remained unfinished after the date stipulated. *Held* that, in the circumstances, the various stipulations as to time being inconsistent with the work being completed on the date fixed, the claim as to liquidate damages could not be enforced.

Observations on penalties and liquidate damages.

ON 3d February 1879, John Robertson, joiner, Dollar, raised an action 2D DIVISION.
 against John Henry Driver, residing at Springfield, near Dollar, for Lord Lee.
 balances alleged to be due to him on two contracts for repairs and altera- R.
 tions executed by him on Mr Driver's house. Mr Driver defended the action, and stated certain objections to the accounts sued upon. Some of these objections took the form of details of sums of money stated to have been necessarily expended by Mr Driver in consequence of the careless and bad workmanship of Robertson in connection with the first of the contracts.

With respect to the second contract, Mr Driver claimed to set off against the balance said to be still due a sum of what he averred to be penalties incurred by Robertson under the stipulations in the contract.

This contract was one for the putting in of oriel windows into Springfield House, and provided for the whole work connected with the alteration, including not only mason work, and the joiner, carpenter, and glazier work, but also the work of the plasterer, and the slater, and the plumber. The whole mason work is to be completed "within six weeks from the acceptance of offer;" and the clause relative to joiner, carpenter, and glazier work provides as follows:—"The roof of the oriel windows to be made ready for the slates within two days after the time specified for the completion of the mason work, and the portions of rooms requiring to be plastered to be made ready for the first coat of plaster within two days thereafter, and the internal finishing proceeded with as soon as possible." Article 2 of the general conditions was—"Should the contractor refuse or delay so to carry on his work as that it may be fully and properly completed in every respect, viz., mason, joiner, slater, plumber, glazier, and all other work, on or before seven weeks from the date of contractor receiving the acceptance of offer, it shall be in the power of the proprietor, after giving two days' notice in writing to the contractor of his intention so to do, to employ other tradesmen to carry on and complete the work at the contractor's expense. . . . 6. The contractor to receive one-third of the contract price as soon as the mason has the stone-work of the oriel windows completed, the other third to be paid after the glazier, slater, and plumber work is completed, the remaining third to be paid on the com-

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pletion of the work; but said price shall be subject to deduction of £2 for each day or part of a day after date as before specified for the completion of the work, during which the work may remain unfinished, or in any manner incomplete, of which the proprietor, or architect, or inspector foresaid, shall be sole judge."

Mr Driver averred that the work had been unduly delayed, Robertson's offer to execute it having been accepted by him on 18th August 1876, and the contract therefore falling, in terms of the specification, to be completed by 6th October 1876, whereas it was not completed until 2d December 1876. He, therefore, claimed deduction of £2 *per diem* for the sixty-two days after 6th October until the work was completed.

Robertson averred in answer to the defender's statement that any delay was due to Mr Driver's own fault.

On 11th June 1879, the Lord Ordinary (Young) "on the motion and of consent of both parties," remitted to Mr Smith, Dean of Guild, Edinburgh, to report on the matter in dispute, with the exception of the claim for penalty.

Mr Smith took evidence at considerable length as to the work executed, and the time employed in doing it. On 7th June 1880 he reported the result of his investigations, which was that Mr Driver was due a sum of £288 odds to Robertson.

Mr Driver having died soon after this, his trustees were, on 20th July 1880, sisted as defenders in his place.

The Lord Ordinary (Lee), on 26th October 1880, allowed both parties a proof of their averments as to the claim for penalties. From the evidence adduced it appeared that Robertson only received the acceptance of his offer and the relative plan and specification on 28th August 1876 instead of 19th August as averred by Mr Driver, and that the contract which should have been completed in seven weeks from the former date, *i.e.*, on 16th October, was not finished until 30th November. Evidence was led by Robertson to the effect that it was impossible that the contract could ever have been completed in seven weeks, the plaster-work alone requiring most of that time to dry. There was also evidence of wet weather and unforeseen delays which retarded the work. The evidence on this and the other points is referred to in the Lord Ordinary's note.

On 24th December 1880 the Lord Ordinary pronounced this interlocutor:—" . . . Finds, . . . and apart from the defender's claim for penalty under the oriel window contract, the balance due to the pursuer upon the accounts libelled amounts to £282, 13s. 3½d.; and with respect to the defender's claim under the oriel window contract for a deduction from the price payable under the same, in respect of the pursuer's failure to complete the work within the stipulated time, finds that on a sound construction of the said contract, as contained in the specification with relative offer and acceptance annexed, the pursuer undertook for £314 to execute, complete, and in all respects finish the work referred to in said specification, within seven weeks from the date of his receiving the acceptance of his offer, and agreed that the price payable as therein provided should be subject to deduction of £2 for each day or part of a day after the date therein specified for the completion of the work, during which the work might remain unfinished or in any manner incomplete: Finds that the pursuer received the acceptance of his offer on 28th August 1876, and that the work was not completed until 30th November 1876: Finds it not proved that the deceased defender was to blame for the delay in the completion of the work, or for any part thereof, but that there was some wet weather during the contract, and that for delay so

caused, and other unforeseen contingencies, the pursuer is entitled to an allowance of three weeks over the time stipulated: Finds that the defenders are entitled to a deduction at the rate agreed upon as aforesaid, for each of the remaining twenty-four days, and are therefore entitled to set off against the sum of £104, 13s. 4d. remaining unpaid, under the said oriel window contract, and included in the balance above mentioned, the sum of £48: Decerns against the defenders, trustees of the deceased John Henry Driver, and as sisted in his place, for the sum of £234, 13s. 3½d., in terms of the conclusions of the summons, with interest thereupon at the rate concluded for from 4th February 1879 until payment: Finds the defenders entitled to expenses from 6th June 1879: *Quoad ultra* finds neither party entitled to expenses; and remits," &c.*

* "NOTE.—The proceedings in this case, which have been of a protracted and confusing character, have arisen in the settlement of accounts between the pursuer, as a joiner and contractor at Dollar, and the deceased Mr Driver, who was proprietor of a villa residence called Springfield House in that neighbourhood. Mr Driver died during the dependence of the process, and the present defenders were sisted as his trustees in his place. Besides a general jobbing account, the pursuer undertook, in 1876, two contracts for work upon said house—firstly, a contract for the erection of a bath-room, &c., for the fulfilment of which no time was fixed; and, subsequently, a contract for the alteration of the front of the house, by making four oriel windows, two on each side of the door, as shewn in the plan No. 31. Besides a variety of objections to the accounts, which were a good deal mixed up by the pursuer, the defender maintained certain counter claims, and especially a claim under the oriel window contract, to a deduction at the rate of £2 per day for sixty-two days, on account of the pursuer's failure to complete the work within the stipulated time.

"If the balance of accounts between the parties be adjusted, the only remaining points are (1) as to the defender's claim to a deduction under the oriel window contract, and (2) as to interest. The former of these involves a question of considerable nicety, and of some practical importance.

"The contract provides for the whole work connected with the alteration, including not only mason work, and the joiner, carpenter, and glazier work, but also the work of the plasterer, and the slater, and the plumber. The whole mason work is to be completed 'within six weeks from the acceptance of offer;' and the clause relative to joiner, carpenter, and glazier work provides as follows:—'The roof of the oriel windows to be made ready for the slates within two days after the time specified for the completion of the mason work, and the portions of rooms requiring to be plastered to be made ready for the first coat of plaster within two days thereafter, and the internal finishing proceeded with as soon as possible.'

"Article 2 of the general conditions provides—'Should the contractor refuse or delay so to carry on his work as that it may be fully and properly completed in every respect, viz., mason, joiner, slater, plumber, glazier, and all other work, on or before seven weeks from the date of contractor receiving the acceptance of offer, it shall be in the power of the proprietor, after giving two days' notice in writing to the contractor of his intention so to do, to employ other tradesmen to carry on and complete the work at the contractor's expense.'

"Article 6 of the general conditions provides for payment of the price as follows:—'The contractor to receive one third of the contract price as soon as the mason has the stone work of the oriel windows completed, the other third to be paid after the glazier, slater, and plumber work is completed, the remaining third to be paid on the completion of the work; but said price shall be subject to deduction of £2 for each day or part of a day after date as before specified for the completion of the work, during which the work may remain unfinished or in any manner incomplete, of which the proprietor, or architect, or inspector foressaid, shall be sole judge.'

"The contract price for the whole work was £314. The pursuer's offer is

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LORD JUSTICE-CLERK.—If I thought that any farther light could be obtained upon this case I would have suggested that the Court should take some time to

dated 14th August 1876. The acceptance is dated 18th August 1876. Both offer and acceptance are written upon the specification. It is proved, however, that the acceptance was not received by the pursuer on 18th August or for ten days thereafter. A letter was sent to him on the 18th, and was received by him on the 19th, informing him that Mr Driver had appended his acceptance to the specification. But the pursuer, being unable to go on with the work without the plan and specification, which were in the hands of Mr Driver's agent in Dundee, wrote on the 22d asking that they should be sent. Owing to the absence of Mr Driver's agent from Dundee there seems to have been some delay about this, as his reply, though dated 25th, was not received until the 28th. This is the date when the contractor actually received the acceptance of his offer; and, although he heard on the 19th that his offer was accepted, it appears to the Lord Ordinary that, in the absence of the relative plan and specification, this was not equivalent to receipt of the actual acceptance, as it did not enable the contractor to begin the work.

"As to the progress of the work and the time when it was finished, it appears from the evidence that the mason work was completed on or about 8th October; the roof was ready for the slater on 10th October, the slater work was completed, and the ridges put on by the 12th; the plasterer began on the 14th and finished on the 21st October; but the joiner and carpenter work (being the work peculiarly belonging to the pursuer) was not finished until 30th November.

"Now, as the period of seven weeks from the contractor's receiving the acceptance expired on 16th October, it is plain that if the contract contains an obligation to complete the work by that date to which the stipulation in article 6 of the conditions is referable, a question arises concerning the import and effect, in the circumstances, of the alleged penalty or deduction from price. The Lord Ordinary had imagined from the record that the pursuer's reply to the defenders' counter claim was that stated in his 4th plea in law, viz:—'That the defender, being responsible for any delay which occurred, is not entitled to recover the penalties referred to.' But it appeared at the proof and debate that the pursuer now maintains that the contract imposed no obligation upon him to complete the whole work within any specified time. He states in his evidence that the joiner and carpenter work, to a considerable extent, could not be done until after the plaster work was completed and dry. He referred specially to what is called 'the internal finishing,' which seems to include putting on shutters, breasting, and foot-base, also the shutter knobs, window fastenings, and other mountings. And evidence was adduced by him to the effect that it was impossible the whole work could be completed within seven weeks, as the plaster work, if done in three coats according to contract, would necessarily occupy many weeks, and would take, according to any mode of procedure and in any weather, some weeks to dry sufficiently to allow of the wood work being completed. It was maintained on behalf of the pursuer that the seven weeks' stipulation does not apply to the plaster work, and the Lord Ordinary admitted the evidence adduced on the subject above-mentioned in case it should be ultimately held that the contract is ambiguous on this point. His own view, however, is that the contract is clear; that the obligation applies to the completion of the whole work falling under the contract; and that the pursuer having undertaken by the terms of his offer to 'complete and in all respects finish the work herein before referred to, in accordance with the true meaning and intent of the foregoing amended specification,' is not entitled to plead against the defenders the impossibility now alleged, especially as he does not attempt to prove that the deceased defender was made aware of any such impossibility.

"It was contended on behalf of the pursuer, that the contract itself admits of a construction which would exclude plaster work from the stipulation as to time. This contention was founded on the explicit terms in which the time is

read this proof. But after the full statement by the counsel for the defenders, No. 104. and looking to the elaborate note of the Lord Ordinary, I do not think more

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regulated up to the plasterer's work; the provision that the internal finishing is to be proceeded with 'as soon as possible,' and the absence of any express mention of plaster work in article second of the conditions. The Lord Ordinary is far from saying that the contract is as distinct as it could have been made. But he is unable to read the contract as between the defenders and the contractor, who states that he prepared the specification, otherwise than as assuring the employer that the whole work could and would be completed 'in all respects' within seven weeks. The argument that plaster work is not included in the enumeration in the second article of the conditions is open to two observations. In the first place, this is not a deed of entail that is being construed. In the second place, the enumeration includes expressly joiner work, as well as 'alater, plumber, glazier, and all other work,' and it is clearly proved by the defender's evidence that the joiner work could not be completed until after the plaster work had been done.

"The Lord Ordinary, therefore, holds that, under the contract, fairly construed, the pursuer was bound to complete, and in all respects finish, the work within seven weeks from 28th August, unless prevented by some cause for which he cannot be held responsible.

"It is pleaded that the deceased defender was to blame for the delay, and it was contended that the delay in sending the specification involved more than a mere postponement of the date of receiving the acceptance. Had the receipt of the agent's letter of 18th August been sufficient to bind the pursuer as an acceptance there would be great force in this argument, for it is obvious that a week's delay at that time of year might have involved, through subsequent change of weather, a delay of much longer duration. The Lord Ordinary, however, is of opinion that it was open to the pursuer to withdraw his offer any time before he received the plan and specification. These formed an essential part of the acceptance. For the acceptance referred to the 'foregoing offer;' and the offer related to the foregoing amended 'specification and plan.' Without these the acceptance was incomplete and unintelligible. Mr Agnew's observation that the pursuer ought to have kept a tracing of the plan, and a copy of the specification, is of no weight in a case where the plan and specification were adjusted, as in this instance, and where no arrangement was made for duplicates. Having on 28th August received and acted on the acceptance, with plan and specification all complete, and having made no objection then that the contract as to time should be no longer binding on him, the Lord Ordinary must hold that the pursuer, as well as the defenders, is precluded from founding upon delay prior to that date.

"The question, then, is, what is the effect, under the contract, of the stipulated penalty or deduction of £2 per day? Although it has been called a penalty on the record the Lord Ordinary holds that in determining the effect of the stipulation, and whether it is incumbent upon the employer to prove damage by the delay, or whether it rests with the contractor to shew grounds of abatement, the thing to be considered is the real nature and substance of the stipulation. It may be either (1) a penalty properly so called, viz., a sum imposed *in pœnam*; or (2) an adjusted and agreed on rate of damages proportionate to the breach of contract; or (3) a rate of damages agreed upon, but exorbitant and unconscionable. The cases of *Craig v. M'Beath*, 1 M. 1020, *Johnstone v. Robertson*, 23 D. 646, and *Forrest & Barr v. Henderson*, 8 M. 187, illustrate the distinction between these several cases. The result of them appears to be, that if the sum be truly penal, it will not be enforced beyond the damage actually suffered. Even where the sum bears to be agreed upon as liquidated damages, the Court may modify it if exorbitant and unconscionable. But where intended as liquidated damages, and there appears to be nothing exorbitant in the stipulation, but a reasonable and fair proportion between the consequences of a breach of contract and the penalty, a Court of justice will not interfere—(1 Bell's Com., 5th ed., p. 655, and *Johnstone v. Robertson*.) If it be maintained

No. 104. detailed information is necessary. The question comes to be, whether this penalty is at all applicable to the circumstances of the case.

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in any case that the stipulated sum is excessive and exorbitant, it rests with the party alleging this to set forth and establish grounds for modification, otherwise the party claiming the penalty is entitled to assume that the damage has been justly assessed by the contract at the amount of the penalty—(*Craig v. M'Beath*).

"In the present case the party claiming the penalty does not allege actual damage, except in so far as the want of the front part of his house implies damage. His claim is founded entirely on the contract. On the other hand, the party resisting the deduction so claimed sets forth no grounds for abatement or modification, but pleads non-liability, in respect that any delay which occurred was caused by circumstances for which the claimant was alone responsible.

"The Lord Ordinary is of opinion that according to the true meaning of the contract the sum stipulated as a deduction from the price in the event of a breach of the obligation as to time is of the nature of pactional damage, and not penalty. He cannot distinguish the stipulation in substance from that in *Johnstone v. Robertson*. He holds that there is nothing manifestly disproportionate and exorbitant in the rate agreed upon by the parties. His view is that the parties, knowing the kind of house and having before them the extent of inconvenience that must be caused to the employer by delay, assessed the damage at a rate which they mutually agreed upon as proportionate to the breach of contract. The stipulation of the second article of the conditions does not seem to be at all inconsistent with this view. It is intended to provide against unreasonable delay, or refusal to do the work. Article 6 assumes that the work is proceeded with and done, but that the contractor fails to implement his obligation to do it in the time stipulated.

"In this view, the only question comes to be, whether the pursuer has established, as a matter of fact, that any delay which occurred was caused by circumstances for which the defender is responsible. The alleged delay in sending the plan the Lord Ordinary has already dealt with. He holds that in the circumstances it goes to the date of receiving the acceptance and cannot exclude the defender from enforcing the contract. The case of *M'Elroy v. Tharsis Company*, 5 R. 161, and H. L. 171, was different, and the judgment in that case has no application to this cause of delay,—for in that case the Court proceeded upon fault during the time allowed for executing the contract. Here the delay was in concluding the contract, and thus fixing the time for its commencement.

"But other causes of delay are also alleged, for which it is pleaded that the pursuer cannot be held responsible, and particularly unusually wet weather in the early part of the contract, causing some postponement of the proceedings, which was consented to by the deceased defender. The Lord Ordinary is of opinion that a certain amount of wet weather is proved to have occurred during the execution of the work, for which the pursuer is entitled to an allowance in point of time. It was not, however, extraordinary in character, or sufficient in duration to account for anything like six weeks' delay. With the exception of two or three days, it appears to have occurred after the work should have been completed. Even assuming that the six weeks occupied in the internal finishing had been accounted for by satisfactory evidence that it was required for the purpose of allowing the plaster work to dry, the Lord Ordinary doubts very much if the pursuer would be entitled to plead such a delay in this case. But the evidence on that subject was not satisfactory to the Lord Ordinary's mind. The portions of wall which required to be plastered were of small extent, and consisted of narrow strips. The plaster on the new bit of roof added at the oriel windows is not proved to have interfered in any way with the wood work. It is very difficult indeed to understand how the six weeks between 21st October (when the plaster work was finished) and the 30th November were occupied, if the wood work had been previously in course of preparation, as it is said to have been and might have been. The evidence rather suggested to the Lord Ordinary that a couple of men in each of the four rooms could have fixed up

It is manifest that the parties meant to make a time bargain, as is also the fact that the time taken to perform the work was unusually long, and presumably might have been shortened if greater activity had been displayed.

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When we come to the penalty clause we are bound to look at the stipulations on which it rests. I do not think we can tie down the contractor to these provisions. If we were to attempt to do so then he would have been bound to complete the mason work in six weeks, and then to have the roofs ready in two days, and within two days thereafter to have the walls ready for plastering, "and the internal furnishings proceeded with as soon as possible." Such stipulations never could lay the foundation for exacting such a penalty as is here demanded. I am quite willing to let the defenders read the subsequent stipulation as to time as they desire, namely, that the whole work was to be completed in seven weeks. But if that be so, then what was undertaken was impossible, because we have it proved that six weeks being taken for the mason work as provided in the contract, the plaster work could not be ready for the joiners for a fortnight after that. The Court will not enforce a penalty where the thing undertaken could not possibly be done in the time. It is quite plain that this is a case where the Court must modify the stipulated penalty. That is the short view I take of the case. I think we should adhere to the Lord Ordinary's interlocutor, except in so far as it allows the £2 penalty to form a deduction from the contract price.

LORD YOUNG.—I am of the same opinion. I regret there should have been such a prolonged litigation in this case. When it originally came before me as Lord Ordinary, seeing that it was an action for a contractor's account, I suggested that the whole matter should be remitted to a competent man of skill. This was done, and I am sorry that the man of skill should not in so simple a

the internal finishings in a very few days ; and it is quite inconsistent with the idea of continuous wet weather that the window sashes, which were glazed at the beginning of October, should have been kept out for some time, for drying purposes. On the whole, the evidence satisfied the Lord Ordinary that the pursuer either undertook to do what he knew to be impossible, or failed to do that which he had undertaken to do, and which, with proper diligence, could have been done. In either view, the defenders appear to be well entitled to enforce the contract against the pursuer, at least to the extent of setting off the stipulated deduction against the balance of the contract price.

"It is reasonable, however, that every possible allowance should be made to the pursuer for unforeseen delays ; and the Lord Ordinary thinks that fourteen days may be allowed for wet weather, and that another week may be allowed for a delay of two days, caused by a new beam which was required, and for other contingencies, though not proved to have caused delay. An examination of the evidence will possibly shew that this allowance of three weeks is too liberal. But the Lord Ordinary holds it to be consistent with legal principle that the equitable jurisdiction of the Court should be exercised favourably towards the contractor in this matter.

"With regard to interest, the Lord Ordinary is of opinion that the result of this action shews that the pursuer's claim was subject to certain counter claims, and that it was necessary to ascertain the balance. No interest before the date of citation, therefore, has been allowed. From that date, however, the pursuer has been found entitled to interest on the balance, because he appears to have offered, before proceedings were commenced, to refer to arbitration the adjustment of the accounts.

"As to expenses, the defenders have been found entitled to expenses from the date of the minute of tender, No. 16 of process."

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matter have given his judgment without taking this proof, which we would have been better without. He should have gone and seen the house himself, and formed his opinion from his observation. I certainly intended the man of skill to go and inspect the work, and that seems to me the reasonable way of settling the matter.

The question of penalty or no penalty as a question of law was properly excluded from the remit. The Lord Ordinary has now found the defenders entitled to £48 as stipulated penalty. I agree with your Lordship that this is not a case where the penalty clause, having regard to the evidence and terms of the contract, is capable of being enforced. Where there is a distinct time bargain and a stipulation by the parties that if the contractor fail to complete the contract within the time distinctly limited, he shall be liable for a certain sum of money for every day or week during which it remains incomplete, the Court will generally give effect to that bargain if it be reasonable that damages be paid. But if, again, the penalty be truly a penalty—that is, a punishment—the Court will not allow that, because the law will not let people punish each other. They may contract that the one will be bound to reimburse the other for any loss caused, but not for punishment. Anything beyond compensation, which is a reasonable enough penalty, is punishment, and will not be enforced. That is the result of all the decisions. The word “penalty” is sometimes used to express liquidate damages, and, again, what is called liquidate damages is really penalty. The Court will look into the circumstances of each case, without being influenced by the term used, and having ascertained the truth, will act accordingly. In this case, in the circumstances, I do not think this penalty should be enforced.

LORD CRAIGHILL.—I concur in the opinions which have been expressed.

If the stipulation had been clear and distinct, and capable of being fulfilled, the defenders would be entitled to succeed in their demand. But when we look at the contract we find that under it the contractor was bound to finish all the work under the contract in seven weeks. Now, we find six weeks and four days of that time is to be taken up in certain specified work, but after that is completed there is still a great deal of joiner work and internal fittings to be done. It is not a compatible provision that six weeks and four days are to be given to do so much of the work, and then only three days are to be allowed for the rest. It is impossible to imagine that that was the bargain. Upon this contract, as it stands, I am of opinion that it is impossible to enforce this penalty or deduction.

THE COURT pronounced this interlocutor :—“ Recall the interlocutor reclaimed against : . . . Find that the defenders are not entitled to any deduction from the sums sued for in respect of the penalty stipulated in contract between the parties, and that the balance due to the pursuer upon the accounts libelled amounts to £282, 13s. 3½d. sterling, and decern against the defenders, the trustees of the said John Henry Driver, as sisted in his place, for payment to the pursuer of that sum, with interest thereon at the rate of £5 per centum per annum from 1st March 1877 till payment : Find no expenses due by either party to the other prior to 7th June 1880, the date of Mr Smith's report : Find the pursuer entitled to expenses from that date, and remit,” &c.

J. B. M'INTOSH, S.S.C.—ROBERT MENZIES, S.S.C.—Agents.

Poor ELIZABETH GOUDIE OR ALLAN, Pursuer.—*Sym.*
RICHARD SANDEMAN, Defender.—*J. P. B. Robertson.*

No. 105.

Mar. 4, 1881.

Allan v. Sandeman.

1ST DIVISION.
M.

Process—Appeal—Act of Sederunt, 10th March 1870, sec. 3, sub-sec. 1—Time for application to dispense with printing.—The process in an appeal from the Sheriff Court was received by the Clerk of Court upon 21st February. Upon the appellant's application to be admitted to the benefit of the poor's-roll, a remit was made on the 25th February to the reporters on *probabilis causa litigandi*. On 4th March the appellant presented a note to the Court praying them "to dispense *hoc statu* with printing, or otherwise, to extend the time for printing until the application for the benefit of the poor's-roll should be disposed of."

Motion *refused*, on the ground that it had not been made within eight days after the process had been received by the Clerk of Court, as required by sub-section 1 of section 3* of the Act of Sederunt, 10th March 1870, but observed that it would be open to the appellant within eight days after the appeal should be held to be abandoned under the first sub-section, to apply in terms of the 3d sub-section† to be reponed upon cause shown.

W. T. SUTHERLAND, S.S.C.—M. MACGREGOR, S.S.C.—Agents.

JOHN DUNCANSON, Complainer.—*Asher—Guthrie.*
BAKER PHILIP DANIELS (Jefferis' Trustee), Respondent.—*D.-F. Kinnear—J. P. B. Robertson.*

No. 106.

Mar. 4, 1881.

Duncanson v. Jefferis' Trustee.

Right in security—Security over moveables—Lease—Possession—Reputed ownership.—The proprietor of a new hotel (which required £20,000 to furnish it) in letting it to a tenant agreed to advance £10,000, to be expended on furniture, on condition that furniture to that value should be placed in certain rooms and inventoried as his property, and that the tenant should lease this furniture for ten years at a rent equal to 5 per cent on the sum expended by the landlord. There was also a separate agreement that the tenant should purchase the furniture in ten lots by yearly payments of £1000, the furniture rent being reduced in proportion as the payments were made. In terms of this agreement the furniture was purchased and inventoried, and the agreement itself was subsequently embodied in formal deeds. The tenant, after making three half-yearly payments of the furniture rent, and paying for one lot of the furniture, became bankrupt. In a question between the landlord and the trustee in the tenant's sequestration, who claimed the whole furniture as the property of the tenant, maintaining that the arrangement was merely a device to create a

* The Act of Sederunt of 10th March 1870 provided :—Section 3, sub-section 1.—"The appellant shall, during session, within fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any, unless within eight days after the process has been received by the Clerk he shall have obtained an interlocutor of the Court dispensing with printing in whole or in part, in which case the appellant shall only print and box as aforesaid those papers the printing whereof has not been dispensed with . . . and if the appellant shall fail within the said period of fourteen days to print and box . . . the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed as hereinafter provided."

† Sub-section 3.—"It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court . . . to repon him to the effect of entitling him to insist in the appeal, which motion shall not be granted . . . except upon cause shown, and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court shall seem just."

No. 106.

Mar. 4, 1881.
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2D DIVISION,
Lord Lee.
I.

security over the furniture without possession by the creditor, *held* that the agreement was lawful, and that in terms thereof the landlord was proprietor of the furniture standing in his name, and that the tenant had possession of it merely on a contract of hire.

JOHN DUNCANSON, builder, Glasgow, was proprietor of the Grand Hotel, Charing Cross, Glasgow. Towards the close of 1877, the hotel being then nearly completed, he entered into correspondence with Mr Lewis Jefferis, then proprietor of the Queen's Hotel, Cork Street, London, who contemplated becoming tenant, as to the duration of the proposed lease of the hotel, and as to how Jefferis was to be assisted in purchasing the £20,000 worth of furniture necessary to furnish the building. Jefferis was anxious that Duncanson should supply £10,000 towards the furnishing, and on 29th November wrote that should he do so he was willing to give him any security short of a registered bill of sale, which he thought might injure his credit. By 26th December Duncanson and Jefferis had agreed upon the main points in connection with the lease of the hotel, and that £10,000 was to be in some way or another contributed to the furnishing by Duncanson. The manner in which he was to be secured in repayment was made the subject of conversation and correspondence between the parties, and eventually it was arranged that Duncanson was to purchase £10,000 of furniture which was to be placed in particular rooms in the hotel, and inventoried as belonging to him, Jefferis to get a lease of this furniture and to pay rent therefor. The following letters from Jefferis shew his understanding of the arrangement at that time:—"29th December 1877.—I received your favour of yesterday, and will get Mr King to send you copy of estimate as soon as he can do so. The way we have done it is this:—We have taken so many drawing-rooms at one price, so many at another, and the same with the bedrooms, so many large, and so many single, and so many servants'. Then, again, for some of the best rooms an additional amount is provided, with separate sums for coffee-room, drawing-room, billiard-room, smoking-room, &c. The carpets are all carefully measured, both for rooms and passages, staircases, &c.; plate, linen, mats, gasaliers, mops and brooms, glass, kitchen, buttry, and lots of other things unnecessary here to mention.

"Depend upon it I will take care that you have an ample amount to cover your advance, and shall look out that all the substantial and large furniture is booked to you, and stamped J. D. underneath with a stamp that I shall keep in my possession. Then, as I pay off, you can stamp a suitable amount with a stamp L. J., to be kept in your possession. Take, for instance, tables, chairs, couches, looking-glasses, gasaliers, bedsteads, spring mattresses, wardrobes, billiard-table, fire-grates, and similar articles that will not wear out or perish, like china, glass, earthenware, linen, and carpets. This seems to me to be the right way, and if you can suggest anything else pray do so."

"2d January 1878.—Since writing you my last letter I have been talking the matter over with Mr King, and he thinks it will be better for you to have a list of the furniture in certain rooms, to be numbered and invoiced to you, and he has prepared an estimate accordingly, which I beg to enclose. If you want more articles included to make it a better security, I am quite willing to fall in with your views. Practically speaking, it may as well all be invoiced to you; but, as a matter of business, the invoice ought to be for about the same amount, as this arrangement is, after all, a *bona fide* purchase of so much furniture on your own a/c." . . .

The furniture was ordered by Jefferis from Green & King, a London firm, who had furnished his own hotel.

Duncanson's agents having been, in the end of December, instructed to prepare the deeds necessary to carry out the proposals of the parties, made drafts of a lease of the hotel, a lease of £10,000 worth of furniture, and of an agreement between the parties. These drafts were duly revised by the parties and their agents by 28th February 1878, but owing to a difficulty in getting the inventories of the furniture completed, were not finally executed until 16th August 1878, some time after Jefferis had been in possession of the hotel and furniture as tenant of both. In February 1878, while the furniture for the hotel was being prepared and collected by Green & King, Jefferis asked Duncanson to grant them a letter of obligation for the £10,000 worth of furniture, which was to be invoiced to him. To this Duncanson, on 16th February, replied:—"I had a meeting yesterday with Messrs Mitchells, Cowan, & Johnston, and my own lawyer, and they both saw a difficulty in the way of me signing the letter to Mr King before arrangements were complete as to what goods I was to purchase, the manner in which they were to be distinguished from yours, and divided into lots of as nearly as possible £1000 each, so that when the time came for you to take them over the different settlements would be of the simplest character and devoid of confusion. I have to see them again on Monday, and hope that they will have seen their way then to get the details settled to their mutual satisfaction.

"Since wiring you to-day I have been looking over your letters of December 29th and January 2d, and with the information obtained from them, part of which had escaped my memory, I think that I see my way to give them ideas on the subject which will enable them to adjust details. However, to keep Mr King and yourself quite at ease on the matter, I may state that there is no misunderstanding as to the arrangement between you and I, viz., that I am to purchase and pay for £10,000 worth of goods, to be put into the hotel at Charing Cross here and leased to you. You are quite at liberty to shew Mr King this letter, which will let him see that the entire delay lies with the lawyers, and not with me."

On 4th March, however, the following letter to Green & King was sent by Davidson, Duncanson's manager:—"Glasgow, 4th March 1878.—I beg to order of you furniture to the extent of ten thousand pounds sterling, to be charged in ten distinct invoices.

"The goods and furniture to be of the best description, as selected by Mr Lewis Jefferis, and to be approved of by myself both as to quality and value. I agree to pay you the sum of £4000 on the 1st June 1878, and the balance of £6000 on the 24th June 1878, or as soon as the furnishing of hotel shall be completed. It is quite understood that the balance for the furnishing is to be paid by Mr Jefferis."

Subsequently, on 9th March, this letter was confirmed by Duncanson himself at Green & King's request. Green & King made use of these letters to obtain overdrafts from their bankers.

Furniture commenced to be sent to the hotel in March 1878, and by 31st May, when Duncanson paid Green & King £4000 to account, furniture to a greater value than that sum was in the house. The furniture, with the exception of a few articles, was all in the hotel by the end of June, and on 1st July the hotel was opened by Jefferis, Duncanson on that day handing over possession of the house and the furniture invoiced to him. Duncanson subsequently, on July 3d and August 2d, paid Green & King two cheques for £3000 each, making up the balance of the £10,000.

The leases and agreement entered into between the parties were all executed on 1st and 16th August 1878, and were shortly in the following terms:—1. *Lease of the hotel.*—By this Duncanson let Jefferis the hotel for twenty-one years, with breaks at seven and fourteen years, the

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No. 106. tenancy to commence nominally as at Whitsunday 1878, but actually on 1st July 1878.

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2. *Lease of furniture.*—By this deed Duncanson let to Jefferis “all and whole the furniture enumerated in the inventory thereof annexed and subscribed as relative hereto, to be purchased” * by Duncanson and placed in the hotel, “and that for the period of ten years from and after Whitsunday 1878.” It was provided that in the event of Jefferis becoming notour bankrupt during the currency of the lease, Duncanson could by a written notice declare the lease null and void, and so bring it to an end, and regain possession of the furniture. Jefferis bound himself to pay a yearly rent of £500, but for the year 1878, as his tenancy was only to commence on 1st July, he was only to pay £454, 15s. 11d. He was also taken bound to keep in good order and repair the furniture, and replace all broken or damaged articles.

3. *The agreement.*—By this deed (which was recorded for preservation and execution on 21st June 1879) it was provided, after a narrative of the leases of the hotel and the furniture, 1st, that Duncanson was to purchase £10,000 worth of furniture, which was to be divided into ten lots worth £1000 each, and to place the whole within the hotel by 24th June 1878.

2d, That Jefferis was to purchase a similar amount of furniture and place it in the hotel.

3d, That Jefferis was to purchase as at 15th May 1879, and so on each year until 15th May 1888, one of the ten lots of furniture put into the hotel by Duncanson, each at the price of £1000.

4th, That the rent of the furniture was to be reduced each year as each lot was paid for.

The other stipulations were to take effect if Jefferis took advantage of the breaks allowed in the lease of the hotel.

Jefferis continued to occupy the hotel until June 1880, when he was adjudicated bankrupt in the Bankruptcy Court in England. Baker Philip Daniels was appointed trustee on his bankrupt estate. Daniels having claimed the whole of the furniture in the hotel as belonging to Jefferis, Duncanson, on 26th June 1880, presented a note of suspension and interdict against his selling or removing the furniture inventoried in the list appended to the furniture lease between Jefferis and Duncanson. In the statement of facts the transactions and deeds above-mentioned were narrated, and it was contended that under them the furniture claimed was the property of Duncanson. Daniels stated in reply that the furniture was truly the property of Jefferis, and that Duncanson had merely advanced £10,000 towards payment of the price thereof. The deeds he alleged were executed merely with a view to create a security for that advance, and that the lease of the furniture was merely a simulate transaction intended to confer a security upon Duncanson. The furniture, he stated, was not thereby let; it never belonged to Duncanson, and the lease was not acted on. He added,—“From June 1878 down to his bankruptcy Mr Jefferis had the sole control and use of the said furniture; he was holden and reputed as sole owner of the same, and he was dealt with by his present creditors upon the credit of such ownership. All this took place in the knowledge of the complainer.”

Duncanson pleaded;—(1) The furniture in question being the property of the complainer, the respondents are not entitled to sell or cause to be sold, or remove, or otherwise interfere with the same, without the complainer's consent. (2) The respondent, the said Baker Philip Daniels,

* As before stated, the drafts were adjusted and the deeds extended by the end of February, and before Duncanson had written to Green & King ordering the furniture.

having intimated his intention to remove the said furniture, and dispose of it without the complainer's consent, to the complainer's serious loss, suspension and interdict ought to be granted as craved. No. 106.

Interim interdict having been granted, Daniels pleaded ;—(1) The furniture libelled being part of the bankrupt estate of Mr Jefferis, the note should be refused, and interdict recalled. (2) *Separatim*, Mr Jefferis having been reputed owner of the said furniture, the present application cannot be maintained. Mar. 4, 1881.
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A proof was led, from which, in addition to what has been above stated, the following facts appeared :—Messrs Green & King, the furnishing firm, although they had received letters from Duncanson and his manager ordering the furniture, and had also received payment of £10,000 from him, in their books entered all the furniture against Jefferis, and credited him with the payments made by Duncanson. Mr King, the partner who conducted the whole transaction, deponed that he always looked on Jefferis as the customer and proprietor of the furniture, and that he understood that Duncanson was only advancing the money to him to enable him to furnish the hotel. When the furniture had been placed in the hotel, Green & King prepared an invoice to Duncanson of furniture alleged to be of the value of £10,000. Duncanson had had this invoice checked by practical men, and on their report objected that the prices put on the furniture were too high, and in consequence the goods invoiced to him did not really represent £10,000. After some demur on the part of Jefferis this point was yielded, and the furniture of twenty-one additional rooms was added to the invoice. From this invoice the inventory was made out which was annexed to the lease of the furniture. This addition to the invoice was made in June before Jefferis was in possession of the hotel and furniture. Jefferis deponed that although he had meant all along to act in good faith with Duncanson, still that he had understood the transaction to be a security one, and not a purchase by Duncanson and lease to him.*

On 17th January 1881 the Lord Ordinary (Lee) pronounced this interlocutor :—“ Finds that the bankrupt Lewis Jefferis obtained possession of the furniture in question under and by virtue of an agreement with the complainer to take a lease of the Grand Hotel, Glasgow, in which it was placed, and to become tenant also of said furniture, in terms of the two leases Nos. 5 and 6 of process, and relative agreement No. 6/1 of process, and that at the date of his bankruptcy the possession of the said Lewis Jefferis was due to the contract of lease therein contained : Finds it not proved that the bankrupt Mr Jefferis was at the date of the bankruptcy the owner or reputed owner of said furniture ; therefore repels the respondent's pleas in law, suspends the proceedings complained of, interdicts, prohibits, and discharges the respondent as craved from selling or causing to be sold, or removing or otherwise interfering with any of the articles enumerated in the inventory or list appended to said lease, No. 6 of process : Declares the interdict formerly granted perpetual, and decerns.”†

* Jefferis paid the stipulated rent for the furniture at Martinmas 1878, Whitsunday 1879, and Martinmas 1879, and on 7th March 1879 he also paid £1000 as purchase price of lot No. 1.

† “ NOTE.—At the date when Mr Jefferis became bankrupt he was in possession of the furniture in question. It was situated in the hotel occupied by him, and if no distinct title of possession other than that of property could be instructed the trustee was well entitled to found on the presumption of law that possession of moveables presumes property.

“ But a distinct title was produced, in the shape of the two contracts of lease, dated in August 1878, and the relative agreement of same date. Upon the

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Daniels reclaimed, and argued ;—The transaction being really a security one, Duncanson had no such right over the furniture claimed by him as he

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strength of the definite contract thus instructed, the Lord Ordinary granted interim interdict in passing the note for the trial of the question. As, however, it appeared that Mr Jefferis had been in possession of the hotel, and of the furniture, prior to the date of the leases, and from the beginning of July 1878, and as it was alleged by the respondent that Mr Jefferis had been the real purchaser of the furniture, and that the lease was merely part of an arrangement for securing an advance on the furniture to the extent of £10,000, it appeared to the Lord Ordinary to be necessary that inquiry should take place concerning the original title of the bankrupt's possession, and that the complainer should lead in the proof.

"The result of the proof, in the opinion of the Lord Ordinary, is to shew that the arrangement embodied in the deeds of 1st and 16th August had been deliberately adjusted and agreed to by the parties before possession was obtained by Mr Jefferis, either of the hotel or the furniture specified in the inventory. And although the inventory was not fully completed till after 19th July, when the amended invoice was sent down by Messrs Green & King, the agreement under which Mr Jefferis obtained possession is proved to have been entirely consistent with the arrangement ultimately expressed in the formal deeds. Indeed, the deeds themselves had been adjusted in draft some time previously, and the only thing that prevented the execution of them before possession was given was the fact that the inventory of furniture was not completed.

"It is true that the object of the arrangement, as adjusted and expressed in the deeds, was to enable Mr Duncanson to give Mr Jefferis assistance to the extent of £10,000 in furnishing the hotel. But it is not proved that that assistance was to be given in the shape of an advance to Mr Jefferis to be secured over the furniture. On the contrary, the Lord Ordinary thinks it proved by the correspondence, and by the evidence of Messrs Cowan and Mitchell, that the form in which such assistance was to be given, according to the agreement of parties, was that Mr Duncanson should purchase furniture for the hotel to that amount, and grant a lease of it on the terms ultimately expressed in the formal deeds. Mr Jefferis' letters of 29th December and 2d January, and Mr Duncanson's letter of 16th February, shew that there was no misunderstanding on the point; and the evidence of Messrs Cowan and Mitchell proves that the deeds were adjusted with the knowledge and authority of all concerned, in the shape in which they were put, for the very purpose of enabling Mr Duncanson to give the required assistance in the form most favourable for himself, and so as to give him as effectual a hold of the furniture as possible.

"After all that has taken place, therefore, the question comes to be, what is the import and effect of the contract embodied in the lease and relative agreement? The Lord Ordinary has not arrived at the conclusion that the dispute resolves into this question without full consideration of the evidence adduced, and satisfying himself that possession was obtained under an obligation *bona fide* undertaken by Mr Jefferis to execute such a contract. But he refrains from any discussion of the evidence as unnecessary. The fact that Mr King considered Mr Jefferis to be the purchaser of the furniture (assuming it to be the fact), appears to him of very little consequence, because the question is, what was the fact? And that depends not upon Mr King's opinion, but on the contract between Mr Jefferis and Mr Duncanson, and the actings of parties. Mr King's reason for his opinion accordingly shews, that what he went upon was, that he got the order through Mr Jefferis, and that Mr Jefferis selected the furniture. Mr Duncanson's letter of 4th March, however—confirmed on 9th—shews that Mr King must have known, that as between the parties Duncanson was the giver of the order, and Jefferis was to select the furniture, subject to his approval. The Lord Ordinary cannot take it off the hands of Mr King that he did not supply any goods to Mr Duncanson on the faith of the letter of 4th March, and that that letter was only intended for Mr King's bankers. He thinks that Mr King, having got that letter and acted on it, both in getting

set up. The law of Scotland did not admit of a security over moveables without possession.¹ The transaction was not of the nature which the

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advances from his bankers, and ultimately in getting payment from Mr Duncanson of the price of the furniture as therein promised, cannot be permitted to repudiate it. It is quite true that the hotel furniture had been ordered before the date of the letter of 4th March, but the footing on which it had been ordered was the same as therein expressed. This is clear from Mr Jefferis' letter of 2d January 1878. With regard to the form in which the transaction is entered in the books of Mr Jefferis the Lord Ordinary thinks that the point chiefly to be considered is the substance of the contract, which, in his opinion, was that for the purpose of enabling Mr Duncanson safely to aid Mr Jefferis in regard to the furniture there should be a purchase of furniture by him on his own account. The evidence of Mr Jefferis is, as a whole, perfectly candid, and quite consistent with this view.

"Much stress was laid upon the mode in which the furniture of twenty-one rooms was added to Mr Duncanson's invoice in the end of June. The Lord Ordinary has felt that the way in which this was done introduces an element of difficulty into the complainer's case which would otherwise have been absent. But the additional furniture having been transferred to Mr Duncanson's invoice before possession had been given it appears to the Lord Ordinary that any agreement to take possession under a lease of the articles, as specified in an inventory, must be applied generally to the whole. No distinction can well be made. Unless, therefore, the circumstances attending the addition of these articles could be held to give to the agreement a different complexion from that which it professes to bear, and to prove collusion or want of *bona fides*, it must depend on the contract, executed in terms of that agreement, whether it instructs a lease as the title of the bankrupt's possession, or a mere right in security of money lent. The Lord Ordinary is of opinion that the circumstances do not justify any conclusion that the deeds do not truly represent the contract of parties.

"Holding, therefore, that possession was obtained by Mr Jefferis under an obligation to execute a contract in terms of the lease No. 6, and relative agreement, the Lord Ordinary inquires, what is the import of that contract? It was contended for the trustee that it discloses a right of property in the bankrupt, and a mere security in favour of the complainer. If it be the true meaning of the instruments that the relationship of lessor and lessee should be apparent merely, the Lord Ordinary does not doubt that the real character of the lessee's right must receive effect. No reduction would be necessary, and in this case no ground of reduction is alleged. But it must be kept in view that if the tenant truly obtained possession under an obligation to enter into the contract the fact that the furniture was in the lessee's possession at the date of the contract is no reason for construing it against the relationship which it appears to create.

"The contract may be said to consist of three deeds, all of the same date—1st and 16th August 1878: (1) A lease of the Grand Hotel for twenty-one years from Whitsunday 1878, but containing clauses which shew that the tenant's occupation was to commence, and had commenced, only on 1st July, at a rent of £1500 per annum for the first three years, but rising ultimately to £2500 per annum; (2) a lease of certain 'articles of furniture, enumerated in the inventory thereof annexed,' for the period of ten years from Whitsunday 1878. The articles so described are referred to as 'to be purchased by the first party (Mr Duncanson), and to be placed in that portion of the building . . . let or about to be let by the first party to the second party.' But this form of expression is explained by the fact that the drafts had been adjusted some months previously. There is a declaration that if the lessee becomes notour bankrupt, the lessor should have power to bring the lease to an end, and to take possession of or re-let the furniture. The rent is to be at the rate of £500 per annum, equal to 5 per cent on £10,000. The lessee is to keep and maintain

¹ Heritable Securities Investment Association v. Wingate & Co., July 8, 1880, *ante*, vol. vii., 1094; Cropper & Co. v. Donaldson, July 8, 1880, *ante*, vol. vii., 1108; M'Bain v. Wallace & Co., Jan. 7, 1881, *supra*, p. 360.

No. 106. deeds would appear to set forth, and therefore the deeds could not be given effect to.

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the furniture in like good condition as he acknowledges to have received it, and to replace all articles broken or damaged, and the lessor is to have free access to inspect it at all reasonable times. It is stipulated that the lessee shall insure the said articles of furniture, and the furniture in said hotel belonging to himself, to the extent of £20,000; (3) an agreement relating to these leases, and narrating that the parties had each agreed to invest £10,000 in the purchase of articles of furniture 'to be placed in the said hotel as the furniture thereof, and the first party's share whereof is contained in the lease last before mentioned.' Thereupon the parties agreed that the furniture to be purchased by each of them should be placed in the hotel between 1st May and 24th June 1878, the lessor's share being specified as conform to inventory subscribed as relative to the furniture lease, and being divided into ten portions, each containing articles of furniture to the value of £1000. The lessee is taken bound to purchase one of said lots annually, commencing 15th May 1879 with lot number one in said inventory, and so on until 15th May 1888, at which date the whole ten lots would be purchased, and the lease would come to an end. It is provided that the several sums of £1000 so payable by the lessee to the lessor shall respectively bear interest at the rate of 5 per cent from the respective dates of payment during the non-payment thereof, 'but declaring that no sale of any portion of the said furniture shall take place until payment of the price thereof, the said respective lots of furniture remaining the property of the said first party or his assigns until payment of the respective prices thereof, as above provided; but on payment of the price of each of the said respective lots, the property of such lots so paid for shall *ipso jure* vest in and belong to the second party or his assigns absolutely, and free from payment of the rent applicable thereto stipulated for, in, and the whole conditions of the said lease of furniture before referred to.' Provision is also made for a proportional reduction of rent upon each payment of £1000, and for the earlier payment of some of the lots in certain contingencies.

"It appears to the Lord Ordinary that, although the arrangement expressed in these deeds may be an unusual one, there is nothing in it at all inconsistent with the idea of a *bona fide* contract of lease being the true title on which the lessees held possession of the furniture. And he is of opinion that, assuming the deeds to represent the true contract of parties, there is no reason in law why that contract should not receive effect according to its terms. That the complainant and the bankrupt were both desirous to make the best arrangement possible for starting the new hotel; that the bankrupt had not the means himself to provide the requisite furniture; and that one object in view was to enable the bankrupt to become the tenant, and to occupy it, suitably furnished—seem to account sufficiently for the form of the contract. But none of the facts contradict or throw doubt upon the deeds as representing the truth of the contract between the parties. Can it be said, then, that there was anything unlawful in the arrangement? Was it beyond the power of the parties to arrange that the object in view should be effected by Mr Duncanson becoming the purchaser of the furniture to the extent of £10,000, and giving the intending tenant the use of it for a hire equal to five per cent on the price, with a stipulation that he should keep it in repair, and purchase it in lots annually. The Lord Ordinary knows no authority for such a view. He is of opinion that the law of Scotland allows a contract of that kind, if made in good faith, and that the cases of *Cowan v. Spence*, 21st May, 1824 (3 Sh. 28), *Wight v. Forman*, 10th December 1828 (7 Sh. 175), and *Orr's Trustees v. Tullis*, 2d July 1870 (8 M. 936), afford proof that the law will give effect to such a contract against creditors, if satisfied that it truly and honestly represents the engagements of the parties. The cases of the *Heritable Securities Investment Association v. Wingate*, 8th July 1880 (7 Rettie, 1094), and *Cropper & Co. v. Donaldson* (*ib.* 1108), were decided upon the ground that, according to the true meaning of the deeds, the transactions were not really of the nature of lease or hiring, but were securities

Argued for Duncanson ;—The arrangement come to was a perfectly legal one, and Jefferis being, in point of fact, tenant of the furniture of which Duncanson was proprietor, his creditors could have no such rights over it as were here claimed.¹

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LORD YOUNG.—We think it is not necessary to have any further argument in this case, which has been exhaustively argued for the reclaimer.

It raises an important question of law, but we think the case clear, and that the Lord Ordinary is right. The intention of the parties is not doubtful, and I venture to think it a pity that language should have been used for obscuring it, in the apprehension that by stating it frankly the legitimate position of the parties would be judicially affected. The relation of the parties was this—Mr Jefferis, an hotel-keeper in London, desired to become tenant of an hotel in Glasgow which the other party, Mr Duncanson, was in course of building, and which was in 1877 on the verge of completion. It was a great undertaking to open it and carry it on, but Jefferis was prepared for it. The hotel was so large that the only question was how much the purchase of the necessary furniture for it would exceed £20,000. Jefferis was not prepared to lay out so much, so in the course of the negotiation he told Duncanson that it would facilitate their arrangements if he could advance £10,000 for furniture. The tenant thus proposed that the landlord should accommodate him with £10,000 to furnish the house. In the result the landlord, Duncanson, agreed to do this provided that he should be satisfactorily secured. No security was available but the furniture itself, and Jefferis, who is an Englishman, being familiar with bills of sale and the inconveniences attending them under the statute, which requires that they should be registered, proposed that Duncanson should, if possible, be content with a security not involving any registered deed. But after an agreement as to that matter was come to, on applying to a Scotch man of business they were told that a security could not be thus granted in Scotland. A bill of sale is a written contract of sale, just as a bill of lading is a written contract of carriage, the word bill being equivalent to written contract. By the law of England a sale of moveables passes the property of the article sold, and so prior to the statute to which

for monies lent or acknowledged to be due, attempted to be created over moveables belonging to the debtor. The Lord Ordinary does not understand that the majority of the Judges differed from Lord Young upon the law. They took a different view of the facts; and, at all events, the Lord Ordinary holds that the decisions above referred to, and the case of *Marston v. Kerr's Trustee* (6 R. 898), make it clear that if the title of possession be a definite contract of hiring or lease, and be *bona fide* entered into, it is no objection to the contract that it enables the owner of moveables to give accommodation to an intending purchaser, by allowing him to hire the subjects in the meantime, and thus have the use and possession of them without ownership.

“The Lord Ordinary rejects, as inconsistent with the deeds, the contention that they instruct a present sale of the furniture by Mr Duncanson to Mr Jefferis, and that they contain no effectual condition suspensive of the transfer of property. He also repels as unsupported by evidence the plea of reputed ownership. And, for the reasons above stated, he is of opinion that the claim of the complainer has been established.

“It is right to explain that he delayed judgment, in order that he might dispose at the same time of another action raised by the complainer against the respondent, and arising out of the matters in controversy in this case.”

¹ *Cowan v. Spence*, May 21, 1824, 3 Sh. 28; *Wight v. Forman*, Dec. 10, 1828, 7 Sh. 175; *Orr's Trustee v. Tullis*, July 2, 1870, 8 Macph. 936, 42 Scot. Jur. 566; *Marston v. Kerr's Trustees*, May 13, 1879, *ante*, vol. vi., p. 898.

No. 106. I have referred a bill of sale of the borrower's furniture in favour of the lender passed the property to the lender and gave him a good security as on a property title. He became proprietor of the furniture just as if he had bought it, although he really only had entered into a contract of sale with the owner—a perfectly fair contract of sale—in which he was to be in the position of a buyer, limited if necessary to this, that he should not use those rights or that title to any further effect than to obtain payment of his money, with interest. But by the statute a bill of sale is required to be registered, and Jefferis was, at first, apprehensive of registration, lest that should affect his credit. I refer to that merely to interpret the letters, and to shew what was intended, viz., that there should be a loan, the lender being made proprietor of the furniture which his money was to purchase. If he had done that it is not doubtful (indeed it is conceded) that the furniture would have been his, and would not have passed to the creditors of Jefferis on his bankruptcy. But it is said, I think reasonably, that what was done was substantially the same. The tenant, who was to acquire the furniture, thought he would get it reasonably from Green & King, and the arrangement was that he (Jefferis) should order the whole £20,000 worth of furniture, and that Duncanson should put himself in the position of orderer to the amount of £10,000. That was assented to. It was very satisfactory to Green & King, for Duncanson became liable to them for £10,000 worth of it by his order. But the furniture was a *unum quid*, and the two purchasers desired Green & King to invoice £10,000 worth of it to Duncanson, sending it all to the hotel. Now, this was done, and to accomplish the transaction—we think a legitimate transaction—it was necessary to divide the £20,000 worth, and the parties to make the division were Jefferis and Duncanson, the only parties interested, and they did so by putting so much into the inventory as it was agreed that Duncanson should have a property title too. The only two parties interested agreed that that should be the position of affairs, and it is an observation of no value whatever that the articles were put into the inventory at lower prices than were to be paid to Green & King. That was a matter for the parties themselves.

Duncanson having paid the £10,000, and having the furniture representing it inventoried as his with the consent of Jefferis, proceeded to give Jefferis possession of it by lease, the rent to be paid being, according to the legitimate arrangement of parties, equivalent to interest at five per cent on the price paid by Duncanson for the thing leased. It was to be £500 a-year. That was the bargain. It was carried out by being reduced to formal deeds in July and August 1878, in pursuance of the agreement of parties, but these deeds expressed the arrangement which had been acted upon all along. I put the question during the argument—After all this had passed, after the furniture had been sent in and divided, and the inventory made, and the rent fixed and paid by the tenant, what, as between Jefferis and Duncanson themselves, was the title on which Jefferis held? There could be but one answer. Jefferis put his name to a deed, being *sui juris* and solvent, and in pursuit of a legitimate end, in which he says he holds £10,000 worth of furniture on a contract of hire. Who can say that that was not his position? If he could not say so, neither could his creditors. If he had been transgressing the bankrupt law, or committing any fraud, some one might have had a right to object; but it was a perfectly fair open transaction, and neither he nor his creditors, nor his trustee, who takes *tantum et tale* as he had, could object. The suggestion in such cases always is that there is something unfair to creditors. But how? Nobody is entitled to suppose that the

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tenant of a great hotel like this has the property of the furniture. It may be with him on hire. That is a matter for inquiry. The result of inquiry here would have been that Duncanson was proprietor and Jefferis lessee of this furniture. There was absolutely nothing in which the creditors of Jefferis were interested, and the case is undistinguishable from that of Duncanson going to his own tradesman and ordering the furniture, and sending it to the hotel. It would then have been in the hotel all the same, and Jefferis' possession would have been all the same. I am therefore of opinion—and I believe that is really the opinion of the Court—that here Jefferis held this furniture as lessee, or upon a contract of hire with Duncanson, and that, so far as he did not in pursuance of that contract purchase it and pay for it before his bankruptcy, it does not pass to his creditors or to his trustee, but remains the property of Duncanson.

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LORD CRAIGHILL and LORD LEE concurred.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

LOCKHART THOMSON, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

THE EARL OF SOUTHESK AND ANOTHER, Pursuers.—*D.-F. Kinnear—H. Johnston.*

No. 107.

INCH BLEACHING COMPANY AND OTHERS, Defendants.—*J. P. B. Robertson—Jameson.*

Mar. 5, 1881.
Earl of Southesk v. Inch Bleaching Co. &c.

Process—Issue—River—Nuisance.—In an action by riparian proprietors on the banks of a river, to prevent pollution by owners of mills on the river, and others, an issue was adjusted by the Lord Ordinary whether the defenders polluted the river “to the nuisance of the pursuers or their authors, or one or more, and which of them.” *Held* that the words “and which” were a departure from the ordinary style of issue, and should be struck out, *diss.* Lord Shand, who held that it was unnecessary to alter the issue adjusted by the Lord Ordinary, as with or without the words “and which” the issue was fitted to try the case.

THE EARL OF SOUTHESK, the EARL OF DALHOUSIE, and A. KENNEDY 1ST DIVISION.
ERSKINE, of Dun, riparian proprietors on the river South Esk, raised an Lord Adam.
action of declarator and interdict against the Inch Bleaching Company, B.
and other manufacturers in Brechin, and also against the Commissioners of Police of the Burgh of Brechin, to have them prevented from polluting the river South Esk. The whole defenders other than the Commissioners of Police made offer to construct remedial works, on time being allowed them for that purpose.

The Lord Ordinary adjusted this issue for the trial of the case between the pursuers and the Commissioners of Police:—“Whether, between the 11th day of June 1877, and the 11th day of June 1880, the Commissioners of Police of the Burgh of Brechin did, by discharging sewage or other impure matters, or permitting sewage or other impure matters to be discharged from the sewers or drains under their charge, at or near the burgh of Brechin, into the Skinners Burn, the Den Burn, and the Glencaldham Burn, or one or more of them, before their confluence with the river South Esk, and into the said river South Esk itself, pollute the water of the said river South Esk, to the nuisance of the pursuers or their authors, or one or more, and which of them?”

The pursuers moved the Court to vary the issue by deleting therefrom the words “and which.” They contended that the words were unnecessary, and contrary to the established form of issue in similar cases.¹

¹ Duke of Buccleuch v. Cowan, &c., Feb. 13, 1864, 2 Macph. 653, 36 Scot. Jur. 311, Dec. 21, 1866, 5 Macph. 214, 39 Scot. Jur. 152.

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The defenders maintained that the three pursuers were very differently situated with regard to nuisance from the town sewage,—Lord Dalhousie being chiefly above the town, Lord Southesk some little distance below, and Mr Erskine as much as six miles below, where it was impossible he could receive any appreciable injury from them. Each pursuer must prove his own case independently of the others, and if he failed the defenders were entitled to a verdict in their favour *quoad* him, with expenses. The words “and which” were therefore necessary to bring the case properly before the jury.

The pursuers offered to withdraw Mr Erskine's name from the issue, as in the question with the Police Commissioners he was not materially interested. This was accordingly done.

LORD PRESIDENT.—I think the issue should be “to the injury of the pursuers or their authors, or one or other of them.”

LORD DEAS concurred with the Lord President.

LORD MURE.—My opinion has been distinct from the first that the words “and which” should be deleted from the issue. Their insertion is a departure from the style of issue on which cases of a similar description have been satisfactorily tried, and I think the Lord Ordinary ought not to have allowed them to be inserted in it, unless on some special grounds. No such cause, however, has been shewn; and, as they are not necessary, I think that they are just as likely to confuse as to assist the jury.

LORD SHAND.—I confess I think this reclaiming note a most unnecessary and unreasonable proceeding. It is perfectly obvious that unless the jury should find a verdict for all the pursuers they must specify by name the particular pursuers to whose injury the nuisance or pollution was caused, and if the Lord Ordinary thought it would tend to clearness to bring this out by adding the words “and which of them,” I can see no reason for interfering with what he has done, and certainly nothing worthy of being called a reason has, in my view, been stated in support of the reclaiming note. The issue as adjusted appears to me to be quite as well fitted to try the case as that proposed by your Lordship, and the counsel for the pursuers have been altogether unable to suggest any possible mischief or disadvantage to the pursuers by leaving the issue as it is. I should have thought and said the same if the Lord Ordinary had preferred the words proposed by your Lordship, for under that issue also the jury must specify particular pursuers if they do not find in favour of all of them. But to alter the words of the issue settled by the Lord Ordinary, when no reason affecting its substance can be stated, appears to me to be simply giving encouragement to expensive procedure for no end. I am for refusing the reclaiming note, and leaving the issue in the terms of which the Lord Ordinary has approved.

THE COURT pronounced this interlocutor:—“Remit to the Lord Ordinary to alter the said issue by striking out the words ‘more, and which,’ and substituting the word ‘other’ in their place, and to proceed farther as shall be just.”

MACKENZIE & KERMAK, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 108.

Mar. 5, 1881.
 Mackenzie v. Mackenzie.

MRS MACKENZIE, Petitioner.—*Sol.-Gen. Balfour—J. P. B. Robertson.*

MACKENZIE, Respondent.—*Asher—Mackintosh.*

Parent and Child—Access to child by mother living separate from husband.—A lady who had left her husband presented a petition to the Court praying

their Lordships to regulate the terms on which she was to have access to her only child, two years of age, who remained with its father. Petition *dismissed*, on the ground that the lady had left her husband without any good or sufficient reason in law.

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2D DIVISION.
R.

MRS MACKENZIE presented this petition to the Inner-House, praying their Lordships to find her entitled to access to her only child. The narrative of the petition contained the following statements: Mr and Mrs Mackenzie were married on 26th June 1877, and a daughter, the child in question, was born on 1st March 1879. Mrs Mackenzie averred that ever since her marriage her husband had treated her with "much neglect and unkindness." In February 1880, as she stated, "on the suggestion of and with the full consent of her husband," she went to stay with her parents in England, leaving her child with her husband at their home in the north of Scotland. Shortly after her departure her husband left his own house and went with the child to live with his mother in the neighbourhood. Mrs Mackenzie, in the meantime, had been unwell, but on 5th June she wrote, offering to return to her home and rejoin her husband and child, and making certain proposals as to contributions to be made by her out of her separate income—her fortune having been settled on herself. Mr Mackenzie answered, declining the proposed pecuniary arrangements, and offering to receive her in his mother's house. Mrs Mackenzie thereafter, on 1st July, went to her mother-in-law's house, where she remained until 4th August, when "certain painful circumstances" occurred "which compelled her to leave." She thereupon took a residence within two and a-half miles, and applied through her legal advisers that arrangements should be made for her obtaining access to her child. The result of this was that her husband stated he was prepared to permit her to see her child for an hour three times a-week at his mother's house, on condition of her coming unaccompanied, and of the child being attended by either its nurse or its grandmother. The petition then proceeded,—“The petitioner does not dispute that in law the custody of her child belongs to its father, subject to her right of access to it, but she considers that, taking into consideration her being prepared to isolate herself in this remote part of Scotland, many hundred miles from any of her own relations, where she has taken and furnished a residence, and will there have to keep a suitable establishment for the one object of being able to see her child, from whom she has now been separated for a year, with the exception of a few weeks, the access now offered is insufficient, and is hampered with conditions which ought not to be imposed upon her, and she now craves your Lordships to make such regulations as shall seem to you good for securing to the petitioner adequate access to and means for enjoying the society of her only child. The petitioner has throughout been desirous of being reconciled to her husband, and has made overtures more than once with that view, but hitherto without success. The petitioner is still wishful to effect a reconciliation with her husband, but in the meantime, and until that can be effected, she is naturally desirous of enjoying the company of her child so far as the law permits.”

The petitioner prayed their Lordships “to find that the petitioner is entitled to free access to her child, the said Mary Thyra Mackenzie, at all reasonable times, and in particular that she is entitled to have the said child sent to her at her own house for two whole days in each week, to be fixed by your Lordships, and is also entitled to have access to her company on the other days at all reasonable times during the day at the grandmother's house, or where the said child may be for the time, and that in either case outwith the presence of its father or his mother, or any one on their behalf.”

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Mr Mackenzie lodged answers to this petition, in which he repudiated the charges of neglect and unkindness. He also stated that before her departure to England in February Mrs Mackenzie had formed a design for removing the child with her without his knowledge. He explained that after Mrs Mackenzie's departure their marriage-contract trustees had withdrawn her separate income, and otherwise made calls upon his resources which had so crippled him that he had to break up his own establishment and go and live with his mother. He denied all responsibility for the "painful occurrence" alluded to in the petition, but which was not otherwise explained or referred to in greater detail, and concluded with a judicial offer to receive the petitioner as his wife at his mother's house, his mother having offered to take up her residence elsewhere in the meantime. On the whole matter, he submitted that the petition ought to be dismissed as altogether unnecessary. The correspondence between the parties was printed and boxed to the Court, but was not otherwise made public.

LORD YOUNG.—We do not think it necessary to call for an answer. We have read the petition and answers, and also the correspondence which has been printed and laid before us, and we are of opinion that the course taken by the counsel for the petitioner is to be commended,—that is, in abstaining from stating the cause of the disagreement, or referring to the letters, which it is desirable should not be published. The separation has not been of so long duration as to destroy all hope of the parties coming together again. Indeed I am inclined to entertain sanguine hopes that they will. I will not go into the terms of the correspondence, as to do so would be not for but against the interest of the parties.

This lady has been living apart from her husband, and she declines to return to him, although she has been invited, and affectionately invited, to do so.

In the absence of evidence to the contrary, we must assume that her absence from her husband is not legally warranted. In another than a legal point of view there may be more or less of excuse for her, but legally—and we must regard her conduct from the legal point of view—she is not doing her duty in living apart from her husband and child. The fact of her removing her separate income is not in her favour. She has thereby compelled her husband to break up his own establishment and go and live with his mother, whose only son he is. She has been invited to come and live in her mother-in-law's house, but declines to do so unless she is to be the mistress of the house. We consider that demand not legally warranted. As far as we can judge from the correspondence we are inclined to sympathise to a large extent with the husband, and to hold that the wife is not legally warranted in absenting herself in such circumstances. We know of no authority empowering a wife so deserting her husband and child to apply to the Court for access to the child. It is unnecessary to go more into detail. Our opinion is that the petition is not legally maintainable, and ought therefore to be refused. The affectionate terms of the husband's letters precludes the idea that he, in any spirit of vindictiveness, or from any other motive not to be commended, will deny access to this child on the part of its mother. This child may eventually be a bond to bring the spouses together again.

The petition will be refused.

LORD CRAIGHILL and LORD LEE concurred.

THE petition was refused.

MACKENZIE & BLACK, W.S.—ADAM & SANG, W.S.—Agents.

THE FACULTY OF ADVOCATES AS TRUSTEES OF CHALMERS'S HOSPITAL
FOR SICK AND HURT, Pursuers.—*D.-F. Kinnear—Thorburn.*
THE LORD PROVOST AND MAGISTRATES OF THE CITY OF EDINBURGH,
Defenders.—*Asher—Mackay.*

No. 109.

Mar. 8, 1881.
Chalmers's
Hospital v.
Magistrates
of Edinburgh.

Public burden—Burgh assessments—Public charity—Liability of charitable hospital for assessments—Edinburgh Municipal and Police Act, 1879 (Stat. 42 and 43 Vict. cap. 32.)—"The Edinburgh Municipal and Police Act, 1879," sec. 70, exempted from burgh assessment "any house or building which is solely occupied for purposes of public charity, or any premises exempted from taxation by public law." The directors of a charitable hospital in Edinburgh, in order to extend the usefulness of the hospital, opened certain additional wards—which they had otherwise not sufficient funds to support—to patients who should pay 3s. per day for board. Held that the fact that certain patients contributed to the cost of their own maintenance did not deprive the hospital of the character of a building "solely occupied for purposes of charity," and that it was entitled to exemption.

THE following narrative is taken from the Lord Ordinary's note:—^{2D DIVISION.}
"Mr George Chalmers, who died in 1836, left the residue of his estate to the Dean and Faculty of Advocates for the purpose of founding a new infirmary or sick and hurt hospital. ^{Lord Adam.}
^{R.}

"The Dean and Faculty accepted the trust, and in 1863 they erected the buildings now occupied as 'Chalmers's Hospital for Sick and Hurt.' The building contains four wards—one for males and one for females on the lower storey, and the same on the upper storey. Each ward affords accommodation for eight patients.

"There are no limitations as to the persons who are admitted to the benefits of the charity. All kinds of surgical cases are admitted, and all kinds of medical cases except certain cases of infectious disease.

"When the hospital was opened in 1863 the funds at the disposal of Chalmers's Trustees were insufficient to enable them to make use of all the wards, and the two lower wards only were used. In the year 1870-71 the trustees fitted up and furnished the two upper wards for the benefit of those who could afford to contribute to the expense of their board. The sum which they contribute is 3s. a-day.

"The daily average number of patients in the paying wards for the years 1877, 78, 79, was four, five, and eight respectively, and the sums received for their board in these years respectively were £209, 14s., £241, 4s., and £434, 5s."

In 1879 the Magistrates of Edinburgh obtained a new Municipal and Police Act, stat. 42 and 43 Vict. cap. 32. Under the 70th section of this Act it is provided as follows:—"The burgh assessments shall not be imposed in respect of the Royal Palace of Holyrood, Queen's Park, Arthur's Seat, Duddingston Loch, nor houses or buildings in the Castle of Edinburgh; nor the Courts of Justice, General Register House, City Chambers, County Buildings, Prison of Edinburgh, nor the University of Edinburgh and the buildings connected therewith, except those parts which are used as houses; nor the Royal Infirmary, the Royal Edinburgh Hospital for Sick Children, nor the Assembly Hall of the Church of Scotland, the Free Church College, the Free Church Assembly Hall, the Synod Hall of the United Presbyterian Church and the buildings connected therewith, so long as these shall continue to be solely used for ecclesiastical purposes, or shall not be let for hire for other purposes, except those parts which are used as houses; or in respect of any house or building which is solely occupied for purposes of public charity, or any premises

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exempted from taxation by public law ; and the public parks, gardens, and bleaching-grounds, drying-grounds and grounds, public buildings, public wash-houses, baths, gymnasiums, open spaces, the police offices, station-houses, and other buildings or grounds connected with the police establishment, or provided or upheld out of the burgh assessments, shall be exempted from the payment of such assessments, and the said police offices, station-houses, houses, and other buildings or grounds connected with the police establishment shall also continue to be exempted from the payment of all cess or poor-rates imposed or to be imposed."

In September 1879 the burgh assessor for the first time included Chalmers's Hospital in the assessment-roll, and notice setting forth the assessments imposed upon the building and grounds of the hospital was sent to the directors. The directors, through their agent, objected to being assessed, on the ground that the hospital was a public charity, but their objection was overruled by the Magistrates. The directors then, on 6th May 1880, raised an action against the Magistrates, concluding for declarator " that the building or premises called and known as ' Chalmers's Hospital for Sick and Hurt,' situated in Lauriston Place, Edinburgh, are, in respect to assessment under the ' Edinburgh Municipal and Police Act, 1879,' a house or building solely occupied for purposes of public charity within the meaning of the 70th section of said Act, and are within the meaning of said section premises exempted from taxation by public law ;" and that the Magistrates were not entitled to impose assessments on the hospital.

There was also a conclusion for interdict against payment of the assessments already laid on being enforced.

The Magistrates defended the action.

A minute of admissions was adjusted, which bore :—" 5. That no charge is made for the accommodation and treatment of patients in the hospital, except in the case of—(1) pauper patients, who are paid for at the same rate as in the Royal Infirmary of Edinburgh by the inspector of poor of the parish to which they are chargeable, but no such pauper patients have been in the hospital since 1864 ; (2) the patients in the two upper wards ; and that in no case are any fees or gratuities allowed to be taken, on any pretence, by any one connected with the hospital, from any patient or the friends of any patient. 6. That the two upper wards (male and female), each affording accommodation for eight patients, are set apart for the benefit of persons who require hospital treatment, and are able to make some contribution ; and that the patients in said wards are admitted in the same manner, and under the same conditions, except as regards payment, as the patients in the other wards. 7. That the funds of the hospital do not admit of the said two wards being kept open unless the patients in them make some contribution. 8. That the acting physician and the acting surgeon, as well as the house surgeon, give their services gratuitously (with this exception, that the house surgeon is provided, without payment, with apartments, board, and attendance in the hospital). 9. That the average annual number of patients treated in the hospital during the last five years ending 31st December 1879 has been 267, of whom 32 on an annual average have contributed 3s. a-day during their stay in the hospital for their board ; and that the average number annually treated in the waiting-room and surgery of the hospital as outdoor patients during said period has been 2138, none of whom have contributed towards the funds of the hospital ; and that a few donations to the hospital have been voluntarily made by patients and their friends, amounting to about £17 a-year. 11. That property and income-tax paid or retained from the revenue of Chalmers's Hospital is returned by the Government, on the

ground that Chalmers's Hospital is an institution exempt from property No. 109. and income-tax under the statutes regulating said tax, and that applications for the return of the sums paid as property and income-tax are made by the trustees of Chalmers's Hospital every three years. 12. That inhabited house-duty is not paid by the trustees of the hospital. 13. That land-tax is paid by the trustees of Chalmers's Hospital in respect thereof, and that the parochial assessment for the repair of the church of St Cuthbert was also paid by them in 1879 in respect thereof. 14. That the amount of the hospital expenditure in the years ending 31st December 1877, 31st December 1878, and 31st December 1879 respectively, was £1381, £1540, and £1753. 15. That the sums received for board for the years ending 31st December 1877, 31st December 1878, and 31st December 1879 respectively, were £209, 14s., £241, 4s., and £434, 5s."

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From abstracts prepared by the treasurer of the hospital it appeared that on no occasion since the hospital had been open for paying patients had the sum of 3s. per day for each patient been sufficient to meet the expense incurred in their maintenance.

On 15th February 1881 the Lord Ordinary assoilzied the defenders from the conclusions of the actions.*

* "NOTE.—The question in this case is whether the buildings known as Chalmers's Hospital are liable to have burgh assessments imposed upon them under 'The Edinburgh Municipal and Police Act, 1879.' That, again, depends upon whether or not they are solely occupied for purposes of public charity, or are exempted from taxation by public law. In either of these cases they will fall within the exceptions specified in section 70 of the Police Act, and will be free from the imposition of such assessments; otherwise they will be liable to assessment.

"The facts which raise the question are these—(Quoted in narrative).

"It appears to the Lord Ordinary that hitherto the trustees have not derived any profit from these paying patients, as from the smallness of their numbers the expense which they occasioned is considerable. Were these patients to become more numerous the Lord Ordinary thinks that the result would probably be different, and that the present rate of charge would probably yield a surplus. It also appears that so long ago as in 1864 some pauper patients were sent to the Infirmary by the Parochial Board, for whom payment was made. But that has not occurred since, and, the Lord Ordinary thinks, may be left out of view in the present question.

"The Lord Ordinary accordingly thinks that the question truly at issue is whether the use which is thus made of the hospital for paying patients takes it out of the category of buildings solely occupied for purposes of public charity.

"That the scheme which the trustees have thus initiated is a most benevolent and excellent one the Lord Ordinary does not doubt. It no doubt has proved of the greatest benefit to the persons who, as appears from Mr Crichton's evidence, have already taken advantage of it, and the Lord Ordinary has no doubt that, as it becomes better known, it will be more extensively made use of.

"If this result be obtained the Lord Ordinary thinks that the success will probably be attributable to the fact that those who make such use of the hospital are making a return for the benefits derived from it, and will not regard it in the light of an institution from which they are receiving charity. In order to be exempt from assessment the buildings must be solely used for purposes of public charity. The case may be taken, therefore, as if the hospital were solely used for paying patients. The Lord Ordinary has the greatest difficulty in seeing that such an institution could be considered as a 'public charity.' The rate of board charged—3s. a-day—must necessarily exclude the immense majority of the public, and all the most necessitous.

"The word 'charity' has a wider and a more limited meaning. In its wider

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The directors reclaimed. Argued for them;—(1) The Lord Ordinary had taken too narrow a view of what constituted a charity. Here the charity consisted in giving the sick and hurt gratuitous medical and surgical treatment, including drugs, nursing, surgical appliances, and attendance. If all the patients treated could be so treated without food this would be done, but that was impossible, so in order to make the charity reach as far as possible these small sums were taken from a comparatively very limited number of patients, in order that they might get the benefit of the medical and surgical skill supplied by the charity. The true definition of a "public charity" was a charity managed either by a public body or by trustees, as opposed to a private individual charity. Any charity which could not be put an end to by the caprice of a private individual was a "public" charity.¹ (2) This hospital was exempted from taxation by public law. The Legislature exempted from taxation under local statutes all properties which were exempted from imperial taxation. That was the position of Chalmers's Hospital.

Argued for the Magistrates;—(1) The hospital could not be held to fall under the exempting clause (a), because it was no longer used "solely" as a public charity; and (b) because even if it could still be called a charity it was no longer a "public" charity. It did not matter that no profit was made out of the charges for board. If any revenue was drawn it ceased to be a public charity. That, at all events, was the rule in

sense all benevolent schemes and institutions may be considered as charitable schemes and institutions, and in this sense the scheme of the trustees is a charitable one. But in its more limited sense charity means relief given to the poor gratuitously; and the Lord Ordinary thinks that in this Act of Parliament the word is used in this more limited sense. The Lord Ordinary has already said that in this case no profit is at present derived from the paying patients. Were it otherwise, he does not suppose that it could be contended that this, or any similar institution, was solely a public charity. He does not see that its character as a public charity can depend upon the fact of whether or not, in any particular year, the contributions of the patients did or did not meet their expenses, or that any inquiry could be gone into on that matter. He thinks that there is involved in the idea of public charity that there shall be no return in money for the relief or benefit given. He is, therefore, of opinion that the hospital is not exempt from assessment in respect that the buildings are solely used for purposes of public charity.

"The next question is whether the hospital buildings are premises exempt from taxation by public law. The pursuers contend that the buildings are exempt from taxation by public law, because they are exempt from taxation under the statutes relative to the House-Tax and the Property and Income-Tax Acts. The Lord Ordinary does not think that the meaning is to exempt from assessments buildings that may be exempt from taxation under any particular statute or statutes. He thinks the meaning is that they shall be exempt from taxation by public or general law, apart from statute—as, for example, property in the occupation of the Crown, or of persons using it exclusively in or for the service of the Crown. After the decision in the case of the *Mersey Docks*, 3 Macph., H.L., p. 102, note, it may be difficult to say that any other class of property falls under this exemption, but in the opinion of the Lord Ordinary it is to property so exempted that the exception in the 70th section of the Police Act is intended to apply.

¹ The Queen v. St George, &c., May 1st 1847, 16 L. J. Mag. Ca. 129; Manchester School Case, May 13, 1867, L. R. 2 Chanc. App. 497; *in re Latymer's Charity*, Jan. 29, 1869, L. R. 7 Eq. 353; *Macdonald v. Massachusetts General Hospital*, June 1876, 21 American Rep. 529; *Reformatory of Glasgow v. Commissioners of Maryhill*, Nov. 26, 1880—(Outer House judgment by Lord Curriehill, *not reported*).

England as regarded poor-rates.¹ The fact of taking in paying patients put this hospital out of the category of public charities.² (2) The contention that this hospital was exempted by public law could not be maintained in the face of the cases already quoted. Such an exemption only extended to Crown property.

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LORD JUSTICE-CLERK.—This case has been very carefully considered by the Lord Ordinary, and ably argued to us. It involves the construction of a recent statute, and the result may reach very far however we may decide it. This makes the case one of importance, although no very large question is involved, nor one accompanied with much intricacy.

The question arises under the following circumstances. The late Mr Chalmers, who died in 1836, left the residue of his estate to the Faculty of Advocates for the purpose of founding "a new infirmary or sick and hurt hospital." The Faculty accepted the trust, and, through managers selected from the body, prepared and carried through a scheme for the erection of such an hospital as was indicated by the testator. The question we have now to decide is whether the bequest which has now been carried into effect by the erection of a building and the framing and execution of a scheme of management which has been found to be of great public benefit for a number of years is or is not a charity. In order to decide that we must find some definition for the word "charity." It seems to me that a charity is the application of funds for a benevolent purpose for the benefit of those who would not otherwise be able to supply themselves with the advantages so put within their reach. I do not think a closer definition is necessary. The funds must not be expended for profit or for pleasure and amusement only. If that be even an approximate definition then Chalmers's Hospital is a charity in every sense of the word. The next question for us to consider is, is it a public charity? It may be argued that to be such it must be supported by public money. But I do not think that a large hospital such as St Thomas's in London, or this Chalmers's Hospital, are public in any other sense than that they exist only for the benefit of the public. That being so, the question arises, does the 70th section of the recent Edinburgh Municipal Act of 1879 affect this hospital? That section provides that certain buildings and properties belonging to the Crown, and some public bodies, shall be exempted from municipal taxation, adding, "and the buildings connected therewith, except those parts which are used as houses." It then goes on to exempt the Royal Infirmary, &c. and certain ecclesiastical buildings, but again adding, in connection with the latter class of buildings, "so long as these shall continue to be solely used for ecclesiastical purposes, or shall not be let for hire or other purposes, except those parts which are used as houses." Then comes the part of the section which we have now to construe, "or in respect of any house or building which is solely occupied for purposes of public charity or any premises exempted from taxation by public law." Now, the question comes to be, is this hospital "a house or building solely occupied for purposes of public charity"? As I indicated in the course of the debate I think that "solely" there means that no part of the building is used so as to make it rateable as in the case of

¹ The Queen v. Sterry, 1840, 12 Adolph. and Ellis, 84.

² St Thomas's Hospital v. Stratton and Others, March 1, 1875, L. R. 7 H. L. Ca. 477; Mersey Docks Board v. Jones, June 22, 1865, L. R. 11 H. L. Ca. 443, 3 Macph., H. L. 102, note; Greig v. Edinburgh University, June 8, 1868, L. R. 1 H. L. Sc. 348, 6 Macph. H. L. 97, 40 Scot. Jur. 520; The King v. St Giles, May 5, 1832, 3 Barn. and Adolph. 573.

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public or ecclesiastical buildings. That I take to be the meaning of "solely" here, because there are no other words in the clause which are appended as a qualification to the use of the other buildings mentioned. The construction put upon the wording of this special part of the section by the Magistrates is that no one shall be relieved in the hospital who can in any way contribute to their own maintenance.

The lower wards in this hospital we find contain patients who pay nothing at all, and those in the upper wards pay 3s. a-day for their board, but the directors supply them with medical attendance, drugs, nursing, and all the other advantages of the hospital, gratuitously. It is said this is not fulfilling the purposes of a public charity, because part of what the patients in the upper wards receive is not supplied out of the donor's funds, but out of their own. That is, I think, a very narrow view. It is plain that this receiving of paying patients was resorted to by the directors to enable them to use all the wards in the hospital, which they could not have done with the funds at their command unless something was paid for board by those patients who could afford to do so. The charge is 3s. a-day, which costs the patients no more than if they bought their own food. This in no wise resembles an extraneous use of part of the building for boarders. But, it is argued, the amount of public charity bestowed altogether is infinitesimal. Now, I find from the returns of the hospital that during the last five years an annual average of 267 patients have been treated in this hospital, of whom not more than an average of 32 have been so-called paying patients, and, in addition, the annual average of out-door patients has been 2138. I do not think that that can be called an infinitesimal contribution to public charity, or that the proportion of paying patients, or the element of their being treated, can in the slightest degree alter the character of this charity. I am therefore of opinion that this hospital falls under the exemption as a public charity.

LORD YOUNG.—I am entirely of the same opinion. The law of the matter can really be put in a single line, whether or not this building "is solely occupied for purposes of public charity." With your Lordship, I am clearly of opinion that it is so, and that notwithstanding that a small daily payment is taken from some of those who are recipients of the charity.

I agree that "solely" here is not meant to touch a case like this, where small daily payments are taken from some of the patients, but has the plain meaning that no part of the building is to be occupied otherwise than for charity.

We have nothing to do with the political economy of the question here. If we had, I would sympathise with the Magistrates in trying to bring all the subjects they can within the area of their assessments. These assessments are not, properly speaking, a tax. They are, in reality, for supplies and services given, such as lighting, cleaning, and watching,—and such conveniences, if supplied, must be paid for. The Legislature has, however, made certain exemptions from liability for such charges, and this building, falling within one of these exemptions as being solely used for charitable purposes, is protected from liability.

LORD CRAIGHILL.—I am of the same opinion.

Chalmers's Hospital, in my opinion, is a public charity, and the building is "solely occupied for purposes of public charity."

I entirely adopt your Lordship's definition of a charity so far as it is necessary for deciding this case.

According to the way in which this charity has been administered there are several ways in which the public can get the benefit of it. Numbers come as dispensary patients to receive out-door medical advice and treatment. Others come into the hospital because they are "sick or hurt," and in order to be treated they are also maintained. These belong to a class which, unless so treated and fed, the charity could not reach. If the charity had been limited to this class of patients, the upper wards of the hospital could never have been used owing to want of funds. The directors accordingly resolved to admit to the upper wards patients who could and would pay—not for their treatment, medical or surgical, but for their own food. No profit was to be or is made out of these payments; but even if there were a profit I doubt whether the building could be held to be used in any sense contrary to its proper use as a public charity. It is only being used so as to extend the purposes of the charity further. Nothing is paid for medicine, or nursing and attendance, or medical and surgical treatment. The difference between the cases of paying and non-paying patients will not deprive this hospital of its character as a building "solely occupied for purposes of public charity." I am therefore of opinion that the Lord Ordinary has erred in the conclusion he has come to.

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THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against, and find, declare, and decern in terms of the declaratory conclusions of the libel: Find the pursuers entitled to expenses," &c.

MORTON, NEILSON, & SMART, W.S.—W. WHITE-MILLAR, S.S.C.—Agents.

JOHN TRAILL, Pursuer.—*J. Guthrie Smith—Jameson.*
JAMES ALEXANDER DEWAR, Defender.—*D.-F. Kinnear—Moncreiff*
—*Dickson.*

No. 110.
Mar. 8, 1881.
Traill v.
Dewar.

Partnership—Obligation on expiry of Partnership to renew, but without a term, whether enforceable—Agreements and Contracts.—Three medical practitioners, in 1869, entered into a contract of partnership for a period of ten years, and thereafter so long as they should agree, but subject to any of the partners being entitled to put an end to it at the 30th April 1879, or at the 30th April in any year thereafter, on notice given. The two senior partners bound themselves by a supplementary agreement, also entered into in 1869, "that on the termination of the fixed period of copartnership provided by the said contract" . . . "neither of them shall enter into any new arrangements connected with the carrying on of their profession and business in A without the concurrence and consent of the other, and, unless otherwise agreed, each of the said parties hereto shall then be entitled to retain an equal interest . . . in the present business, subject to deduction," &c.

Held that the supplementary agreement was not binding on the parties to it, for want of a definite and certain term.

PRIOR to 1860 the pursuer, Dr John Traill, had carried on a medical practice in Arbroath, in partnership with his elder brother, Dr William Traill, for many years. In 1860 Dr William Traill retired from practice, and the pursuer took into partnership the defender, Dr James A. Dewar. The contract of partnership then entered into was terminated by agreement in 1869, and a new contract was entered into between Drs Traill and Dewar, and Dr James Keith Anderson, whom they assumed as a third partner.

This contract of partnership provided, *inter alia*,—"First, the copartner-ship shall, notwithstanding the date of these presents, be held to have

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commenced upon the 1st day of May last 1869, and shall endure for the period of ten years from that date, that is, till the 30th day of April 1879, and thereafter so long as the partners shall agree, . . . but it shall be in the power of any of the partners to put an end to the copartnership at the said 30th day of April 1879, or at the 30th day of April in any year thereafter, provided such partner shall give notice in writing to his copartners of his intention to do so six months previous to the date at which he wishes to withdraw from or to terminate the copartnership."

The fourth head provided for the distribution of the profits, in payment of certain annual allowances to the partners, the surplus being divided equally. But no provision was made for the possible deficiency of the receipts to pay the stipulated allowances.

The tenth head provided for the winding up of the affairs of the partnership on its termination or dissolution.

In consequence of the contract in its fourth head not providing for a possible deficiency of receipts to pay the stipulated annual allowances to the partners, and for other reasons, a supplementary memorandum of agreement was entered into on 14th October 1869 between the pursuer and defender, the two senior partners.

Article 1 contained the altered agreement between the pursuer and defender as to the emoluments, and it was further provided in art. 2 that "the said parties hereto agree and bind themselves respectively that on the termination of the fixed period of copartnership provided by the said contract, being ten years from 1st May 1869, neither of them shall enter into any new arrangements connected with the carrying on of their profession and business in Arbroath without the concurrence and consent of the other, and, unless otherwise agreed, each of the said parties hereto shall then be entitled to retain an equal interest of not less than one-third in the present business, subject to the deduction of two pounds per week, or one hundred and four pounds per annum, for the services of an assistant, in terms of article sixth of the said contract, in case of absence or inability to attend to duty."

The original contract between the pursuer, the defender, and Dr Anderson was brought to an end at the expiry of the ten years on 30th April 1879, by notice given by the defender, and thereafter differences arose between the pursuer and the defender as to the obligations of the latter under the second head of the supplementary agreement.

The pursuer maintained that the defender was bound to remain in partnership with him for the period of their joint lives, or, at any rate, for a farther period of ten years, which had been the period of endurance of their two former contracts of partnership. He accordingly raised an action against the defender to compel him to enter into a formal contract either for life or for such usual and reasonable period as the Court should determine, and to account for his whole profits and emoluments from his practice since the expiry of the term of their former partnership at 30th April 1879.

The defender maintained that the supplementary agreement being indefinite, and without any certain term, was not binding on him, but, subject to all his pleas, he made offer to account to the pursuer, on the assumption of their partnership having been extended for one year from 30th April 1879, and tendered a sum in full of what might be found due on that footing.

This offer the pursuer declined.

The pursuer pleaded;—(1) Upon a sound construction of the said supplementary agreement the defender is bound to enter into a partnership with the pursuer, which shall secure to the pursuer a life-interest in

the business of the copartnership. (2) In any view, the defender is not entitled to limit the partnership to a single year, but is bound to enter into a partnership for such usual and reasonable period as may be fixed by the Court. No. 110.
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The defender pleaded;—(2) The agreement founded on does not constitute any obligation upon the defender to enter into a copartnership with the pursuer, and no *termini habiles* of a contract of copartnership are therein contained. (4) *Separatim*, in any event, no contract is therein provided for longer than a year's duration.

The Lord Ordinary, on 5th January 1881, assoilzied the defender from the conclusions of the summons.*

The pursuer reclaimed.

After hearing counsel, the Court continued the case to allow the defender an opportunity of considering whether he would not repeat the offer made by him at the commencement of the litigation. When the case was again called, the defender repeated the said offer at the bar, on condition that he was not to be subject to any farther proceedings for damages or interdict.

LORD JUSTICE-CLERK.—This may, and probably is, a hard case for the pursuer, who, at his age, and with apparently somewhat infirm health, may find that he has lost hold of the business in which he has been engaged for the greater part of his life, and that it has gone over to his younger and more active partner. But, at the same time, I cannot avoid agreeing with the Lord Ordinary, for I am of opinion that there are no materials to enable us to give effect to the conclusions of the summons.

The whole case depends on the second head of the supplementary agreement, which was introduced to remedy a defect in the original contract. The first part of that head provides "that on the termination of the fixed period of copartnership provided by the said contract, being ten years from 1st May 1869, neither of them (*i.e.*, the pursuer and defender) shall enter into any new arrangements connected with the carrying on of their profession and business in

* "NOTE.—(After stating the terms of the contract of copartnership of 1869, and relative supplementary agreement)—It is sufficiently clear that the parties intended, on the expiry of the existing contract, to carry on business in partnership. It will be observed, however, that nothing is provided as to the disposal of one-third share of the business in the event, which has occurred, of neither party desiring to have a third partner. But what is more material in the present question is, that there is no provision as to the duration of the partnership. In particular, it is not provided that it shall endure during the lifetime of the parties, and the Lord Ordinary can discover no *data* from which it is to be inferred that such was the agreement of parties. If the partnership is not to be for the lifetime of the parties, the Lord Ordinary does not know what would be a "usual and reasonable period" for the duration of such a partnership. It was suggested that, as the two previous partnerships in connection with this business had each been for a period of ten years, it ought to be inferred that this one was intended to be for a like period. But the Lord Ordinary cannot think that that would be a legitimate inference to draw. The Lord Ordinary is therefore of opinion that the supplementary agreement cannot be enforced against the defender to the effect of compelling him to enter into a new partnership with the pursuer, seeing that one of the essential terms of the partnership has not been fixed.

"The pursuer has an alternative conclusion for damages; but the Lord Ordinary thinks, in accordance with the principles laid down in the case of *M'Arthur v. Lawson*, 19th July 1877, 4 R. 1134, that the pursuer cannot recover damages."

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Arbroath without the concurrence and consent of the other." Now, I think that unless a term is adjoined to this provision, it is inextricable, and cannot have any effect. A contract of this kind is capable of receiving effect, but only when it is so limited that it has a definite and certain end. The reason is obvious. In the present case there is unfortunately no such limitation.

I do not think it necessary to add more. The result is that this imperfect and informal agreement can receive no effect in a Court of law. At the same time the tender which the defender made at the commencement of the proceedings, and repeated to-day at the bar, is a very proper one in the circumstances, and should, in an honourable way, put an end to the dispute between the parties.

LORD YOUNG.—My opinion is also in favour of the Lord Ordinary's interlocutor, and I would only explain, shortly, why we continued the case from the last hearing. It was not because we entertained any serious doubt about the soundness of the Lord Ordinary's judgment, but because we thought it not unreasonable, and certainly desirable, that the defender should renew the offer which he had made at the commencement of this litigation. I was of opinion that, taking the most favourable view of the case for the pursuer, the defender could not, under article 2 of the supplementary agreement, be bound for more than one year. I am far from saying that that view is a sound one; but the farthest point to which I think it possible to go is to hold that the clause of the original contract putting it in the power of any of the partners to bring it to an end at the 30th April 1879, or the 30th April in any subsequent year, was by implication part of the supplementary agreement, and that, therefore, if the partnership did continue after the lapse of the ten years for which the original contract was to run, it was an indefinite continuance, liable to be brought to an end, on notice, at the end of any one year. Otherwise the supplementary agreement would import an obligation on the partners to continue in partnership for the term of their natural lives,—a thing which cannot have been contemplated. In that view the defender, by offering to account for the profits of the year succeeding the ten years' partnership, has completely satisfied the utmost which the pursuer can possibly demand from him. We thought the offer proper and reasonable, and that the pursuer was ill-advised in not accepting it. We, therefore, gave time for the defender to consider whether he would not renew it. This he has done, and I have no doubt it will be honourably carried out without the necessity of its entering our judgment.

LORD CRAIGHILL.—I concur in the judgment proposed by your Lordships. On an anxious consideration of the original contract and the supplementary agreement I am unable to adopt any construction which will warrant the conclusions of the action.

The truth of the matter seems to be, that the pursuer himself had no very accurate conception of his own *rationes concludendi*. Accordingly we have him proposing alternative conclusions, the effect of the latter of which is simply that because the parties have not made a formal and obligatory agreement for themselves the Court is asked to make a new one for them.

I therefore adopt the reasoning of the Lord Ordinary and of your Lordship.

THE COURT adhered.

LEBURN & HENDERSON, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

JOHN M'MEEKIN, Pursuer.—*Dickson*.
ROBERT RUSSELL AND ALEXANDER TUDHOPE, Defenders.—
Guthrie Smith—Alison.

No. 111.

Mar. 9, 1881.
M'Meevin v.
Russell and
Tudhope.

Bill—Accommodation Bill—Blank stamp—Bankruptcy.—Held that a person who has obtained for his own accommodation a blank acceptance is barred by the acceptor's sequestration from making use of it thereafter.

Bill—Blank stamp—Indorsee—Reparation—Damages—Wrongous use of diligence.—In an action brought by the acceptor of a bill against the drawer and an indorsee, concluding for reduction of the bill, and damages, on the allegation that the bill had been signed blank by the pursuer, and delivered to the drawer for his accommodation prior to the pursuer's sequestration, and that the drawer had wrongously filled it up and indorsed it after the pursuer's sequestration, and that the indorsee had redelivered the bill to the drawer to enable him to obtain the pursuer's apprehension on a *meditatione fugæ* warrant which had followed, held that the pursuer had set forth a relevant case against the drawer of the bill, but not against the indorsee, as it was not averred that he knew that the bill had been delivered blank to the drawer for his accommodation prior to the sequestration of the acceptor.

Issue.—Forms of issues to try a question of wrongous filling up of and indorsement of a blank bill, and of wrongous apprehension and imprisonment on a *meditatione fugæ* warrant.

THIS was an action by John M'Meevin, iron-merchant, Coatbridge, against Robert Russell, Carluke, and Alexander Tudhope, Carluke, concluding (1) for reduction of a bill for £100 which bore to be drawn by the defender Russell upon the pursuer, and to be indorsed to the other defender Tudhope, dated 1st March 1879, and payable twelve months after date; (2) for damages.

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Lord Adam.
B.

The pursuer made the following averment:—He and the defender Russell were in the habit of granting to each other accommodation-bills, and for this purpose were in the habit of sending blank bill stamps for signature. In accordance with this practice the pursuer signed and delivered to the defender Russell two blank bill stamps in July and another in October 1877 for the accommodation of Russell.

(Cond. 4) "The pursuer's estates were sequestrated in December 1877, after which no further transactions of any kind whatever took place between him and the defender Russell, and no bills or bill stamps have since been signed by the pursuer, either for the defender or any other person. The pursuer was discharged under the sequestration on the report of Mr Henry M'Lachlan, accountant, Coatbridge, the trustee, on payment of a composition, in December 1879. The defender, although well aware of said sequestration, and of the whole proceedings therein, never lodged any claim in respect of the bill for £100." (Cond. 5) "In March thereafter the pursuer arranged to go with his family to Australia, and paid half of the passage money—the steamer being timed to leave on 31st March 1880. He had then in view lucrative employment abroad, and the defender Russell, who was aware of this, and of the pursuer's intention to leave Scotland, called upon the pursuer and urged upon him to arrange for payment of two bills which had arrived at maturity, and which had been drawn in accordance with the foresaid practice for the pursuer's accommodation prior to the sequestration." (Cond. 6) "The pursuer was apprehended on 8th March 1880 on his (Russell's) instructions as in *meditatione fugæ*. The debt on which the proceedings were taken by the defender was set forth as a sum of £100, contained in a bill alleged to have been drawn by the defender upon and accepted by the pursuer, and dated 1st March 1879, payable twelve months after date, and indorsed by the defender Russell to the defender

No. 111. Tudhope, who was said to be the then holder thereof. In the petition presented for the pursuer's apprehension and detention the defender Russell stated in his condescendence, *inter alia*, that the pursuer became indebted to him in said sum of £100, for which the bill was granted; that he indorsed the bill to the other defender Tudhope for value; that in the event of the pursuer failing to pay the contents the said defender Tudhope would fall back upon Russell for recourse; and that thus the defender Russell had an interest to apprehend and detain the pursuer. The petition in said *fugæ* proceedings was presented on 6th March 1880, by which time the pursuer had taken out and paid for the passage to Australia of himself, his wife, and children, a circumstance well known to both defenders, or at all events, to the defender Russell. In order to accomplish this the defender Tudhope gave facilities to the defender Russell by reinstating the latter in the possession of the bill, which was founded on and produced in the proceedings." (Cond. 8) "The pursuer never heard of said bill alleged to be due on 4th March 1880 until he was apprehended as aforesaid, nor was he ever asked for payment of its contents until he was in custody, and within the precincts of the Airdrie Court-House, where it was presented at the instance of the defender Tudhope, who in turn had got it back for this purpose from the other defender Russell. Thereafter the defender Tudhope protested the said bill, and caused it to be recorded and published against the pursuer. Both the presentation of said bill at the time and place specified, and the subsequent publication of the protest by the defender Tudhope, were illegal acts, and were wrongously and maliciously done, with the view of securing the pursuer's detention in the event of the defender Russell failing in his *fugæ* proceedings. For these acts the defender Tudhope is liable in damages to the pursuer along with the defender Russell." (Cond. 9) "The whole of the proceedings *in meditatione fugæ* were taken by Russell most wrongously and maliciously, for the purpose of extorting money from the pursuer which he was not actually due, a circumstance known also to the other defender Tudhope, and to his law-agent, Mr Robert Muir, writer, Lanark, who also acted as agent for Russell." (Cond. 11) "The pursuer was, as the defenders well knew, or at all events as the defender Russell well knew, due nothing to them, or either of them, when said proceedings were adopted against him, and the statements on which the defender Russell obtained said warrant for the pursuer's imprisonment were false, and were made by the defender Russell most wrongously, unjustly, and maliciously, and in the knowledge that they were false, for the purpose of securing the pursuer's imprisonment, in the hope that the defender would thereby extort money from the pursuer to which he was not on any ground entitled."

The Lord Ordinary approved of the following issues:—"1. Whether the bill-stamp on which the pretended bill, No. 8 of process, is written was signed by the pursuer when altogether blank, or at least when blank in many of the essentials of a bill, and was delivered to the defender Robert Russell in that condition prior to the sequestration of the pursuer in December 1877? And whether the said bill-stamp was filled up or caused to be filled up by the said defender, and was by him, after the said sequestration of the pursuer, wrongfully indorsed to the defender Alexander Tudhope, to the loss, injury, and damage of the pursuer? 2. Whether, on or about 8th March 1880, the pursuer was wrongfully apprehended at or near Coatbridge on an application at the instance of the defender Robert Russell against him as *in meditatione fugæ*, to the loss, injury, and damage of the pursuer? 3. Whether, on or about 8th March 1880, the pursuer was brought before David Davidson Balfour, Esq.,

Sheriff-substitute of Lanarkshire, at Airdrie, under the said application No. 111. at the instance of the defender, the said Robert Russell, against the pursuer as *in meditatione fugæ*? And whether under the said proceedings *in meditatione fugæ*, and on the application of the defender Robert Russell (or of another or others for whom he is responsible) the pursuer was wrongfully incarcerated in the prison of Airdrie on said 8th day of March, and detained there as a prisoner till the following day by virtue of a warrant granted by the said D. D. Balfour, to the loss, injury, and damage of the pursuer? 4. Whether the bill, No. 8 of process, was indorsed by the defender Robert Russell to the defender Alexander Tudhope 'without recourse,' and whether the defender Alexander Tudhope wrongfully redelivered the said bill to the defender Robert Russell for the purpose of having the pursuer wrongfully apprehended and detained under said application as *in meditatione fugæ*, to the loss, injury, and damage of the pursuer? 5. Whether the defender Alexander Tudhope, on or about 8th March 1880, wrongfully protested, or caused the said bill to be protested, against the pursuer for non-payment, and thereafter wrongfully caused the said protest to be recorded in the Sheriff Court Books of the county of Lanark, to the loss, injury, and damage of the pursuer?

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"Damages laid at £1000 sterling."

Both defenders reclaimed.

At advising,—

LORD PRESIDENT.—With regard to the first issue I do not think there is any difficulty. The statements of the pursuer are quite distinct. He says that he was in the habit of signing blank stamps for the defender Russell, and in particular that he gave two such bills in July 1877; that these two bills were entirely for the accommodation of Russell, no value being received by the pursuer himself; that one of these bills was filled up and put into the circle, and that when it became due in October 1877 it was replaced by another blank stamp which the pursuer signed and gave to Russell. Now, the pursuer says that one or other of these blank stamps—either the remaining one of the two which he delivered in July, or the one delivered in October—is the blank stamp on which the bill charged on is made; and in confirmation of this he says, that having been sequestrated in December 1877, he did not sign or issue any stamp or bill after that date. Now, the issue which he proposes is in these terms:—"Whether the bill-stamp on which the pretended bill is written was signed by the pursuer when altogether blank, or at least when blank in many of the essentials of a bill, and was delivered to the defender Robert Russell in that condition prior to the sequestration of the pursuer in December 1877? and whether the said bill-stamp was filled up or caused to be filled up by the said defender, and was by him after the said sequestration of the pursuer wrongfully indorsed to the defender Alexander Tudhope, to the loss, injury, and damage of the pursuer?"

Now, I think that this issue is entirely supported by the record, because although the delivery of a blank stamp is undoubtedly an authority to fill the bill up with the amount carried by the stamp, or if the amount is, as seems to be the case here, written on the bill, then with that amount; yet, though that is clear in law, it is also clear that if the bill is merely for the accommodation of the party receiving it, and if the party signing the bill becomes bankrupt and is sequestrated, it is out of the question that the holder can use it after the sequestration. The notion of rearing up after sequestration as a debt a bill signed for the sole accommodation of the holder is entirely contrary to the fundamental

No. 111. principles of bankrupt law. I do not entertain any doubt, therefore, about the first issue. I think we should allow it.

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With regard to the next two issues I shall postpone what I have to say until I have considered the fourth and fifth issues. These issues are directed against the other defender Tudhope, and he is sought to be made liable for the proceedings taken against the pursuer, on the ground that he was *in meditatione fugæ*, the debt on which the defender Russell founded the petition being the bill in question. Now, if Mr Tudhope had been acting in concert with Russell, in full knowledge of the circumstances that the bill was given solely for the accommodation of Russell, and that it was delivered before, but was not issued till after, the sequestration, there would be a great deal to say for making Tudhope liable. But there is no averment which comes up to that. What is said is that the bill was indorsed by Russell to Tudhope, and that when Russell proceeded against the pursuer as being *in meditatione fugæ* "the defender Tudhope gave facilities to the defender Russell by reinstating the latter in the possession of the bill which was founded on and produced in the proceedings." Now, if Tudhope was an indorsee for value—and it is not alleged that he was not—the crucial matter is this, that if the bill is honoured then the debt due by Russell to Tudhope is paid, but, if it is not honoured, the debt due by Russell still exists. Thus it is just as much for the interest of Russell as it is for the interest of Tudhope to get the bill enforced; and if the debtor in the bill is *in meditatione fugæ* there is an interest both in Tudhope and Russell to prevent that *fuga*. There is therefore nothing irregular in Tudhope being a party to these proceedings. There is nothing wrong, unless on the assumption that Tudhope was in the knowledge that the whole debt was a sham, and the bill entirely for the accommodation of Russell, which is not alleged. The only other averment which at all tells against Tudhope is in these terms:—"The pursuer never heard of the said bill alleged to be due on 4th March 1880 until he was apprehended as aforesaid, nor was he ever asked for payment of its contents until he was in custody and within the precincts of the Airdrie Court-house, where it was presented to him at the instance of the defender Tudhope, who in turn had got it back for this purpose from the other defender Russell. Thereafter the defender Tudhope protested the said bill, and caused it to be recorded and published against the pursuer." Now, I cannot see that Mr Tudhope has done anything wrong in this. It was quite proper that he should act in this way. Everything would be wrong that he has done if it was done in the knowledge of the prior proceedings by Russell, but if he did not know about these proceedings he was just availing himself of his legal rights as indorsee of the bill.

There is but one other averment of the least importance against Tudhope, and it is contained in condescendence 11. It is there said,—"The pursuer was, as the defenders well knew, or at all events as the defender Russell well knew, due nothing to them or either of them." Now, this is just one of those averments which as in questions of relevancy must be taken as meaning nothing more than the smallest substance which the words will bear—that is to say, in the present case that Russell "well knew," and not that Tudhope "well knew." But the pursuer must go much further than that. He must aver that Tudhope was aiding and abetting the legal wrong of which he says Russell was guilty. I think, therefore, we must disallow the issues against Tudhope. And this makes the question regarding the two remaining issues more simple; and I should propose, if your Lordships should agree with me, that one issue should try the

whole questions raised by the second and third issues, which would run in these terms :—" Whether, on or about 8th March 1880, the pursuer was wrongfully apprehended at or near Coatbridge on an application at the instance of the defender Robert Russell against him as *in meditatione fugæ*, and was thereafter brought before the Sheriff-substitute of Lanarkshire, at Airdrie, under the said application, and wrongfully incarcerated in the prison of Airdrie on said 8th day of March, and detained there as a prisoner till the following day by virtue of a warrant granted by the said Sheriff-substitute, to the loss, injury, and damage of the pursuer ? "

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LORD DEAS.—As regards the first issue I am of the same opinion. What is said about the bill having been signed when blank cannot of course affect it,—assuming it not to have been filled up fraudulently, which is not alleged. The use subsequently made of it is the question, and is rightly raised by the issue.

The next question is whether any ground of action has been stated against Tudhope? I am very clearly of opinion that there has not. I took the liberty of mentioning in the course of the discussion the case of *Marshall* against *Dobson*,¹ which was debated in a hearing in presence between your Lordship now in the chair and myself a great many years ago, in which the late Lord President Hope observed, quoting the "Antiquary" for his authority, that a *fugæ* warrant had always been esteemed a very dangerous sort of diligence to deal with. I am not surprised, therefore, that Mr Tudhope should have wished to have nothing to do with it. Even if Tudhope, therefore, had known that Russell wanted the bill back for the purpose of suing out a *meditatione fugæ* warrant, I think that was not a reason why he should have agreed to indorse the bill, but rather the reverse. In short, I cannot, therefore, see any ground of action against Tudhope. That disposes of what were proposed as the 4th and 5th issues.

As to what will now stand as the 2d and 3d issues, I cannot see why they should not be in one. In some cases there may have been wrongous apprehension and no imprisonment, or there may have been a doubt about the one and not about the other. But here the pursuer has no interest to separate them, as the apprehension and imprisonment are one ground of action. To allow two issues here would be a mere abuse of words.

LORD MURE.—I agree with your Lordships as to the first issue. It is rested on the circumstance that the blank bill-stamp was not filled up till after the date of sequestration; and as that is distinctly stated in the record the pursuer is, I think, entitled to the issue.

I also agree that the second and third issues should form one issue. But upon the fourth issue I have had considerable doubt. When I first read the record my impression was that Tudhope had been acting in concert with Russell in the full knowledge of the previous proceedings; and if that had been distinctly averred I should have been of opinion that an issue should have been allowed as against Tudhope. On this the record is rather apt to mislead. In the 6th article of the condescendence it is stated that Russell caused the pursuer to be apprehended on a *fugæ* warrant, and that in order to accomplish this the defender Tudhope gave facilities to the defender Russell by reinstating the latter in the possession of the bill, which was founded on and produced in the proceedings. In condescendence 8 it is set out that Tudhope, after giving

¹ *Marshall v. Dobson*, Dec. 18, 1844, 7 D. 232, 17 Scot. Jur. 111.

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the bill to Russell, got it back again, and presented it for payment, and afterwards "caused it to be recorded and published against the pursuer," and that "both the presentation of the said bill at the time and place specified, and the subsequent publication of the protest by the defender Tudhope, were illegal acts." Then, in condescendence 9, the pursuer says that he believes and avers "that this was done by the said defender, and the whole of the proceedings *in meditatione fugæ* taken by Russell most wrongously and maliciously, for the purpose of extorting money from the pursuer which was not actually due,—a circumstance also known to the other defender Tudhope, and to his law-agent, Mr Robert Muir, writer, Lanark, who also acted as agent for Russell." And in condescendence 11 it is said that the "pursuer was, as the defenders well knew, or, at all events, as the defender Russell well knew, due nothing to them or either of them, when the said proceedings were adopted against him." Now, when I read these allegations I was under the impression that it was intended to be averred, although it may not be very aptly done, that Tudhope knew that the bill was an accommodation bill, and acted throughout in that knowledge. But, as it is now admitted by the pursuer that this was not intended to be the meaning of the averments, I do not differ as to the fourth issue.

On the fifth issue I have no difficulty in concurring. My difficulty applied only to the fourth issue.

LORD SHAND.—I am clearly of opinion that there is no case against Tudhope.

I shall assume that Russell knew that he had no right to fill up the bill and put it in the circle. He did fill it up, however, and indorsed it. It is not alleged that Tudhope was not an indorsee for value, and, in that state of the facts, I think he was entitled to do diligence on it. Farther, in the view which Tudhope must have taken of the matter, Russell was also interested in diligence being done on the bill, because, unless it was paid, he would still be debtor in £100 to Tudhope. In these circumstances I think it is impossible to say that because Tudhope gave back the bill in the way alleged on the record, and with a view to diligence at the instance of Russell, he incurred any liability to a claim of damage at the pursuer's instance. I approve of the proposed issues in the case against Russell.

THE COURT pronounced this interlocutor :—"Recall the interlocutor ; disallow the fourth and fifth issues ; approve of the issues as now adjusted, No. 15 of process, and appoint them to be the issues for trying the cause ; remit to the Lord Ordinary to assolzie the defender Tudhope, and find him entitled to expenses."

J. & A. HASTIE, S.S.C.—T. F. WEIR, S.S.C.—Agents.

No. 112.

WILLIAM KILPATRICK (Tennant's Judicial Factor), Petitioner.—*Goudy*.

Mar. 10, 1881.
Kilpatrick.

Outer-House.
Lord Fraser.

Judicial Factor—Special Powers—Unworkable Trust—Exhumation of dead body.—By his trust-disposition and settlement the late William Tennant, of Eatonville, Ayr, directed his trustees to erect upon the place of his interment in the New Cemetery at Ayr a mausoleum, which was to cost £500. After his decease he was interred in the said cemetery in a plot of ground belonging to a deceased relative, whose representatives refused to permit the erection of a mausoleum upon it. On a petition by the judicial factor who had been appointed to execute the trust, authority

was granted by Lord Fraser to exhume the body and re-inter it in another part of the said cemetery at the sight of the Sheriff-substitute at Ayr, and to erect a mausoleum upon the place of re-interment.¹

No. 112.
Mar. 10, 1881.
Kilpatrick.

JOHN MACMILLAN, S.S.C.—Agent.

MRS ANNE JARDINE OR ELDER AND OTHERS (Elder's Trustees),
First Parties.—*Mackintosh—J. C. Lorimer.*

JOHN MACDONALD (Treasurer of the Free Church of Scotland) AND
OTHERS, Second Parties.—*Trayner—Jameson.*

No. 113.

Mar. 10, 1881.
Elder's Trustees v. Treasurer of the Free Church of Scotland, &c.

2D DIVISION.
R.

Succession—Acceleration of distribution of residue.—The late Mr Thomas Elder, Edinburgh, died on 5th December 1869, leaving a trust-disposition and settlement for the following purposes, viz., first, payment of debts; second, payment of the provision in his marriage-contract in favour of his wife (being an annuity of £300); third and fourth, certain special legacies in favour of relations and charities, amounting to £5050; fifth, "that my trustees shall hold the whole rest, residue, and remainder of my estate remaining after fulfilment of the above written provisions, with the income arising therefrom, until the death of my wife, and shall out of such residue and income make payment of any other legacies or provisions I may leave by any writing to be hereafter signed by me expressive of my will although not formally executed; sixth, that my trustees shall, upon the death of my wife, set aside out of the residue of my estate the sum of £10,000, and shall either hold the same themselves or invest the same in the name of the general trustees for the time being of the Free Church of Scotland and their successors in office, or in the name of any other persons, as my trustees shall think best, in trust, to apply the free interest and profits accruing annually from the said sum, after deduction of all expenses, as a provision or endowment of a Professor of Natural Science in the said New College of Edinburgh in connection with the Free Church of Scotland;" seventh, upon the death of his wife to apply £7000 in building a territorial church, and £3000 as a partial endowment for the minister; and lastly, "after all the above purposes shall have been fulfilled, I appoint and direct my trustees to apply and pay over the whole residue and remainder of my estate, if such there shall be, to and for the use and benefit of such four of the Schemes of the Free Church of Scotland, and in such proportions as to my trustees shall appear most expedient." The residue of Mr Elder's estate as brought out in the residue account, after payment of legacies, but subject to his widow's annuity, amounted to £27,000. A special case was presented in February 1881, during the lifetime of the testator's widow, by Mr Elder's trustees, of the first part, and by the General Treasurer and College Committee of the Free Church, of the second part, for the opinion of the Court, whether the trustees were entitled to pay the £10,000 during the widow's life (she not objecting) under the sixth purpose of the settlement.²

¹ *Petitioner's Authorities.*—*Mellick v. The Asylum*, 1 Jacob (Chan.) 180; *Adnam v. Cole*, 6 Beavan, 353; *Grant v. Macqueen*, 1877, 4 Ret. 734; *Fisk v. Attorney-General*, L. R. 4 Eq. 251; *Berwick Commissioners v. Craw*, 1678, M. 1351; *Cemeteries Clauses Act*, 10 and 11 Vict. c. 65, secs. 26, 40, 44; *Kincaid's Appeal*, 5 American Reports, 377; *Craig v. Presbyterian Church of Pittsburgh*, 32 Amer. Rep. 426; *M'Leod v. Leslie*, 1865, 3 Macph. 840.

² *Lucas' Trustees v. Trustees of Lucas' Trust*, Feb. 18, 1881, *supra*, p. 502; *Martin v. Masterman*, July 12, 1871, 2 R. 12 Eq. 559.

No. 113.

Mar. 10, 1881.
Elder's Trustees v. Treasurer of the Free Church of Scotland, &c.

The Court *held* that there was no reason why the express direction to the trustees to hold the residue and accumulations till the widow's death should not receive effect, and that the trustees were not entitled to make an immediate payment of the £10,000 to the prejudice of the four schemes of the Church favoured under the last clause of the settlement.

H. & H. TOD, W.S.—COWAN & DALMAHOY, W.S.—Agents.

No. 114.

Mar. 10, 1881.
Beynon, &c. v. Kenneth.

THOMAS BEYNON AND OTHERS, Pursuers (Respondents).—*Guthrie*.
JAMES SPIERS KENNETH, Defender (Appellant).—*R. V. Campbell*.

Ship—Charter-party—Cesser clause, effect of—Bill of Lading, Charterer's obligation under.—A vessel was chartered for the voyage from Greenock to Monte Video at a slump freight of £550, and the charter-party bore that £150 was to be payable on clearing at Greenock, and "bills of lading for the balance payable abroad to be taken (*sic*) by the captain, on receipt of which documents all responsibility of charterer to cease." The vessel was loaded chiefly with coal. The charterer divided the slump freight among the various items of the cargo, and presented bills of lading, together making up the *cumulo* sum, for the master's signature, the charterer himself being consignee. In that for the coal there was entered 453½ tons, freight 22s. 6d. per ton. This the master signed, but the bill of lading had a note at the foot "weight and contents unknown." On arrival at Monte Video, the master, waiving his lien for freight, delivered the coal, which turned out only 398 tons, as weighed there. The agents for the charterer, in settling for the balance of freight, retained for coal alleged to be short delivered £24, and freight applicable thereto £62.

In an action by the owners against the charterer for the balance of the freight stipulated for in the charter-party, *held* (1) that the action could not be sustained on the charter-party, in respect that, bills of lading having been granted for the freight, the cesser clause put an end to the charterer's obligation under the charter-party; (2) that the bill of lading only entitled the shipowners to recover the freight of the 398 tons proved to have been delivered; and (3) that as it had not been proved that any part of the cargo shipped had not been delivered, the defender was not entitled to retain the £24.

2D DIVISION.
Sheriff of
Lanarkshire.
M.

A CHARTER-PARTY of the ship "Alice," of Newport, then lying at Greenock, was entered into, on 9th July 1878, between Thomas Beynon & Co., the owners, and James Speirs Kenneth, merchant, Glasgow, the charterer. The vessel was to load at Greenock, and proceed to Monte Video, "and there deliver the said cargo, in the usual and customary manner, agreeably to bills of lading," "on being paid freight, say lump sum of £550 stg. to Monte Video. Clyde dues on cargo to be paid by ship; ship guaranteeing to carry, at least, 500 tons dead weight, the freight being payable as follows, say, at least, £150 sterling on clearing at custom-house, less 6 per cent for all charges. Bills of lading for the balance payable abroad to be taken by the captain, on receipt of which documents all responsibility of charterer to cease."

In pursuance of this charter-party a cargo was shipped, which consisted chiefly of coal and coke. Five bills of lading were prepared by the charterer, dividing the slump sum of freight stipulated for in the charter-party, viz., £550, among the several articles of the cargo. The bill of lading for the coal (which bore that delivery was to be made to the charterer's order or to assigns) stated the quantity shipped at 453 tons 10 cwts., and the freight thereon at 22s. 6d. per ton, that being the rate calculated to produce the necessary proportion of the slump freight. But the bill of lading had a note printed at the foot "weight and contents unknown." £152, 1s. 5d. was paid in advance to the captain at Greenock

in terms of the charter-party, and the bills of lading were then signed by him, and transmitted by Mr Kenneth to his agents, Bates, Stokes, & Co., Monte Video. No. 114.
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When delivered at Monte Video the cargo of coal turned out only 398 tons 2 cwts., according to the return of the weigher employed by Bates, Stokes, & Co., the consignees. The master did not interfere in the weighing, beyond protesting against the correctness of the machine used, which was a small moveable steelyard, only capable of weighing about 3 cwts. at a time, and placed on the deck.

Bates, Stokes, & Co., in settling the freight with the master at Monte Video, deducted for coal short delivered 55 tons 8 cwts. at 8s. 9d. per ton,

£24 4 9
Freight applicable thereto, at 22s. 6d. per ton,
62 6 6

£86 11 3

which they refused to pay.

T. Beynon & Co., in consequence, raised an action in the Sheriff Court at Glasgow against Mr Kenneth for the sum of £86, 11s. 3d., and interest.

The pursuers pleaded;—(1) In terms of the foresaid charter-party the defender is liable, as charterer, for the balance of freight sued for. (2) As consignee of the cargo the defender is liable under the said charter-party and bills of lading, and also at common law, for payment of the said balance of freight. (4) The captain of the said vessel having delivered the said cargo to the agents of the defender on the agreement and faith that the freight would be paid on completion of the discharge the defender is liable for said balance of freight.

The defender pleaded;—(1) The pursuers having agreed by said charter-party that the defender's responsibility should cease on bills of lading being granted, the defender ought to be assoilzied, with expenses. (2) The pursuers having granted bills of lading for 453½ tons coal, and having failed to deliver 55½ tons thereof, the defender is entitled to set off as against pursuers' claim the value of said coals short delivered, and the freight applicable thereto as fixed by pursuers. (3) The said 453½ tons having been actually put on board, and bills of lading granted therefor, and the pursuers having failed to deliver the same to the extent foresaid, the defender's right to set off the value and freight applicable thereto ought to be upheld, and decree of absolvitor pronounced, with expenses. (4) The pursuers, in any event, are only entitled to freight per bill of lading on the quantity actually delivered.

A proof was led, the import of which was as follows:—

The coal was not weighed on behalf of the shipowners as it was put on board, the master, as the ship was chartered for a slump freight, acting on the footing that he had no concern with the weights shipped.

The evidence as to the true weight shipped was very conflicting. The way-bills of the Merryton Coal Company, who supplied the coal, as sworn to by their clerk and weigher, shewed 468 tons 13 cwts. sent forward from the pit.

In the charge-sheet of the Caledonian Railway Company, as sworn to by their mineral superintendent, the quantity was stated as 462 tons 2 cwts., but by the company's weights at Greenock 24 tons 13 cwts. of that quantity was short shipped, leaving 437 tons 9 cwts. as the quantity actually put on board, as sworn to by their servant in charge of the shipment of coal at that port.

The amount entered in the bill of lading, 453½ tons, did not correspond with any of these figures, and Mr Kenneth's own clerk admitted that he

No. 114. had made a clerical error to the extent of 10 tons in making out the invoice and bill of lading, and that the amount should have been 443½ tons.
 Mar. 10, 1881. Beynon, &c. v. Kenneth.

The Sheriff-substitute (Guthrie) pronounced this interlocutor:—"Finds that the defender shipped on board the pursuers' ship 'Alice' at Greenock a cargo consisting chiefly of coals, for which the master granted bills of lading: Finds that, on delivery of said bills of lading, the defender's liability under a previous charter-party libelled on ceased in terms of said charter-party, and that the pursuers are not entitled to sue for the lump sum of freight therein stipulated: Finds that the defender, as consignee and owner of the cargo so shipped, through his agents, Messrs Bates, Stokes, & Co., received delivery at Monte Video of the cargo so shipped, and is liable in payment of freight therefor under the said bills of lading: Finds that the pursuers have proved that the bills of lading are granted for a larger quantity of coals than were, in fact, loaded on board said ship by 10 tons, the freight of which is £11, 5s.: Finds that the balance of freight due under said bills of lading, after making said deduction, and after giving credit for the sums paid to account by the defender as condescended on, is £75, 6s. 3d. sterling, for which decerns against the defender in favour of pursuers: Finds the pursuers entitled to expenses," &c.*

* "NOTE.—. . . The first question is, what quantity of coals was shipped? The master signed a bill of lading for 453½ tons; and this, as was said in *M'Lean and Hope v. Fleming* (9 Macph. H. L. 38), is *prima facie* evidence against the shipowner that such a quantity was actually shipped. The shipowners have not rebutted this presumption except to a small extent, for their own case shews that about 443 tons were shipped.

"The next point is whether there was right delivery of this quantity at Monte Video. The captain and the witness Evans say that all the coals shipped were delivered, and they are supported by the other witnesses so far as they are able to speak on this subject, and by the absence of any suggestion of the possibility of the coals shipped being made away with. On the other hand, there is reason to suspect the accuracy of the weighing at Monte Video, upon which the defender's agents relied when they retained part of the balance of freight which was due according to the bill of lading and freight-note in process. I am therefore of opinion that upon the evidence the pursuers have made a right delivery of the goods shipped, and that the consignees at Monte Video were not justified in retaining part of the freight due for these goods.

"The defender, however, maintains that he is free from responsibility for the freight sued for by the clause in the charter-party, 'bills of lading for the balance payable abroad to be taken by the captain, on receipt of which documents all responsibility of charterer to cease.' And it appears that the bills of lading were made out and apportioned to the different parts of the cargo in such terms and at such rates as to bring out the exact amount of the lump freight stipulated for. The clause in question is not very accurately expressed, because the master makes or grants, and does not take the bills of lading; but that inaccuracy may pass, as the meaning cannot be doubtful. Nor does it seem to be material that the cesser of the charterer's liability is to take place upon delivery of the bills of lading, and not, as in all the reported cases relating to clauses of this kind, 'upon the loading of the cargo,' or 'as soon as the cargo is loaded.' It may be more for the ship's advantage that the charterer is not absolved until bills of lading have been adjusted in such terms as to give the shipowners the same rights against the consignees and the cargo as they have against the charterer. But it seems that the construction of the charter-party in regard to the liberation of the charterer must be practically the same as if the clause had been couched in the most familiar terms. The effect of this kind of clause has been the subject of discussion in numerous English cases, from *Ogleby v. Iglesias* downwards. References to all of them may be found in the two latest cases,

The Sheriff (Clark) adhered on appeal.

The defender appealed to the Court of Session.

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Argued for him;—The cesser clause in the charter-party put an end to his obligation thereunder. The Sheriff was therefore right in holding that the action could not proceed on the charter-party. But he had gone wrong in holding that he was liable notwithstanding on the bill of lading. The charter-party had stipulated that on bills of lading "payable abroad" being granted the charterer's liability should cease. The bills of lading had been granted in conformity therewith. The charterer's name did not appear on them, and he undertook no obligation thereunder. It was indeed an inherent condition of a bill of lading that freight should be earned by the carriage of the goods, but that was also a condition of carriage at common law, enforceable by the master and owners' common law lien for freight. All that a bill of lading in such terms as that in question did was to fix the rate and to give the master and owners a ground

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which also bear more directly on the present question—*French v. Gerber* (45 L. J. C. P. 880, L. R. 1 C. P. Div. 737), and *Sanguinetti v. Pacific Steam Navigation Company* (46 L. J., Q. B. 105, L. R. 2 Q. B. Div. 238). These cases have arisen out of the efforts of shipowners to fix upon charterers liability in spite of this clause, and two points have been made clear by the judgments of the Court—(1) that when the clause is expressed with the ordinary generality and clearness all liability ceases whether antecedent or posterior to the loading; and (2) that it ceases (with perhaps an exception in the case of antecedent liabilities, for which no lien is given) without respect to any lien which may or may not be given by the contract. Here it may be remarked the charter-party is peculiar, in so far as it has not the words which generally follow the clause under consideration conferring a lien for freight, dead freight, and demurrage; but as the claim is for freight, which is protected by a lien at common law, no question is suggested by the omission of the lien clause. It was argued, however, that as the defender was owner and consignee of the goods shipped he cannot be absolved by this clause. The answer to this is that the contract declares that his liability ceases in a certain event, which has occurred, and that it is the province of the Court to construe, not to make the contract. This point was distinctly decided by the Queen's Bench Division in the case of *Sanguinetti* cited, the observations in which conclusively shew what the contract is, and that a charterer may have good reason for being relieved from liability even when he is owner of the cargo and ships it to his own agent. But it is evident that the liability which is thus discharged is only the defender's liability under the charter-party, and no more was determined in the case referred to. That decision expressly left open the question whether by obtaining delivery of the goods through his agent the charterer may not incur a liability to the ship entirely independent of the charter. Now, in this case I am of opinion that the charter ceased to be an operative contract when the bills of lading were delivered. But upon the bills of lading the defender was designated as consignee, the cargo was delivered upon his order to Bates, Stokes, & Company at Monte Video, his agents, who, as the correspondence shews, sold it on his account. In these circumstances it is impossible to dispute that apart from the charter-party, and even if the charter-party had never existed, an obligation to pay freight lies upon the defender in virtue of his receiving the cargo under the bills of lading, unless there be something to shew that no contract to pay freight could be inferred from such receipt. Here there is nothing of that kind, and I can only hold the cesser clause in the charter-party to put an end to the obligations under that contract. It cannot affect the separate and distinct contract created by the shipment of the goods and their delivery under the bills of lading.—See also authorities in Bell's Principles, sec. 421. A deduction from the freight claimed to the extent of £11, 5s., the freight having been calculated upon 453 tons instead of 443, the quantity actually shipped, must however be made."

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of action against the holder receiving delivery, if the master happened to part with his lien. The owners had therefore mistaken their remedy, and come against the wrong party. It was for the very purpose of clearing himself of all responsibility for freight that the charterer had required the charter-party and bills of lading to be so framed. It made no difference that the consignees were his agents.¹ But even assuming that the action was well laid on the bill of lading, he could not be liable under it for more than was carried, and the proof shewed that no more than 398 tons was carried. It also shewed that there was short delivery to the extent of at least 45 tons.

Argued for the pursuers;—Though the number of tons alleged to be shipped was entered in the bill of lading, the owners had as little concern with the actual number shipped as with the rate of freight which the charterer chose to insert. The master was particular in signing for weight unknown, and for a good reason. The contract of affreightment was for a slump sum, and the owners' obligation was implemented on carrying the cargo delivered to them, be it more or less. Now, it was clear on the proof that the weighing at one end or other of the voyage, and it might be confidently affirmed at both ends, was erroneous, but it was proved satisfactorily that all that was shipped was delivered. Therefore the slump freight was earned. What the defender sought to do was to ignore the terms of the charter-party altogether, and transform a contract for a slump freight into one at a certain rate per ton carried. He was for ignoring the obligation on him to pay a slump freight. The cesser clause in the charter-party might have the effect contended for, if its conditions were observed. But then the main condition was that bills of lading for the balance of freight were to be granted. Now, the defender was founding on the cesser clause as if this condition were fulfilled, which it was only if he admitted that the bill of lading set forth the freight due, and he was at the same time repudiating the bill of lading, and maintaining that it erroneously set forth the freight due in respect less was carried than was entered in it. But the figures were his own, and were calculated so as to bring out the requisite amount of the slump freight. If the number of tons entered was too great, the rate per ton was too small. The result of the defender's contention was that if he was right on the bill of lading, then bills of lading for the balance of freight had not been granted. Therefore the cesser clause did not take effect, and he was liable on the charter-party. But if, to give him the benefit of the charter-party, the bill of lading was to be held as covering the balance of freight, then he was liable in respect that the consignees, as his agents, received delivery. He could not be allowed by a mere juggle to get rid of his liability to pay a slump freight.²

At advising,—

LORD JUSTICE-CLERK.—If we were to apply to this case certain strict rules in the construction of charter-parties I should have entertained doubts whether the action could be entertained at all, at least as far as the claim for freight is concerned.

I should have been inclined to hold that the cesser clause, as it is technically termed in this charter-party, with the provision that the balance of freight

¹ French v. Gerber, June 14, 1876, L. R., 1 C. P. D. 737; Sanguinetti v. Pacific Steam Navigation Co., Dec. 1, 1877, L. R., 2 Q. B. D. 238.

² Gibson v. Sturge, Jan. 13, 1855, 24 Law Jour., Eq. 121; Coulthurst v. Sweet, May 30, 1866, L. R., 1 C. P. 649; Tully v. Terry, July 7, 1873, L. R., 8 C. P. 679.

should be payable abroad, excluded this action altogether. It has been well fixed | No. 114.
 that the effect of such a clause is to leave the owner's security for the balance of
 the freight to his lien over the cargo, and to his remedy against the consignee ^{May 10, 1881.}
 abroad; and in the recent case of *Sanguinetti* it was laid down that this rule did ^{Heynon, &c. v.}
 not necessarily suffer exception, although the consignees abroad were the agents of ^{Kenneth.}
 the charterer at home. There might be, as was held in that case, good reasons
 why the freight should be, in the first instance, recovered abroad, although, if
 the consignees failed to satisfy the freight, after proceedings were taken, or if
 the lien proved insufficient to realise the amount, the ultimate responsibility
 might rest with the charterer.

But this question is somewhat technical, and at this stage of the proceedings
 in the present case I am unwilling to decide the case upon it. The view I take
 of it is a very short one. In regard to the claim of £24 for coals alleged to
 have been short delivered, I am of opinion that the defender has failed to prove
 that more was put on board at Greenock than was delivered at Monte Video.
 On the other hand, I am of opinion that the pursuers have failed to prove that
 more was delivered at Monte Video than the 398 tons 2 cwt. acknowledged by
 the defender. In regard to the loading at Greenock, although the bill of lading
 acknowledged receipt of 453 tons, it is admitted by the defender that that
 quantity was in excess of the amount actually put on board by at any rate ten
 tons. The evidence on this subject is so unsatisfactory as to leave the exact
 amount subject to the greatest doubt. I am inclined to infer that there must
 be great laxity in weighing cargoes of this kind at Greenock. The amount sent
 down to the quay at Glasgow to be loaded on board the barque "Alice" was,
 according to the Merryton Coal Company, 468 tons 13 cwt. Robert Donald, in
 the employment of the Caledonian Railway Company at Greenock, says the
 amount put on board was 437 tons 9 cwt., while the defender's servant, John
 Stirling, says the real amount was 443½ tons.

It is proved, however, that when the coals were weighed at Monte Video the
 weights only indicated 398 tons, and I am of opinion that there is no sufficient
 evidence that any more was delivered; and although criticisms were made on
 the mode and mechanism employed in the process of weighing at the foreign
 port there is nothing to set against the results so obtained. I do not doubt
 that the cargo was faithfully carried by the master, but the freight could only
 be earned by delivery, and I do not think that it is proved that more than 398
 tons were in point of fact delivered.

The result, in my opinion, is that the pursuers must have decree for the £24,
 4s. 9d. retained from their freight as value of the cargo said to have been
 shipped, but not delivered, and that beyond this the action must fail. This
 opinion of course proceeds not on a determination of the fact, which I do not
 find sufficient evidence to decide, but upon the burden of proof incumbent upon
 either party.

LORD YOUNG.—I am of the same opinion. The Sheriff-substitute has not
 entertained this cause as an action on the charter-party, and I think he was
 right in not doing so. But he holds that the action is well founded as laid on
 the bill of lading, and here I agree with your Lordship that he has taken an
 erroneous view. The reason why the action cannot proceed upon the charter-
 party is that the cesser clause declares "bills of lading for the balance payable
 abroad to be taken by the captain, on receipt of which documents all responsi-

No. 114. bility of charterer to cease." This clause I interpret in the same manner as your Lordship does.
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The charter-party embraces an obligation on the shipowner to receive on board a cargo, proceed to the port of discharge, and there deliver. It involves, therefore, a contract for the carriage of goods. The bill of lading, on the other hand, is simply a contract for the carriage of goods. It has, indeed, by mercantile law, certain important effects in passing the property. These have been introduced by custom and decision, but in its own nature it is simply a contract for the carriage of goods.

The meaning of the cesser clause in the charter-party is that when bills of lading have been granted for an amount sufficient to cover the freight, then the liability of the charterer under the charter-party shall cease, i.e., that there shall not be double contracts to the same end. It is extremely convenient in practice that this should be so. There is always the possibility of dispute as to the due execution of the contract of carriage. Such disputes do not usually arise until the completion of the voyage, when the discharge takes place, and it is obviously convenient that all such disputes should be raised and determined at the port of delivery, and hence that the creation of liability under the bill of lading should discharge that under the charter-party.

In the present case bills of lading were granted to the full amount required by the charter-party. There was a point here, I may say in passing, which did a little perplex me. Agreeing as I do with your Lordship that it is not proved that a larger quantity of coal was put on board the ship than was actually delivered, there was this perplexity arising, that in that view bills of lading had not been granted or should not have been granted for an amount to cover the whole freight stipulated, and that therefore to the extent of the deficiency the cesser clause was not properly brought into operation. But though I agree that it is not proved against the shipowner that the cargo taken in at Greenock was in excess of that delivered at Monte Video, yet I think that the terms of the bill of lading granted by the master are conclusive as against the shipowner. I am of opinion, therefore, that the cesser clause came into full operation, and that the only subsisting and operative contract was the bill of lading, and that under it the rights and liabilities of the parties *hinc inde* must be ascertained.

If the shipowner gave up his lien on payment of insufficient freight he may have his action against the persons to whom he made delivery, but his having parted with his lien will not diminish the effect of the cesser clause or revive any right under the charter-party.

The only other point in the case is with reference to the £24 retained by the charterer's agents in Monte Video in respect of the value of coal alleged to be short delivered. In that matter Bates, Stokes, & Company were not well founded, and the retention was not justified by the fact. To that extent, therefore, the action may be sustained.

LORD CRAIGHILL.—I concur. I am satisfied on the proof that not more than 398 tons were delivered, and therefore that the party liable in freight is only liable in respect of such 398 tons. I am also satisfied that not more than 398 tons were put on board, and that being so, the counter claim for the defender cannot be allowed. The ground of that claim is short delivery. The burden is on the consignee to prove short delivery, and if the evidence is doubtful the ground of the claim must fail.

Entertaining, to a large extent, the views expressed by your Lordships on the important points of law decided by the Sheriff and argued before us with so much anxiety, I yet do not feel called upon to form and pronounce a decided opinion upon them, as they are not necessary for the disposal of the case. I may say, however, that as regards the cesser clause, it appears to me that once the bills of lading were delivered the charterer was relieved of all liability under the charter-party; were it otherwise the cesser clause could have no effect. But the import of the cesser clause is no more than this, that the charterer shall be no longer responsible under the charter-party. If there is any other ground of liability not resulting from the charter-party there is no inconsistency in that liability continuing, though the liability under the charter-party ceases. Whether or not the bill of lading imports a new contract under which the charterer is liable is the question. The Sheriff-substitute has decided that it does. But the decision of the point is not necessary for the judgment which we are to pronounce. If called upon to decide it I would be inclined to support the view which the Sheriff-substitute has adopted, and I am satisfied that there would be no inconsistency in arriving at that result. But while I think there is no inconsistency in holding that such liability may arise, though that under the charter-party is discharged, I find that the point was expressly reserved in the leading English case of *Sanguinetti*, where Mellish, L. J., is reported to have said (L. R. 2 Q. B. D., 248),—"Now, in the statement of claim it is alleged that the defendants themselves, by their agent or manager, requested that the cargo might be delivered to them without enforcing the lien. If that is true, that may possibly give rise to a right on the part of the plaintiff wholly independent of the charter, but it would be a contract *dehors* the charter. Mr Benjamin said he did not claim on the present occasion, or wish for any decision about any right he might have independently of the charter; therefore we give no opinion, one way or the other, in respect of any claim that there may be against the defendants on account of their agent or manager having requested that the cargo should be delivered without the lien for demurrage having been enforced."

Hence, though it may well be that though freed from all liability under the charter-party the charterer is still liable *aliunde* for freight, I desire on that subject to reserve my opinion.

THIS interlocutor was pronounced:—"Find that it has not been proved that the coals shipped at Greenock were not all delivered: Find it not proved that more than 398 tons were delivered to the consignee at Monte Video: Therefore sustain the appeal: Recall the judgments of the Sheriff appealed against: Find the defender (appellant) liable in the sum of £24, 4s. 9d., and decern against the defender for payment of that sum to the pursuers (respondents): *Quoad ultra* assoilzie the defender from the conclusions of the action, and decern: Find no expenses due by either party to the other, either in this Court or in the Court below."

MORTON, NEILSON, & SMART, W.S.—J. STEWART GELLATLY, L.A.—Agents.

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No. 115.

MANUEL DE FRIBIS ARROSPE, Pursuer.—*Trayner*—*Pearson*.THOMAS BARR, Defender.—*Guthrie Smith*—*Jameson*.

Mar. 11, 1881.
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Ship—Clean Bill of Lading—Charter-party.—In a charter-party the ship-master and the charterer agreed that the vessel should load a full and complete cargo to be delivered at the port of discharge on payment of certain rates of freight, “the captain to sign bills of lading as presented at any rate of freight, without prejudice to this charter-party.” A lien was given over the cargo for payment of freight, dead freight, and demurrage. When the lay-days expired the vessel was short of a full cargo by thirty-five tons. The master intimated a claim for dead freight and demurrage, and refused to sign bills of lading, unless qualified by a reference to the conditions in the charter-party. It was afterwards agreed that the charterer should fill up the ship, and that the captain should sign “clean bills of lading, but under protest for three days’ demurrage incurred here, to be settled at the port of discharge.”

The captain still declined to sign bills of lading without this addition, “and all conditions as per charter-party.” Held that, while prior to the agreement he was justified in so declining, he was thereby bound to sign clean bills, i.e., such as neither contained nor implied any reference to matters previously in dispute between the parties, and was not entitled to insist on the bills of lading containing a reference to the conditions of the charter-party.

Observed that a condition in a charter-party that the captain “should sign bills of lading as presented at any rate of freight without prejudice to the charter-party” imported that the charterer might insert a different rate of freight from that stipulated in the charter-party, but not any farther departure from its provisions.

Observations as to the meaning of the term “clean bill of lading.”

1st Division.
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Lanarkshire.
C.

By charter-party, dated 24th September 1880, Captain Arrospe, the master and managing owner of the Spanish ship “Victoria,” entered into a charter-party with Thomas Barr, coalmaster, Glasgow, the former agreeing to charter his ship to the latter for “a full and complete cargo” of steam coals for delivery at Barcelona. The freight was to be 13s. per ton of twenty cwts. delivered, with six guineas gratuity.

The charter-party further bore,—“The said freighters to have the option of keeping the said ship ten days on demurrage over and above the said lying days, at the rate of £8 per day, . . . The captain to sign bills of lading as presented, at any rate of freight, without prejudice to this charter-party. The captain to take on board sufficient coals for ship’s use. It is agreed that for payment of all freights, dead freight, and demurrage, the owners shall have an absolute lien on the said cargo.”

The lay-days expired upon Saturday 2d October, on which day about 550 tons had been loaded. The master, on Monday the 4th, represented to the charterer that the ship was short of a full cargo to the extent of thirty-five tons, and claimed that amount of dead freight, and also three days’ demurrage. The master accordingly insisted that the bills of lading before being signed by him should be qualified by a reference to the conditions of the charter-party. A meeting accordingly took place between the parties, at which the master wrote out and signed this letter :—“Greenock, 5th October 1880. Thomas Barr, Esq., charterer of ‘Victoria.’ Dear Sir,—Upon condition that you supply the balance of cargo, say thirty-five tons coals, I agree to sign clean bills of lading, but under protest for three days’ demurrage incurred here, to be settled at Barcelona. Coal to be put on board to-day.—I am yours truly, MANUEL DE FRIBIS ARROSPE.”

The charterer sent this answer :—“Greenock, 5th October 1880. Captain Manuel de Fribis Arrospe, of ship ‘Victoria.’ Sir,—I acknowledge receipt of your note to-day, and consent to put thirty-five tons more coal

on board your ship, leaving the demurrage claim to be adjusted at Barcelona.—Yours truly, *p. pro.* THOMAS BARR, DAVID I. URQUHART.” No. 115.

On the same day thirty-five tons additional of coal were procured and put on board. On Wednesday the 6th, bills of lading were presented to the master for his signature which contained this clause—“Freight for said goods to be paid by the receivers at the rate of 13s. per ton of twenty cwts. delivered, with six guineas gratuity as per charter-party.” The master declined to sign unless the words “and all other conditions as per charter-party” were inserted, to which the charterer would not agree. Mar. 11, 1881.
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The demurrage days were exhausted upon 12th October, and on the 13th this action was brought by Arrospe, the master, in which he craved warrant to discharge and land the cargo, and to deposit it in neutral custody, and further asked damages.

The pursuer averred that by the regulations applicable to vessels trading between British ports and Barcelona the manifest and ship's papers must be signed by the consul at the port of lading before the vessel sails, and these documents, bearing the consul's signature, must be produced at the port of discharge under heavy penalties. Before the consul can sign he must have the bills of lading, which the pursuer would not sign unless a general reference to the conditions as per charter-party was inserted, or any words that would preserve his right to claim three days' demurrage at Barcelona. He further stated that he was not bound to wait longer than ten days on demurrage, and that, as he could not set sail with the cargo because the consul would not clear his ship as above narrated, he was obliged to bring this action.

The defender averred, *inter alia*, that under the clause in the charter-party “the captain to sign bills of lading as presented, at any rate of freight, without prejudice to the charter-party,” the pursuer was bound to sign bills of lading for any cargo which the defender might ship, in such terms as the defender chose to present to him. He further stated that, after completion of the agreement narrated above, he presented clean bills of lading for the whole cargo for the pursuer's signature, but that the pursuer declined to sign these without the addition of the words “and all other conditions as per charter-party.” The effect of these words, it was said, would have been to subject an indorsee of the bills to every obligation in the charter-party, and to remove the bills from the category of clean documents such as could be negotiated with bankers and merchants for commercial purposes.

The pursuer pleaded;—1. The defender, having loaded on board said ship a cargo for transit to Barcelona, is bound to comply with the regulations applicable to traders with that port. 2. The pursuer having been detained in the port of Greenock, through the defender's failure to comply with said regulations, he is entitled to demurrage, or damages in lieu thereof. 3. The defender having failed within the demurrage days to load said vessel, and arrange for the clearance thereof, he has committed a breach of contract, and the pursuer is entitled to have the cargo discharged at the sight of the Court.

The defender pleaded, *inter alia*;—3. Under the charter-party, the pursuer, being bound to sign bills of lading as presented, was not entitled to refuse to sign the bills of lading presented to him by the defender, his alleged claims against the defender as charterer not being prejudiced thereby. 4. The pursuer having expressly agreed, upon condition of the defender giving his vessel other thirty-five tons of cargo, to sign clean bills of lading for the cargo, was not entitled to refuse to sign clean bills of lading when presented to him by the defender.

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After a proof the Sheriff-substitute (Spens), on 27th October 1880, pronounced an interlocutor, in which, after finding in fact to the effect narrated above, he found in law "that pursuer was not entitled to refuse to sign bills of lading after the thirty-five tons stipulated by the letter of 5th October to be put on board the ship 'Victoria' had been duly loaded, unless defender adjoined the words 'and all other conditions as per charter-party,'" and he accordingly refused the prayer of the petition.

The Sheriff (Clark), on 9th December 1880, adhered.

The pursuer appealed.

Argued for him;—1. It was clear that, prior to 5th October, he would have been entitled to have the conditions he asked inserted before signing the bills of lading. (2) By the letter of the 5th October he offered to sign "clean bills of lading" under protest for demurrage. An unclean bill was one under which there were obligations on the consignee which were not to be measured by looking at the bill of lading, nor to be imported by reference to it, i.e., bills with the stipulation "not responsible for leakage, &c." The stipulation "all other conditions as per charter-party," required the exhibition of the charter-party before a banker would negotiate a bill of lading. But such a bill was a clean one, because it afforded the means of settling the obligations of the consignee, the charter-party being forthcoming. Even a condition as to freight might be *in gremio* of the bill, or be incorporated into it by reference to the charter-party.¹ (3) A reference to the charter-party, such as was here asked, was not unusual, and was as common as bills of lading themselves.² A lien for demurrage was in reality a protection to both charterer and owner.

Argued for the defender;—(1) The pursuer was bound to sign the bills of lading without the addition he wished, before the writing of the letter of 5th October. That followed from the condition in the charter-party, "the captain to sign bills of lading as presented, at any rate of freight, without prejudice to the charter-party." (2) The letter of 5th October obliged the pursuer to sign "clean" bills. A "clean" bill was one which would entitle the consignee to get delivery on payment of the freight set forth in the bill itself.³

At advising,—

LORD PRESIDENT.—The pursuer of this action in the Sheriff Court is the master and managing owner of a Spanish vessel called the "Victoria," and he entered into a charter-party with the defender by which he undertook that the ship should proceed to a berth in the Victoria Harbour at Greenock, and load from the defender a full and complete cargo of steam-coal, and carry the same to Barcelona at a stipulated rate of freight. An advance of freight was to be made to the extent of one-third on signing bills of lading, subject to five per cent to cover charges. The ship proceeded, in terms of that charter-party, to Victoria Harbour, and it was stipulated that the lay-days should expire on

¹ Craig & Rose v. Delargy, July 15, 1879, *ante*, vol. vi. 1269; Foard's Law of Merchant Shipping, 500; Abbott upon Merchant Shipping, 235, 265, 279; Pearson v. Goschen, June 23, 1864, 33 L. J., C. P., 265; Hyde v. Willis, 1812, 3 Campbell's Reps., 202; Peek v. Larsen, July 17, 1871, L. R. 12 Eq. 378; Bell's Comms. i., 538 and 542; Moes, Moliere, & Tromp v. Leith and Amsterdam Shipping Co., July 5, 1867, 5 Macph. 988.

² Chappel v. Comfort, May 29, 1861, 10 Scott's C. B. Reps., 802.

³ Gabarron v. Kreft, July 7, 1875, L. R. 10 Excheq. 274; Shand and Another v. Sanderson, 1859, 28 L. J. Exch. 278; Wegener v. Smith, 1854, 24 L. J., C. P., 25; Porteous v. Watney, July 2, 1878, L. R., 3 Q. B., 534.

the 2d of October. The cargo was loaded, but not completely, when the lay-days expired, and on the 4th of October the captain represented that he had not even then obtained a complete cargo—that thirty-five tons were still required to fill the ship; and he also represented on the same occasion that he had a claim for demurrage for two or three days as the case might be—three days it was mentioned to be, because the additional thirty-five tons could hardly be expected to be obtained before the following day at the earliest—and therefore the master's demand upon the 4th of October was, that he should obtain a delivery of thirty-five tons of coal in addition to what was already shipped, and should have a claim for three days' demurrage at the stipulated rate of £8 per day. Now, this was the subject of discussion between the parties upon the 4th of October, and a good deal of discussion apparently, and I daresay a good deal also of misunderstanding occurred, for the parties who were conducting that discussion spoke different languages, and did not understand each other very well sometimes, and there is in consequence some confusion in the evidence about what precisely took place, but the substance of it undoubtedly was this, that the master made the claims which I have already stated, and that these were not admitted, but resisted, on the part of the merchant. The charterer proposed on that occasion, that as the matter stood the master should sign bills of lading without any special stipulation whatever, but just acknowledging receipt of the cargo, and undertaking in common form to make delivery at the port of discharge. That the master, for the reasons already mentioned, refused to do. Now, had the matter stood there, I think the master was in the right. In the first place, he had certainly not obtained a complete cargo. The ship required to be filled up, in order to complete the cargo, with an additional thirty-five tons—certainly not a very small difference—and there is no doubt also that he had, or appeared to have, a fair claim of demurrage. The defender, however, contends, that whatever the master's claims might be in that respect, he was bound to sign any bills of lading that the merchant presented; that, no matter what his claims might be under the charter-party, he was bound, under a particular clause in that charter-party, to sign bills of lading simply acknowledging receipt of the cargo shipped, and undertaking to deliver it in the like good order and condition at the port of discharge.

The charter-party contains several very important stipulations in favour of the master and owner, and among others he has by express stipulation a lien at the port of discharge upon the cargo, not only for payment of freight but also of dead freight and demurrage. But the defender says that the master has undertaken by the terms of this charter-party to sign bills of lading in the simple form which I have already mentioned. The words founded on are these—"The captain to sign bills of lading as presented at any rate of freight without prejudice to this charter-party." Now, I do not attach much importance to the words "without prejudice to this charter-party," because I think these might be satisfied, if the defender's construction of this clause was otherwise sound, by giving it the meaning merely that the personal obligations of the master under the charter-party were not to be cancelled or abrogated by his signing bills of lading in any form presented to him. But the question appears to me to be, what is meant by the obligation on the captain "to sign bills of lading as presented at any rate of freight"? It is said that that gives the charterer an absolute power to make the bills of lading in any form he likes, not merely that he may alter the rate of freight from that stipulated in the charter-party, but that he may insert condi-

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fair meaning of them is that he is to sign the bills of lading as presented, though the rate of freight shall be other than that in the charter-party. That construction seems to me completely to satisfy the words which are here used; and it would be very unreasonable to construe them in any other way, as I think is illustrated by the circumstances of this case. The master not having obtained a full cargo, was entitled, when he arrived at the port of destination, upon delivery of that imperfect cargo, to demand payment of dead freight, and to retain the cargo until that dead freight as well as the freight for the cargo itself should be paid. It certainly never could be intended by the parties to that original contract of charter-party that one of them, by presenting bills of lading in a particular form, should escape from the obligation which he had thereby incurred, and that the master should be deprived of the security of lien which was there stipulated.

Therefore I think that upon the 4th of October, as matters then stood, the master was in the right, at least as regarded the matter of short cargo and dead freight. Whether he was entitled to claim demurrage as against the consignee of the cargo or the indorsee of the bill of lading at the port of delivery—that demurrage having occurred before the voyage commenced—is a question of more difficulty; and whether he was right or wrong in that respect I do not think it necessary to determine, because at all events I think he was right in one contention, and he had at least a fair claim to have the other reserved. And if the matter had stood there I should have been disposed to say that for what has occurred the defender must be responsible, because he would not allow the master to sail upon the conditions on which I think he ought to have been allowed to sail. He prevented that being done by applying to the Spanish Consul, without whose authority the vessel could not proceed on her voyage.

But then matters were somewhat changed next day—on the 5th of October—because, after a good deal of discussion upon the points in dispute to which I have referred, the parties exchanged two letters, one addressed by the pursuer to the defender, and the other by the defender to the pursuer; and I think the result of these letters is that each party gave up something in order to come to a conclusion and enable the vessel to proceed upon her voyage. The pursuer (the master) writes—"Upon condition that you supply the balance of cargo, say thirty-five tons coals, I agree to sign clean bills of lading, but under protest for three days' demurrage incurred here, to be settled at Barcelona;" and the answer by the defender is—"I acknowledge receipt of your note to-day, and consent to put thirty-five tons more coal on board your ship, leaving the demurrage claim to be adjusted at Barcelona." Now, I think the substance of that agreement is that the two points in dispute were settled so far as to enable the vessel to proceed upon her voyage. The ship was to be filled up so as to complete the cargo. Well, that put an end to the complaint of deficient cargo, and it put an end also to a prospective claim for dead freight. On the other hand, as regarded the matter of demurrage, the captain was satisfied to protest that that claim was not abandoned, but must be settled at Barcelona—"adjusted at Barcelona" is the phrase in the one letter, and "settled" in the other. Now,

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I do not think that the meaning of that was that the master was to keep up his claim of demurrage to the effect of giving him a lien for that demurrage upon the arrival of the ship at Barcelona; and the other objection therefore being removed, the question comes to be what the master means by agreeing to sign "clean bills of lading." When the bills of lading are again presented to him in the same form as before, he will not sign them except with the addition of certain words importing into the bills of lading the conditions of the charter-party. Now, if it had not been for the letters which so passed between the parties, I do not say that he might not have been entitled to have that reference to the charter-party. I do not at all agree with the argument that he was bound to sign those bills of lading, leaving the charter-party to speak for itself, and to work out its own conditions. I think that in certain circumstances, and probably in the circumstances as these stood on the 4th of October, the demand of the master to add the words "other conditions as per charter-party" would have been reasonable enough. And there is no difficulty as regards the practical operation of such a demand, because although it is argued that a bill of lading with a reference on the face of it to unknown conditions would not be a negotiable instrument, it would be a perfectly negotiable instrument if a copy of the charter-party were attached to it; and that is the practical answer to the whole suggestion of difficulty arising from the nature of the instrument. But then matters stood in a very different position when the bills of lading were again presented on the 6th of October. The master had reserved his claim for demurrage, and his other difficulty about dead freight had been obviated by the cargo being filled up. What, then, did he mean by agreeing "to sign clean bills of lading"? I do not think that that phrase has any technical meaning, nor do I think it is a legal phraseology at all. On the contrary, I think it is a popular phraseology as amongst mariners. I do not attach any importance to the evidence that has been led before us as to what is called custom or understanding in this matter. I do not think there is any settled meaning of those words applicable to every conceivable case. In short, it appears to me that a clean bill of lading must be construed with reference to the circumstances of each particular case. If there is a matter in dispute between parties as to the conditions on which the voyage is to take place, and the goods are to be carried and delivered, then a "clean" bill of lading will have reference to the subject of that dispute, and the meaning of it will be that the master will not cumber his bill of lading with any allusion to it. Other cases may be imagined in which difficulties are foreseen, not as subjects of regular dispute, but where there are difficulties anticipated, and if these form an element in the discussion between the parties, and the master signs the bill of lading, it will be understood that it is to exclude all reference to such difficulties. That appears to me to be the rational construction of this term. It can have no abstract meaning. It must have a meaning referable to the circumstances of each particular case. The bill is to be made clean of something—of something that is present to the minds of parties, and has either formed the subject of discussion or dispute, or at least has been anticipated as a difficulty. Now, using the phrase in that meaning here, I cannot doubt that the intention of the master in agreeing to sign clean bills of lading was that the bill of lading should not be encumbered with any reference whatever to the matters that had been in dispute between the parties, and had been compromised—compromised by full delivery of a cargo on the one side, and by the reservation by the master

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LORD DEAS concurred.

LORD MURE.—I am of the same opinion. The case is special in its circumstances, and has been decided by the Sheriff-substitute with reference to that specialty, viz., the terms of the letters which passed between the master and the charterer on 5th October 1880. These letters have admittedly reference to the dispute which had arisen between the parties relative to the quantity of cargo that had been put into the vessel, and as to the settlement of the claim that had been made relative to demurrage. The parties being at issue upon these points, the letter of 5th October was written, stating that upon condition that the charterer supplied the balance of cargo—35 tons of coal—the captain agreed “to sign clean bills of lading, but under ‘protest for three days’ demurrage incurred here, to be settled at Barcelona.” To that he received an answer from the charterer agreeing to put in the 35 tons of coal, qualifying to some extent the letter of protest by adding, “leaving the demurrage claim to be adjusted at Barcelona;” and upon that footing that particular dispute is settled. Now, this gives rise to the question, What is a clean bill of lading? and there is a great deal of evidence adduced to shew what, in the views of the respective parties, a clean bill is. That evidence is very contradictory, but I think the difficulty may be solved in this case in the view which your Lordship has now expressed, viz., that what the parties intended here was a bill of lading which should contain nothing which could by possibility give rise to a renewal of the points as to which the parties had been at issue, and which were settled by the two letters of 5th October. Any bill of lading, therefore, containing a qualification which could by possibility be held to revive those questions was not a clean bill of lading, in the sense of this arrangement. Upon that special ground the Sheriff-substitute has decided, and has, I think, rightly decided the case.

Upon the general question of a clean bill of lading, it appears to me that the authorities rather tend to this, that a clean bill of lading in ordinary circumstances means a bill of lading of the kind recognised in different countries, and that whenever any special stipulation is made with reference to the cargo in the bill of lading by the captain it can scarcely be held to come within the description of a clean bill. I see that in Bell’s Commentaries p. 542, a description is given of bills of lading, and he says—“The form used in Britain is uniform, and generally printed with spaces left for introducing the names and descriptions of the ship, captain, goods, and voyage.” He gives in a note the style and form, and adds, “special stipulations may, however, be introduced.” In the case of *Craig & Rose v. Delargy*, there was a special stipulation as to leakage and breakage added by the captain to the ordinary uniform printed style; and there are opinions in that case to the effect that there the bill was not clean because of that special stipulation having been inserted. I am rather inclined to think, if we were forced to decide the general question, that a clean bill of lading must mean a bill in the ordinary uniform style recognised in all ports in this country, and without any special stipulations different from that ordinary style. That, I think, is the import of the decision in *Craig & Rose’s* case; but in this case

the necessity of deciding the general question is obviated by the terms of the letters passing between the parties. No. 115.

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LORD SHAND.—In the discussion before us in this case there were two questions argued, the first being, whether if there had been no special agreement, such as is contained in the letters of the 5th of October, the master was entitled to insert in the bill of lading the words which he proposed, viz., “and all other conditions as per charter?” and the second, assuming that he was entitled to insert these words, whether he contracted to give up his right to do so by the letter which he wrote on 5th October, and what followed upon it? In regard to the first of these questions, which is of general interest, I concur in the opinions that have been delivered. The charter-party contained a number of stipulations in favour of the owner of the vessel, none perhaps of more importance than that towards the close, to the effect that for payment of all freight, dead freight, and demurrage, the owners should have an absolute lien on the cargo. The argument of the shipper is that the captain was bound to sign a bill of lading for the whole cargo, for the case we are now dealing with is one in which the bill of lading was for the whole cargo, which would practically deprive him of the right of lien as against the cargo; and it appears to me that in order to make out that proposition it would require very clear, distinct, and unambiguous language on the face of the charter-party to entitle the charterer of the vessel to say that he had right to have bills of lading so expressed. The clause founded on as operating that effect is this:—“The captain to sign bills of lading as presented, at any rate of freight, without prejudice to this charter-party.” It appears to me that this clause is limited to one matter, viz., the rate of freight. Notwithstanding that a certain rate of freight is stipulated for in the charter-party, the captain binds himself to sign bills of lading, at any rate of freight, without prejudice to this charter-party—that is to say, that if he signs bills of lading for a smaller rate of freight, his claim against the charterer shall be good for the rate stipulated in the charter-party. I do not see that the clause goes further to any extent. We were referred to the authority of a case of *Gabarron*, in which the clause was to this effect—the captain to sign bills of lading as presented, without prejudice to this charter-party. That is a very different clause from the one we have here. If a captain binds himself to sign bills of lading as presented, the ordinary meaning of which would be that whatever be the terms of the bills of lading he is to sign them, and to look to the charterer for his remedy ultimately, then he has contracted to sign bills of lading in any terms; but here it appears to me to be quite clear that the words “as presented” are qualified by the words which follow, “at any rate of freight,” and accordingly that the only obligation on the part of the master was that he should sign bills of lading at a lower or higher rate of freight as he might be asked, but that he undertook nothing else which would deprive him of any other rights under his charter-party. Accordingly, if this case had depended upon the general question, I should be of opinion that the pursuers would be entitled to succeed.

But then there was a very special transaction between the parties, for on the 5th of October their position was this—a dispute had arisen between the charterer and the captain as to whether the vessel had been fully loaded, and a second dispute as to three days’ demurrage. In regard to the loading, as I understand, the shipper maintained that he had sent down all the cargo which

No. 115. the captain had told him his vessel would carry—a quantity which would fill the vessel according to the representation which had been made by the captain, or at all events by the agents for the captain, who were acting with his authority, and that although it might be the vessel might carry more coals, the shipper was entitled to act on the view which had been presented to him, and was not bound to give more cargo. The captain, on the other hand, maintained that he was entitled to a full cargo for his ship, and that she could carry other thirty-five tons. A question was also raised between them which to some extent also depended on the other question, viz., as to three days' demurrage, making in all a sum of £24. In that state of matters the arrangement which was embodied in these letters is, I think, plainly enough expressed. The captain writes,—“Upon condition that you supply the balance of cargo, say thirty-five tons coals, I agree to sign clean bills of lading, but under protest for three days' demurrage incurred here, to be settled at Barcelona.” The reply to that is—“I consent to put thirty-five tons more coal on board your ship, leaving the demurrage claim to be adjusted at Barcelona.” Now, the first question is, what was the effect of that agreement? I think it was plainly a settlement of any question about deficient cargo. But I think it went further than this, for the charterer agreeing to give the thirty-five additional tons of coal, stipulated for something in his favour, and what he stipulated for was that he should get clean bills of lading, leaving the captain to stand upon his protest for three days' demurrage, to be settled at Barcelona. It appears to me to be very plain upon the face of this contract that whether the words “clean bills of lading” would go further or not, at least they were effectual to this extent, that the bills of lading were to be so expressed that they were not to keep open the claim of demurrage against the cargo. The claim of demurrage was to be kept open as against the charterers; there was a protest for it; and the captain said in his letter, I have not only protested, but it is to be settled at Barcelona, and the charterer agreed that should be so. But I think both parties by these letters must be held, from the language used, to have agreed that although that question was to be open as between the charterer and the captain at Barcelona, the cargo was to be clear of that claim. I say the agreement went that length certainly. I am by no means satisfied that it did not go further, and that the true meaning of the agreement was not that the cargo should be clear of everything by way of condition except the payment of the freight stipulated. But certainly I think the agreement did amount to this, that the cargo was to be free of a claim of demurrage.

Now, that being so, the captain, nevertheless, insisted on these words being inserted, “and all other conditions as per charter-party;” and it is desirable to see from the record and the correspondence at the time what his object was in doing so. Turning to the record, I find that in condescendence 6 the captain says—“The pursuer offered to sign the bills of lading provided a general reference to the conditions as per charter-party was inserted, or any other words that would preserve his right to claim three days' demurrage at Barcelona.” As I read that, the meaning of it was—“I mean to claim three days' demurrage against the cargo, and to keep my right open.” I think that is clear by the letter from pursuer's law-agents on 7th October 1880:—“The captain is bound to sign bills of lading at any rate of freight you think proper to insert, but he is entitled to have the words ‘all other conditions per charter-party’ also inserted, so as to keep up his claim of demurrage,” &c. I read that letter and the

passage in the record as meaning this, that the captain maintains his right to have his claim of demurrage kept up, not against the charterer only, but against the cargo, and he desires to have these words put in for that purpose. I think it is clear on the authorities that if these words had been inserted they would have had that effect. That is matter of express decision, for in the case of *Wegener v. Smith* in 1854, 15 Common Bench Reports, it was expressly held that where the words were inserted, "and other conditions as per charter-party," they amounted to an agreement that at the port of discharge the person holding the bill of lading should settle all claims of demurrage which were due by the charterer. It was, no doubt, left as a question to the jury by the learned Judge who tried the cause, but the opinions of the Judges were to that effect, and I agree in these opinions as thus expressed by Justice Maule in the course of the argument:—"The defendant is liable for demurrage if the bill of lading makes it part of the contract. The fact of his receiving the goods, to which he is only entitled under a bill of lading making them deliverable to him on payment of freight and demurrage, renders him liable to pay demurrage. That is putting it at the lowest. His repudiation of liability amounts to nothing." And the same view as to the somewhat serious consequences which may follow from the insertion of these words, "and other conditions as per charter-party," is very well illustrated by the decision in the case of *Porteous and Others v. Watney*, referred to in the course of the discussion, L. R., 3 Q. B. Div. 534. It was suggested that the law was otherwise on the authority of the case of *Chappel v. Comfort*—a much earlier case, in which there is a very learned judgment by Justice Willea. But it must be observed that in *Chappel's* case the only words inserted in the bill of lading were "he or they paying freight as per charter-party,"—not "and all other conditions as per charter-party." In short, the charter-party was introduced into the bill of lading in the case of *Chappel* simply for the purpose of putting in the amount of freight, but was not referred to or brought into the bill of lading so as to import any condition as to lien on the cargo for demurrage, or anything else. Now, it appears to me, upon the view I have just stated, that the contract between the parties under the letter of 5th October, was that there was to be no claim for demurrage made against the cargo. The bill of lading was to be so far clean. The captain insisted on putting in a clause which would have made the cargo liable to demurrage, and in that I am clearly of opinion that the captain was wrong.

Questions have been discussed at the bar, and even more fully in the course of the proof, by the witnesses, who seem to have given opinions upon legal points with more or less confidence, and with more or less difficulty, as to the meaning of the words "a clean bill of lading." It may not be necessary to decide that question here, but I can very well see that a question as to the general meaning of these words might occur, as for example, if a captain were to sign a charter-party in which he undertook to sign clean bills of lading "without prejudice to this charter-party." Upon that question I shall only say now that it appears to me that the true meaning of that expression is that the captain shall sign bills of lading which from their terms will entitle the holder to delivery of the cargo as there described, on payment simply of the freight, or at least on payment of an amount which may be ascertained on the face of the bill of lading itself. What I mean is this, that even if a sum were stated in addition to freight, but defined, which would let the holder or the acquirer of the bill of lading know that upon presentment of the bill and upon payment of a sum

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which might be ascertained on the face of the bill, he could get the cargo, that bill of lading would be a clean bill of lading, for it would enable the holder to go into the market, and to transfer the cargo at the current price of the subject of it to a purchaser, who would know precisely what he had to pay in order to get delivery of the cargo. In short, such a bill of lading is properly negotiable. But if you have conditions referred to which can only be ascertained by reference to another document, or which leave the sum which the holder of the bill of lading has to pay in considerable uncertainty, instead of giving him the means of knowing the amount which will ensure him the delivery of the cargo, then it appears to me that in the ordinary sense that would not be a clean bill of lading.

Upon the ground I have now stated, I am of opinion, with your Lordship, that the decision of the Court below ought to be adhered to, and I have only to express my regret and astonishment that in this case, in which the parties were really disputing about a sum of £24, the vessel has been kept lying for months at Greenock during a period in which she might have made I do not know how many voyages to Barcelona and back again, in place of an arrangement being made by which the vessel should sail on her voyage at once, and the question be decided by the Court in the ordinary course.

THE COURT pronounced this interlocutor:—"Find that on 24th September last the pursuer and defender entered into the charter-party produced, by which pursuer agreed to charter to the defender the ship 'Victoria' for a full and complete cargo of steam coals for delivery at Barcelona: Find, *inter alia*, it was agreed by said charter, 'the said freighters to have the option of keeping the said ship ten days on demurrage over the said lying days at the rate of £8 per day . . . The captain to sign bills of lading as presented at any rate of freight without prejudice to this charter-party . . . It is agreed that for payment of all freight, dead freight, and demurrage, the owners shall have an absolute lien on the said cargo': Find further, it was agreed that the rate of freight should be 13s. per ton of 20 cwts., with six guineas gratuity: Find that by the said charter-party the lie days expired on Saturday 2d October, on which day 544 tons 15 cwts. of coal had been loaded on the said ship, less some six waggons or trucks which were at the harbour ready to be put on board, probably amounting in all to some 90 tons: Find that said balance of coal was put on board on Monday the 4th, and thereafter the pursuer discovered that what he considered a full and complete cargo was not on board: Find that bills of lading were presented by the defender to the pursuer on Tuesday the 5th October for signature: Find that the bills of lading, as presented, contained the words:—'Freight for said goods to be paid by the receivers at the rate of 13s. per ton of 20 cwts. delivered, with six guineas gratuity': Find that thereafter the words 'as per charter-party' were added by the witness Urquhart on behalf of the defender: Find at this time pursuer was claiming that the cargo to be loaded should be 580 tons, and, that, therefore, there was 35 tons or so of dead freight, and he also claimed three days' demurrage, which claims were disputed by defender, and pursuer insisted that the words 'and all other conditions' should be inserted before the words 'as per charter-party' in the bills of lading: Find a meeting took place on Tuesday the 5th

October, at Greenock, at which the pursuer wrote out and signed the letter or agreement of that date, produced in process, addressed to the defender, and which is in the following terms:—‘Upon condition that you supply the balance of cargo, say 35 tons coals, I agree to sign clean bills lading, under protest for three days’ demurrage incurred here, to be settled at Barcelona. Coal to be put on board to-day. MANUEL DE FRIBIS ARROSPE’: Find at the same time the witness Urquhart, on behalf of defender, gave a letter in the following terms addressed to pursuer:—‘Sir,—I acknowledge receipt of your note to-day, and consent to put 35 tons more coal on board your ship, leaving the demurrage claim to be adjusted at Barcelona. *p. pro.* THOMAS BARR, DAVID I. URQUHART’: Find that thereafter on the same day the said David Urquhart procured 35 tons or more of coal, in implement of the arrangement thus come to, and said coals were duly put on board the ship ‘Victoria’ on the same day or next morning: Find the bills of lading were again presented for pursuer’s signature on the 6th October, after the 35 tons loading had been completed, but he declined to sign said bills of lading unless the words ‘and other conditions as per charter-party’ were inserted therein: Therefore refuse the appeal, and decern: Find the respondent (defender) entitled to the expenses of the appeal: Allow an account thereof to be lodged, and remit to the Auditor to tax, and to report.”

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DOVE & LOCKHART, S.S.C.—J. & J. ROSS, W.S.—Agents.

Poor MRS ANN ROBB OR HARRIS, Pursuer.—*Goudy—Todd.*
PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF THE BURGH OF LEITH,
Defenders.—*Asher—Dickson.*

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of Leith.

Road—Burgh—Liability of the Magistrates of Royal and Parliamentary Burghs for damages for injury caused by insufficient fencing of road—General Police Act, 1862, secs. 147, 170, and 237.—Leith was originally a burgh of barony, holding of Edinburgh, but after 1832 it became a parliamentary burgh, and there were subsequent Acts dealing with the rights, powers, authority, and jurisdiction of the Magistrates. Ultimately in 1862 the burgh adopted the provisions of the General Police Act, 1862.

In an action of damages against the Magistrates of that burgh for injury sustained in consequence of their alleged neglect to fence and protect a parapet wall at Newhaven, within the parliamentary limits of the burgh, on the road leading by the shore from Leith to Granton, *held (dub. Lord Deas)* that as the road in question had not been placed by the statutes above referred to under the charge of the Magistrates, but remained under the county turnpike district road trustees, there was no liability attaching to the Magistrates either (1) at common law, or (2) under the General Police Act, 1862.

Observations upon the cases of Innes v. The Magistrates of Edinburgh, M. 13,189; Threshie v. The Magistrates of Annan, 8 D. 276; and Dargie v. The Magistrates of Forfar, 17 D. 730.

ON the evening of the 17th December 1878 James Harris left his home at East Cottages, Granton, to go to Leith. On his way homewards he made a call at Newhaven, and from that proceeded to Granton by a road which lay close to the Firth of Forth, and was separated from it by a stone bulwark surmounted by a parapet wall. At a part of that road where the roadway turned nearly at right angles Harris fell over the wall upon the beach below and was killed. The wall was only two feet high on the side next the roadway, on the other side it was seventeen feet deep.

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Harris' wife brought this action of damages for the loss sustained through her husband's death against the Provost, Magistrates, and Town-Council of Leith. As police commissioners of the burgh, the defenders, it was averred, were bound to see that the streets and roadways within their district were sufficiently fenced and protected, which had not been done at the place where the accident occurred. It was also averred that the place in question was not sufficiently lighted.

The defenders denied liability, and in their statement of facts averred, further, as follows:—"1. The defenders, the Magistrates and Council of the burgh of Leith, are Commissioners of Police for the burgh under and in virtue of 'The General Police and Improvement (Scotland) Act, 1862,' and 'The General Police and Improvement (Scotland) Act, 1862, Order Confirmation (Leith) Act, 1877.' [And 'The General Police and Improvement (Scotland) Supplemental Act, 1862.']*"

"2. By the 66th clause of the said General Police Act it is provided that 'the monies arising from the assessments hereby authorised to be levied, and all other property acquired by the commissioners in pursuance of the powers hereby granted, shall be, and the same are hereby vested in the commissioners and their successors for the uses and purposes mentioned in this Act, and for no other purpose whatever.' No such purpose as payment of the present or any analogous claim is in any way mentioned or referred to in the Act.

"[The burgh of Leith was originally a burgh of barony, holding of Edinburgh as superior. By the Act 1 and 2 Victoria, chapter 55, Edinburgh and Leith were separated in all the civil and municipal relations thereof. But, so far as Leith has or ever had any separate municipal government, the existence, rights, powers, obligations, and jurisdiction of the Provost, Magistrates, and Council, and Police Commissioners thereof, including the defenders, have always been entirely regulated and defined by statute, and are now regulated and defined especially by the statutes before mentioned. There is no common good in the burgh of Leith, and the defenders have no fund whatever from which to meet such a claim as the present, nor are there assessments which the defenders are entitled to impose available to meet such a claim, or to fence, repair, or maintain the road in question.]*"

"3. The road in front of Trinity Crescent . . . is under the jurisdiction and subject to the control and management of certain trustees acting in and for the county of Edinburgh under the Act 5 and 6 William IV., chapter 62, intituled, 'An Act for more effectually making, repairing, and maintaining the turnpike roads in the county of Edinburgh.' By the 3d clause of the said Act, it is provided that for the better execution of the Act the county of Edinburgh be divided into certain districts. The road leading in front of Trinity Crescent, referred to by the pursuer, and particularly that part thereof at which the alleged accident is stated to have occurred, is in the Cramond district, and subject to the trustees acting for that district."

"4. By the 118th clause of the Act 1 and 2 William IV., chapter 43, intituled an Act for amending and making more effectual the laws concerning turnpike roads in Scotland, it is provided:—"That all civil causes, petitions, complaints, and processes whatsoever, and prosecutions for expenses, tolls, duties, penalties, forfeitures, and fines imposed by this Act or any local turnpike Act, or for any damages incurred or any wrongs done or injuries suffered in any matter thereto relating, or for anything done in pursuance of any of the powers by this or any such Act given and granted, shall be commenced within six calendar months after

* This was added to the record upon amendment in the Inner-House.

the penalty, forfeiture, fine, or damage shall have been incurred, or wrong done, or injury suffered, or fact committed, and not afterwards.' No. 116.

"[It is provided by section 94 of the Act 1st and 2d William IV., chapter 43, which is incorporated by the Act 5th and 6th William IV., chapter 62, as follows:—'And be it enacted that the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security along the sides of all bridges, embankments, or other dangerous parts of the said roads; and, if they shall fail therein, it shall be lawful for the procurator-fiscal, or any commissioner of supply for the shire in which the part of such road complained of is situated, such commissioner finding security to pay expenses of process if he shall fail in his action, to prosecute the trustees of any such turnpike road before the Sheriff of the shire in which such road is situated, who shall judge and determine therein in a summary manner, and upon finding the complaint well founded, may compel the said trustees to remedy the matter complained of, and allow the prosecutor the expenses of process; but if such prosecution shall be found groundless, the private prosecutor shall be liable in expenses.' There is a toll-bar erected by said trustees within a few yards of where the accident took place, and the money taken thereat is received and administered by the said trustees. Said road, and particularly that portion of it where the accident took place, is not, and never has been, subject to the control or management of the defenders, or the Magistrates, Council, or Police Commissioners of Leith, and the defenders have no power or duty as regards the maintenance, fencing, or repair of the same.] *"

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The defenders pleaded;—2. The defenders, being in no way responsible for the alleged accident, are not liable in damages. [5. The defenders having themselves no power or duty as to the repairing, maintenance, or fencing of said road, and more than six months having elapsed after the accident before the pursuer commenced the present action, or even made any claim in respect of said accident, and the defenders having thus lost all right of relief competent to them against the Cramond District Trustees, the action cannot be maintained, and the defenders should be assoilzied. 6. The action cannot be maintained, in respect the defenders have no funds or property available or liable to meet the pursuer's claim, and that the only funds and property held by them are specifically appropriated to other purposes. 7. The defenders should be assoilzied, in respect the accident was caused, or materially contributed to, by the fault and negligence of the deceased himself.] *

Originally, an issue was approved by the Lord Ordinary for the trial of the case, confining the action to the question whether the road was insufficiently lighted or not, but, upon a reclaiming note to have the terms of the issue varied, the Court allowed amendments to be added to the record (which have been incorporated in the above narrative), and allowed a proof, which was taken before Lord Shand.

The result of the proof sufficiently appears from the opinions of the Court. The clauses of the different statutes founded on are quoted by the Lord President.

It was not further argued that the road was insufficiently lighted.

Argued for the pursuer;—Upon the evidence Harris' death was the result of an accident occasioned by the insufficient fencing of the road. No contributory negligence was proved. Even where a party went out of his direct route, and an accident followed, damages had been held due.¹

* This was added to the record upon amendment in the Inner-House.

¹ Chapman v. Parlane, Feb. 25, 1825, 3 S. 401.

No. 116. The Magistrates of the burgh were liable (1) at common law. There was a duty upon them to keep public places safe.¹ The case of *Innes* was authoritative to that effect. If not at common law, there was (2) a statutory liability upon them, as an examination of the clauses in the Acts applicable to the burgh of Leith would show, particularly the provisions of the General Police Act, 1862 (the Lindsay Act), which Leith had adopted. It was possible that the Magistrates might have an action of relief against the Cramond district trustees, but the former were primarily liable.² The liability of the Magistrates being for *culpa* was absolute, and it was irrelevant to the present inquiry to consider how far they might hold a third party liable to them. The 118th clause in the General Turnpike Road Act did not bar such a demand as this.* It applied merely to petitory actions.

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Argued for the defenders;—1. The pursuer had not made out a case of freedom from fault on the part of the deceased. The party suffering could only recover if he had exercised reasonable care himself. The evidence here shewed that the deceased knew the danger, and therefore ran a risk in voluntarily approaching the place, and could not have the claim which a stranger would have.³ 2. There was no duty upon the defenders to attend to the state of this road, either statutorily or at common law. The road was under the jurisdiction of the Cramond Road Trustees. Under their statutes the duties and liabilities of the Magistrates of Leith, at least in a case of this nature, were entirely statutory.⁴ 3. If the defenders were liable, the pursuer's claim had fallen by lapse of time under the General Turnpike Road Act. There could be no action of relief by the Magistrates against them, because in such a case the liability of the party claiming relief must be commensurate with the liability of the party from whom relief is claimed.⁵

At advising,—

LORD PRESIDENT.—The place where the accident occurred by which the husband of the pursuer lost his life was at a part of the road between Newhaven and Granton which runs close to the sea, on an elevation above the beach of about seventeen feet in height, and having a parapet wall to the front of about two feet. The pursuer contends that the two feet parapet was insufficient protection for pedestrians going along the road, and she also maintains that the place was insufficiently lighted, and to these two causes she attributes the unfortunate occurrence. The allegation of insufficient lighting has certainly not been proved on the evidence. On the contrary, there was a lamp within quite a reasonable

¹ *Innes v. Magistrates of Edinburgh*, Feb. 6, 1798, M. 13,189; *Threshie v. The Magistrates of Annan*, Dec. 11, 1845, 8 D. 276; *Dargie v. The Magistrates of Forfar*, March 10, 1855, 17 D. 730.

² *Edinburgh and Glasgow Railway Co. v. Dymock*, Nov. 27, 1847, 10 D. 158.

* The 118th clause of the Act 1 and 2 William IV., was,—“That all civil causes, petitions, complaints, and processes whatsoever, and prosecutions for expenses, toll, duties, penalties, forfeitures, and fines imposed by this Act or any local turnpike Act, or for any damages incurred or any wrongs done, or injuries suffered in any matter thereto relating, or for anything done in pursuance of any of the powers by this or any such Act given and granted, shall be commenced within six calendar months after the penalty, forfeiture, fine, or damage shall have been incurred, or wrong done, or injury suffered, or fact committed, and not afterwards.”

³ Addison on Torts, 24, 25, 26.

⁴ *Inhabitants of Sneddon v. Magistrates of Paisley*, 1759, M. 7612.

⁵ *The Caledonian Railway Co. v. Colt*, June 1860, H. of L., 3 Macq. 833 (Lord Chelmsford's opinion).

distance of the place, and it has not been proved, or indeed alleged, that the lamp was not lighted at the time that the accident occurred. It has been established, certainly, that the parapet wall did not exceed two feet in height, and I think it is impossible to say that that was sufficient protection at a dangerous place. It falls upon the pursuer, however, to establish that that was the cause of the accident that occurred. Now, there was no eye-witness of the occurrence, and therefore we are driven to circumstantial evidence in order to ascertain whether the pursuer's husband lost his life by accidentally falling over the parapet of two feet, and being precipitated on to the sea wall below. After a careful examination of the evidence as regards that matter of fact, I think it has been established that that was the cause of the accident, and of the loss of this poor man's life. It is quite unnecessary to go into any examination of the proof for the purpose of determining that which is merely a verdict upon a matter of fact.

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Now, *prima facie*, in these circumstances, the parties who are in charge of the road will be liable for the consequence of this occurrence, and it is apparent by reference to the Acts of Parliament that the road is within the Cramond district of the county of Edinburgh, and that the Cramond District Road Trustees are charged with the working, maintaining, and upholding of it, and among other duties devolving upon the road trustees in these circumstances is the fencing of dangerous places along it, either by parapet walls or other sufficient fences. That is provided for by the 94th section of the General Turnpike Act (1 and 2 Will. IV. cap. 43), which is incorporated by the Act 5 and 6 Will. IV. cap. 62. We therefore see that there is a duty laid upon the body of statutory trustees of maintaining a sufficient parapet wall at this place, and that the parapet wall actually maintained at the time of the accident was insufficient. *Prima facie*, therefore, the road trustees of the Cramond district are liable for the consequences. But we are not pronouncing any judgment against them, because they are not defenders in this case, and we are not entitled to anticipate that they could have no defence if they were called which would be sufficient as an answer to the pursuer's claim. The only parties called as defenders are the Magistrates of Leith, and the question therefore remaining to be solved is whether they are in any way responsible for this parapet wall being so low as it was.

The history of the town of Leith is very peculiar. It was originally a burgh of barony belonging to the corporation of the city of Edinburgh, and so long as it was in that condition the Magistrates of Leith had no proper municipal jurisdiction at all, and no proper police powers of administration. But a certain change took place in the condition of the Magistrates of Leith, as, indeed, in that of many other towns of the same kind, in consequence of an Act which was passed in 1833 (3 and 4 Will. IV. cap. 77). Leith, like a number of towns in Scotland, had by the Act of 1832 been invested with the privilege of returning, either solely or in conjunction with other towns, a Member of Parliament, and the burghs which were so enfranchised passed under the name of parliamentary burghs. It is matter of fact that the boundaries of Leith were, for the purposes of the Reform Act, so extended as to include the place where this accident occurred. The inhabitants, therefore, of that part of the district where this accident occurred were made electors within the town of Leith by the operation of the Act of 1832. Then by the Act of 1833 it was provided, by section 30, "That the Magistrates and Town-Council to be elected for the said burghs or towns under the authority of this Act shall have such and the like rights, powers, authorities, and jurisdiction

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as is or are possessed by the magistrates and council of any royal burgh in Scotland, and such rights, powers, authorities, and jurisdiction shall extend equally over all and every part of the limits of such burghs or towns as described in the said recited Act of the 2d and 3d year of the reign of his present Majesty." Now, what might be the precise operation and effect of this clause in every conceivable circumstance it would be difficult to determine. But fortunately it has not the least connection with the present case. It is sufficient to say that the administrators of the burgh, like those of other burghs of the same class, after the year 1833 possessed generally the powers of magistrates of royal burghs.

But a much more important Act (1 and 2 Vict. cap. 55) as regards the burgh of Leith was passed in the year 1838, by which the town of Leith was separated from the city of Edinburgh in regard to all civil and municipal relations. In the words of the statute they were (sec. 26) "separated and dis severed, and all rights of patronage and jurisdiction, and of levying any tax, rate, or assessment, custom, impost, or dues of any description whatever, heretofore belonging or competent to or claimed by the said city of Edinburgh in, out of, or over the town of Leith . . . shall be and the same are hereby abolished." And then there was inserted in the Act this clause (section 31),—"That the said Provost, Magistrates, and Council of the town of Leith shall hereafter be bound to free and relieve the trustees of the middle district of roads of the county of Midlothian of all obligations imposed upon them by an Act passed in the 5th and 6th year of the reign of His late Majesty King William the Fourth, intituled 'An Act for further regulating the statute-labour, and repairing the highways and bridges in the county of Edinburgh,' in relation to the upholding and maintaining certain roads and streets within the said town of Leith, under the said last recited Act; and also of all claim of relief competent to the said trustees against the said Lord Provost, Magistrates, and Council of the city of Edinburgh in relation to such obligation." The meaning of the last words of the section, I confess, is, to my mind, past finding out.

Now, under the operation of this statute, it is to be observed that the Magistrates of Leith were invested with powers with regard not only to the ordinary administration of the affairs of the burgh, but also to a certain extent with regard to roads and streets, and in particular with regard to those roads that lay immediately to the east and south of the proper town of Leith. They were made to come in place of the Middle District Trustees, and accordingly the Middle District Trustees had no farther charge of these roads. But as regards the roads on the west of the burgh along the sea-shore there was no such change introduced by this statute, and the road we are now dealing with remained within the administration of the Cramond Trustees just as completely as it did before the passing of this Act.

Then there is the Act of 1846 for regulating the repair and maintenance of the roads and streets within the town of Leith, and the assessments payable in respect thereof. And here the whole streets and roads in and about Leith, which were formerly dealt with by the Magistrates of Edinburgh, or the Middle District Trustees, or the town of Leith, are to be under the administration of the Provost, Master of the Merchant Company, and certain Town-Councillors of Leith. That Act remained in operation for two years until the year 1848, when another statute (11 and 12 Vict. cap. 123) was passed which abolished the commission that had been appointed in 1846, and provided for the muni-

cipal government of the burgh of Leith being in the hands of the magistrates. No. 116.
 They had not, down to that time apparently, possessed any police administra-
 tion or power. But by the Act of 1848 that was conferred upon them. The Mar. 11, 1881.
 Act proceeds upon the preamble that "it is expedient to unite the municipal Harris v.
 and police government and jurisdiction of the said town or burgh of Leith in Magistrates
 the provost, magistrates, and council thereof, to transfer to them all the powers of Leith.
 and jurisdictions of police, &c. by the said recited Acts; to extend such municipal
 and police jurisdiction over the limits hereinafter described; to vest in the
 said provost and magistrates admiralty jurisdiction; and to vest in the said
 provost, magistrates, and council the powers respecting the roads and streets in
 and around the said town, contained in the said recited Act of the 9th and 10th
 years of the reign of her present Majesty," being the Act of 1846 to which I
 have just referred, and in pursuance of that preamble, it is enacted by section 4
 that "the magistrates and other members of the town-council of the said burgh
 for the time being shall be and are hereby appointed commissioners for execut-
 ing the police purposes of this Act." And then comes the section regarding
 roads (section 6), which enacts "that from and after the said first Tuesday in
 November 1848 the powers vested in the trustees appointed by and elected
 under the said recited Act of the 9th and 10th years of the reign of Her present
 Majesty shall cease and determine, and the whole rights, powers, authorities,
 and jurisdictions, together with the rates and assessments, and all arrears there-
 of, and all property, of whatever description, now in or under the administra-
 tion of the said trustees, shall be transferred to and the same are hereby vested
 in the said magistrates and council, who shall administer the said trust in future
 in room and place of the said trustees, by levying the rates and assessments by
 the said Act authorised, and applying the same as herein directed, and other-
 wise conforming to the whole injunctions, rules, and regulations of the said
 Act." And then there is a provision as to the extent of the power thereby con-
 ferred in regard to the administration and management of the roads and streets.
 The 12th section specially defines the district within which these powers and
 rights of administration are to be confined. And it is sufficient to say that there
 is nothing introduced into this new Act to shew that any change was made in
 regard to the road with which we are now dealing. Now, the matter so stood,
 and the administration of the burgh and its affairs, including the streets within
 that defined district, continued to be, in the same position until another change
 took place, when the town of Leith adopted the General Police Act of 1862,
 and the ground on which the pursuer maintains that the Magistrates of Leith
 are liable under the sections of this Act seems to me to depend mainly upon
 the construction and effect of this public statute as adopted by the town.

The first portion of the statute which is material begins with section 146,
 which is under the general heading of "Paving and Maintaining Streets."
 That section provides that "the commissioners may from time to time cause
 all or any of the streets within the burgh not under the management of any
 turnpike road or other trustees, or any part of such streets respectively, to be
 raised, lowered, altered and formed in such manner and with such materials as
 they shall think fit, and they shall also repair such streets from time to time:
 Provided always that nothing in this Act contained shall interfere with any
 right to have applied to such streets any commutation for statute-labour, or other
 fund by law applicable to the repair or maintenance of such streets." And
 the immediately following clause (147) provides that "the commissioners shall,

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from time to time, place such fences and posts on the side of the footways of streets as may be needed for the protection of passengers on such footways, and they may place posts in the carriage-ways of such streets so as to make the crossing thereof less dangerous for foot-passengers, and they shall, from time to time, repair any such fences or posts, or may remove the same or any obstructions to any such carriage-way or foot-way as they think fit." Now, it seems to me that the 147th section applies to the same streets which are the subject of the 146th section, and they are both under the same general heading of that part of the statute which relates to paving and maintaining streets, and consequently the provision for fences and posts applies to the streets which properly belonged to the police commissioners of the burgh, and not to those which are under the management of the turnpike road or other trustees. The statute plainly contemplates that there may be within the burgh a turnpike road under the management, not of the police commissioners, or of the magistrates, but of the turnpike road trustees of the district adjoining the burgh.

I do not think there is any other clause in that part of the statute that bears upon this question materially. But then we come to another division of the statute, which relates to what is called "laying out new streets," and that begins with the 170th section. The most of the sections in this part of the statute refer to the mode of giving notices, and compelling parties to contribute to the making of new streets who are liable to do so. The only section in that part of the statute to which reference was made on behalf of the pursuer was the last section of this division of the statute, viz., the 181st, which provides that "the provisions of this Act in regard to paving and making streets, excepting foot pavements, as above provided, shall not apply to any roads or streets, which are or may come under the management of turnpike or other road trustees, and this Act shall in no respect repeal, alter, or affect the powers or obligations of such trustees, or the provisions of any Act of Parliament under which they act." Now, this must be read along with the provision with reference to the special heading or division of the Act of Parliament in which it is found, and that is the "laying out of new streets," and, therefore, it has no application to the question with which we are now dealing, which is the case of a turnpike road situated in a town or burgh, but under distinct management.

Reference was made to section 237 of the statute; and here, again, it is very necessary to keep in view what is the subject of that part of the statute in which this clause occurs, viz., "Precautions during repairs, and old and ruinous tenements." There are two subjects, therefore, dealt with in this division, and the division runs from section 233 down to 247, inclusive. Of these the first five refer to the matter of "precautions during repair," and the remaining sections refer to "old and ruinous tenements." It is quite impossible to read these sections in sequence, one after the other, without seeing that that is certainly the meaning of that part of the statute, that these two subjects alone are dealt with. The only question that can be raised, and which was raised, by the pursuer's counsel, was whether section 237 refers exclusively either to the matter of precautions during repairs, or to the matter of old and ruinous tenements. Now, it appears to me that it applies to the former of these subjects. The 1st section of this branch provides that hoards shall be erected across streets while repairs or alterations are being made, and lights put up at night. Clause 234 provides that hoards are to be set up during repairs, so as to enclose the work that is going on. Section 235 imposes penalties for not lighting deposits of building materials,

or holes made in the course of carrying on such repairs. The provision is thus made—"When any building materials, rubbish, or other things are laid, or any hole made, in any such streets, whether the same be done by order of the commissioners or not, the person causing such materials or other things to be laid, or such hole to be made, shall, at his own expense, cause a sufficient light to be fixed in a proper place upon or near the same, and continue such light every night from sunsetting to sunrising while such materials or hole remain; and such person shall, at his own expense, cause such materials or other things, and such hole, to be sufficiently fenced and enclosed until such materials or other things are removed, or the hole filled up, or otherwise made secure; and every such person who fails so to light, fence, or enclose such materials or other things, or such hole, shall, for every such offence, be liable to a penalty not exceeding £5, and a farther penalty, not exceeding 40s., for every day while such default is continued." Then comes section 236—"In no case shall any such building materials or other things, or such hole, be allowed to remain longer than may be fixed by the surveyor, under a penalty not exceeding £5 to be paid for every such offence by the person who causes such materials or other things to be laid, or such hole to be made, and a farther penalty, not exceeding 40s., for every day during which such offence is continued after the conviction for such offence." Now, immediately following upon these, comes the section in question (237)—"If any building or hole, or any other place near any public or private street, be, for want of sufficient repair, protection, or enclosure, dangerous to the passengers along such streets, the commissioners shall cause the same to be repaired, protected, or enclosed so as to prevent danger therefrom."

Now, I should be sorry to limit that section too strictly, or to construe it with reference to the preceding clause, because its words are very comprehensive, but, on the other hand, we must not extend its meaning so as to make it applicable to a different class of cases altogether, and to different parts of the statute with which it has no connection. If, according to the words of this clause, any building or hole, or any other place, is, for want of sufficient protection or enclosure, dangerous to the public, the commissioners are to put the same right. Now, a building which is in course of repair, or which needs repair, may be within that section of the statute perfectly well, although the provisions of the clauses which I have read do not expressly apply to that. But then, on the other hand, to say that this section 237 is to apply to the case of the erection of a parapet wall along a turnpike road which is not within the management of the magistrates of the burgh at all, but where their right of administration is excluded, and the right is vested in another body of trustees, is to use the section of the statute for a purpose for which it is quite obvious it never was intended, and therefore, I think, the pursuer takes no benefit from this section of the statute. And the matter just reverts to where it was before the Act of 1862 was passed. The magistrates of Leith are vested with the administration and management, paving and maintenance of certain streets and roads within the burgh, but there is expressly excepted from the statutes applicable to these a particular part of a turnpike road, which, although lying within the limits of the burgh, is under the management of a body of trustees, and such is the road in question.

It is plain, therefore, that the erection of a parapet wall such as we are dealing with here is a matter for the road trustees of the Cramond district, and it is those very words which I think I have already read, of the 94th section of the General Turnpike Act, which require the road trustees, and every road trust, to fence

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dangerous places along a road. If the burgh of Leith, or its magistrates, were to take upon themselves to alter this parapet wall, I rather apprehend they would not only be exceeding their powers, but they would be encroaching on the powers of another body of trustees altogether. They might render themselves liable, perhaps, by doing so, but I do not see how they could possibly render themselves liable by omitting to do that which is not within their duty, but which is within the duty of another body of statutory trustees.

It has been said that this place, being within the burgh, the Magistrates of Leith, if they saw that there was an insufficient fence here, ought to have called upon the road trustees of the Cramond district to make it sufficient. But I do not see any statutory duty on them under any of the various Acts of Parliament to which we were referred. I see in the General Turnpike Act that, if the road trustees of the county fail in their duties about a matter of this kind, the procurator-fiscal is entitled to enforce these against them, and a commissioner of supply of the county may do so, but I see no such power given to any one else, and, therefore, it rather appears to me that it is a very dangerous thing for a public body like the magistrates of this burgh to interfere with the duties of another statutory body of trustees. It might very well be that, as a matter of common prudence, if the magistrates of a burgh saw a danger of this kind, they might call upon the road trustees to see that it was put right. I see nothing against that. But that is not the case here. The question here is, whether by omitting to do so, or by not doing so, the Magistrates of Leith have incurred a legal liability. It does not appear to me that any such liability lies upon these defenders, but that it rests upon another body, unless they have a special defence which will amount to an answer to an action brought to enforce that liability.

I am therefore of opinion that we should sustain the defenders' second plea in law, and assoilzie them from the conclusions of the action.

LORD DEAS.—I have read this proof very attentively, and listened to the very full discussion of the case which we have had.

There can be no doubt at all as to the dangerous nature of this footpath alongside this wall, which—the wall I mean—is only some twenty-one inches, or at all events less than two feet, in height on the side on which people walk, and some sixteen or seventeen feet perpendicular down to the sea-beach upon the other side. That this was a very dangerous footpath, and most inadequately fenced, does not admit of the slightest doubt or dispute. If, therefore, this poor man was lawfully using this footpath, and fell over this wall, as was plainly proved to be the case, it is perfectly clear that the only available answer which could be made to a claim by those in his right would be an answer of contributory negligence. Now, I am clearly of opinion, as I understand your Lordship also to be, that on the face of this proof no contributory negligence can be attributed to him. He was walking along this footpath, which at the place of the accident is very narrow, and it seems his purpose was to make water at a place adapted and used for that purpose. There was no other place of the kind except at a considerable distance, and which is proved to have been totally dark. I have no doubt at all, therefore, that he was fairly entitled to go to the place in question for the purpose stated, and that it was through no fault or negligence on his part that he fell over the wall. The proof all goes to shew that the night was rough and stormy, and that anybody would have been in danger of falling over this wall, however well he knew the road or path, or however carefully he was

walking on it. I think it is impossible to say there was contributory negligence No. 116.
on his part.

The question therefore comes to be, whether anybody is liable for the very dangerous state of this footpath and wall, and, if so, who is liable? Now, I confess I think the matter is attended with more difficulty than your Lordship seems to have thought it. I must say I have great difficulty in holding that the Magistrates of Leith are not under such liability. I think that the series of statutes which your Lordship has cited may be held to shew that the Magistrates of Leith are not liable to maintain that footpath or that wall; but the question here is, whether they were bound to fence this place or to see it put into a proper and safe condition by those on whom that liability rested.

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I do not perceive that the cases in which magistrates have been found liable for obstructions on streets or dangers on streets have turned upon the obligation or even the right of maintenance. The well-known case of *Innes*, which is to be found in *Morrison*, p. 13,189, and which arose in connection with an accident that occurred in the course of the erection of the College of Edinburgh, did not, I am satisfied, turn upon such an obligation of maintenance, but rather upon the duty of the Magistrates of Edinburgh to keep the streets clear. In the course of the operations it had been necessary to dig a pit about fifteen feet deep in the lane on the north side of the building, and of course it became necessary to fence that pit. On the night in question this had been neglected, and Mr Innes, on his way from Leith to his lodgings at Bristo Port, fell into the pit and broke his thigh-bone, for which accident the Magistrates of Edinburgh were found liable in damages and expenses, it being observed on the bench that "one of their most important duties was to take care that the streets of the city are kept in such a state as to prevent the slightest danger to passengers." I am not prepared to say, however, that this path is in any fair sense one of the streets of Leith under the care of the magistrates. They are vested undoubtedly by the statutes which your Lordship has mentioned, and by the *Lindsay Act*, 25 and 26 Victoria, chapter 101, with all the powers and all the liabilities of magistrates of royal burghs. If they were liable I do not think it would be a good defence that the road trustees were also liable. As to a right of relief we cannot deal with such a question in the absence of the party who is said to be liable in relief, and who may have a perfectly good answer to the claim.

But however all that may be, there is a great deal of reason in the views which your Lordship has stated in support of the conclusion you have arrived at. I must say I feel the force of your Lordship's elaborate elucidation of the confused mass of legislation in these Acts of Parliament, and while taking leave to state the difficulties that present themselves to my mind I do not dissent from your Lordship's conclusion. I have only greater difficulty than your Lordship in holding that magistrates of royal burghs, of which the burgh of Leith is one, cannot be held liable in cases like the present. It cannot lessen their liability that these magistrates are also commissioners of police under the local Acts, and also under the *General Police Act*, with all the powers, maintenance, jurisdiction, assessment, and others conferred on them by these Acts. If they are liable at all, they are liable as much in one capacity as the other. But, as I have said, I am not prepared to hold that they are liable at all. I should have had little difficulty if we had had anybody in the field who was liable for the keeping up of this path and parapet wall. But we

No. 116. have not the road trustees here, and we have no right to say anything about them. If any action is brought against them they may be able to state a good defence; but whether they are liable, or whether they have a good defence or not, is not a question that we can decide here. In these circumstances, I cannot dissent from the conclusion at which your Lordship has arrived.

Mar. 11, 1881.
Harris v.
Magistrates
of Leith.

LORD MURE.—I am of opinion that the cause of the accident which here occurred is pretty clear, namely, the lowness and consequent insufficiency of the wall as a protection at so dangerous a place. It was originally built at the height of four feet, and remained at that height till it was carried away by the sea in 1876, and rebuilt by the road trustees at the height of two feet. Since this accident occurred it has been again rebuilt by the road trustees at their expense, and raised to its original height.

On the evidence I have had no difficulty in coming to the conclusion that if the wall, when it was rebuilt or repaired in 1876, had been rebuilt at its original height of four feet, the accident would in all probability never have occurred; and upon the question of contributory negligence I am very clearly of opinion that, upon the evidence, no such defence has been established. So standing the facts upon the evidence, the pursuer's claim would appear to be against the road trustees. But this action is directed not against the road trustees, in whose district the road is placed by section 64 of the Act of 1835, but against the Provost and Magistrates of Leith; and the question for decision is whether these defenders are liable in reparation, in respect either of their powers and obligations as magistrates under the various Acts of Parliament passed since 1832 or at common law.

On the question of common law liability the case of *Threshie v. Magistrates of Annan* has been referred to, but it appears to me to have no direct application. The place there in dispute was the street of a royal burgh, which was the property of that burgh, and had been under the charge and management of the burgh long before the existence of the Act of Parliament of 1777 constituting the road trust. The *onus*, therefore, there lay on the burgh to shew that, by the Road Act, their rights and obligations in respect of that street had been transferred to the road trustees. That they failed to do; and the Court had therefore no difficulty in holding that they were bound to keep up and maintain in proper repair the streets of their own burgh. The present case, however, is the converse of that in every respect. The road was under the management and charge of the road trustees before Leith was made a burgh in the sense of the magistrates having any jurisdiction over the streets or roads within it, or within the districts from time to time attached to it under the various Acts of Parliament to which your Lordships have referred. The *onus*, therefore, is here laid on the pursuer to shew that the road was taken out of the jurisdiction of the road trustees, and placed under the charge of the Magistrates of Leith. This, I think, she has failed to do. It was placed under the jurisdiction of the road trustees under the Road Act of 1835. It is not very clear upon the evidence who it was that built the original wall, but it is not disputed that it was rebuilt in 1876 by the road trustees, who take charge of the keeping up of the surface of the road at the present date. And with reference to the various statutes by which a certain jurisdiction was given to the defenders over roads brought within their district, it appears to me that the jurisdiction so given was of a special and limited description, and did not reach the road here in question, to the extent of subject-

ing the defenders in the duty of protecting the public from the danger here complained of, and of relieving the road trustees from their obligations in that respect. No. 116.
Mar. 11, 1881.
Harris v.
Magistrates
of Leith.

Upon the construction of those statutes I concur in the exposition given by your Lordship in the chair, and have nothing to add.

LORD SHAND.—I think the pursuer in this case has clearly shewn that the part of the road at which her late husband lost his life was a very dangerous place, and it is equally clear the danger was an obvious one. If it had been proved that the accident happened in the precise way in which the witness Banyard and another witness have described, by the deceased Captain Harris stopping for the purpose referred to in their evidence on a slippery path in the darkness, with a wall of two feet in front of him, and a drop of seventeen feet on the other side, I should have had very great difficulty in holding that that was not a case of contributory negligence. The danger was not only obvious, but was fully known to him, and if he thought fit to run the risk, and fell over in consequence, I should hold that he or his representatives were not entitled to be relieved of the pecuniary consequences by recovering damages in such an action as the present. But I do not think that the proof clearly shews that the accident occurred in that way. The argument submitted by Mr Goudy was that it was just as likely that the deceased fell over in the ordinary use of this road, while walking along it, instead of in the way suggested by the witnesses, and, adopting that view, I am of opinion that contributory negligence has not been proved.

As the case came from the Lord Ordinary, his Lordship had adjusted an issue, putting the question, whether the defenders had failed in their duty of lighting this road. But the argument was presented that there was a much wider duty on the defenders at common law, and, looking to the obligations on them in respect of this road, under the series of statutes to which we have been referred; and it became necessary to have the facts as well as these statutes before the Court, and accordingly a proof was allowed and taken. It is not now maintained that the Magistrates of Leith have failed in their duty in lighting the road. It appears that there were lamps at proper intervals along its pathways, and that this place was as well lighted as any in the burgh. Accordingly, there is no case for the pursuer on this point.

But it was said there was liability on the defenders in another way,—that there was a duty on them at common law, as magistrates of the burgh, to see that the wall was of a height sufficient to protect the public in the use of it, and alternatively, that there was a statutory duty under their Acts to that effect.

As to the common law duty, I think the arguments of the pursuer fail, the place in question not having been within the burgh proper. The cases of *Innes* and *Dargie* were cases in which the accident had occurred within royal burghs,—within that part of the town which was entirely under the control of the magistrates for maintenance, care, and lighting,—and therefore these cases are quite unlike the present, for the place where this accident occurred was between one and two miles away from the burgh upon a road which was undoubtedly a country road, with which the Magistrates of Leith had nothing to do in the way of ordinary care, maintenance, and repair. The case of *Threshie* goes no farther than the cases of *Innes* and *Dargie*. That was not a question of liability

No. 116. for an accident, but a question between the Magistrates of Annan and the road trustees as to which of them was bound to keep up the High Street of Annan, and the Court held, that as that street was within the royalty, and was proper burghal territory, the magistrates were the persons to maintain it and responsible for the care of it. In all of these cases the *locus* was within the proper royalty or burgh. In this case it has been proved that the *locus* was only within the parliamentary boundary, and within that limit only for certain police purposes defined by statute, so far as the magistrates were concerned. I do not think there are any grounds in law to support the argument in favour of the common law liability maintained.

Mar. 11, 1881.
Harris v.
Magistrates
of Leith.

The only question that remains is, whether under the statutes referred to and founded on there is such responsibility? And on that point I think it unnecessary to add anything to what has been already said. I cannot doubt that the duty of providing for the safety of the road lay with the road trustees, against whom, within the statutory time, it was in the pursuer's power to insist in a claim of damages by the proper action.

I am of opinion, with your Lordships, that the defenders should be assoilzied.

THE COURT pronounced this interlocutor:—"Sustain the second plea of the defenders: Assoilzie the defenders from the conclusions of the summons, and decern: Find the defenders entitled to expenses, and remit," &c.

THOMAS M'NAUGHT, S.S.C.—J. CAMPBELL IRONS & Co., S.S.C.—Agents.

No. 117.

T. & W. A. M'LAREN, Pursuers.—*R. V. Campbell.*
ALEXANDER M'DOUGALL, Defender.—*Rhind.*

Mar. 18, 1881.
M'Larena v.
M'Dougall.

Agent and Client—Employment—Law-Agents Act, 1873 (Stat. 36 and 37 Vict., cap. 63), sec. 21—Prescription—Reference to Oath.—In an action by Edinburgh law-agents against a person in Glasgow for an account of expenses incurred by them in conducting an action in the Court of Session in his name on the instructions of a Glasgow law-agent, the defender pleaded (1) prescription, and (2) that he had not employed the pursuers. The plea of prescription having been sustained, the pursuers referred the matter to the defender's oath. He deponed that he had not employed the Glasgow agent; that he did not know of the action in the Court of Session until after it had been commenced; that when told of it he informed the Glasgow agent that if he went on with it he must do so on his own responsibility and at his own risk, and that he had not employed the pursuers. *Held* that the oath was negative of the reference.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

MESSRS T. & W. A. M'LAREN, W.S., Edinburgh, in December 1879, raised an action in the Sheriff Court of Glasgow against Alexander M'Dougall, pilot there, for £25, being the balance of an account incurred to them, as they alleged, on the employment of M'Dougall in conducting a civil action for him in the Court of Session against two persons—Campbell, a grocer, and Middleton, a Sheriff-officer. The decree had been extracted on 8th November 1876, and subsequent to that date the only entry in the account was for obtaining a fiat of imprisonment against Campbell in January 1877. M'Dougall stated in defence that he had arranged through a Mr Ampleford with Mr Fisher M'Laren, the Glasgow agent who had employed Messrs M'Laren, that though he was to appear as pursuer in the action, he was not to be responsible for any expense incurred, and that Mr Fisher M'Laren was to trust to recovering his charges

from the defenders in the action of damages. He denied all employment No. 117. of Messrs M'Laren in Edinburgh, the pursuers.

Pleaded for M'Dougall;—(1) The defender pleads prescription. (2) The defender not having employed the pursuers, and it having been arranged that said action against the said James Campbell and R. Middleton should be conducted free of charge to the defender as aforesaid, the defender is entitled to decree of absolvitor, with costs. Mar. 16, 1881.
M'Laren v.
M'Dougall.

The Sheriff-substitute (Galbraith), on 29th January 1880, sustained the plea of prescription, and on 6th March the Sheriff (Clark), on appeal, adhered to his substitute's interlocutor.

On 2d July the pursuers lodged a minute of reference to oath. The oath was taken on the same day. The substance of the deposition was practically the same as that subsequently emitted before Lord Young in the Court of Session, and printed below.

On 13th July the Sheriff-substitute (Spens) found the oath affirmative of the reference, and decerned against the defender.* On 18th November the Sheriff adhered.

M'Dougall appealed to the Court of Session.

At the hearing on 28th January 1881 the Court appointed the defender's oath to be taken *de novo*, and remitted to Lord Young to take the deposition. This was done on 10th March 1881. The following deposition was then made:—"I never employed Mr Fisher M'Laren, writer in Glasgow, to raise an action against Campbell and Middleton. I authorised no one to employ him. I did not authorise Mr Ampleford to employ him. I saw Mr Fisher M'Laren after the action was raised. When he told me that an action had been raised in the Court of Session, I told him that it was on his own responsibility; he had no authority from me. He had written me a note to call upon him, and I called, and it was then he told me that an action had been raised in the Court of Session. Mr Ampleford told me he had seen Mr M'Laren previously, and had shewn him the decree against me, and he (M'Laren) thought it was a clear case for false imprisonment. I had not asked Mr Ampleford to consult Mr M'Laren on the subject, but he knew of my imprisonment, and had done it at his own hand. He did not tell me before he saw Mr M'Laren that he was going to see him; it was after he had seen him that he told me he had seen him. He had no authority from me to see him, or to consult

* "NOTE.— . . . The averment on record founded on by defender is that a certain Mr Ampleford made an agreement with Mr M'Laren, writer, Glasgow, that the litigation in question should be conducted without defender being responsible for any charges in connection with it. Defender, however, does not say, and in point of fact in his oath he admits that he had no communication with pursuers to this effect, nor does he assert that Mr M'Laren, Glasgow, made any such arrangement with pursuers. Now, as matter of law it is provided by the 21st section of the Law-Agents Act, 1873, that a law-agent, authorised in acting for a client whom he discloses, shall incur no liability to any other law-agent employed by him, except such as he shall expressly undertake in writing. It seems to follow from this that an Edinburgh law-agent has only in the usual case his client responsible for expenses incurred in an action, and not another law-agent who employs him, and I therefore take it that it is no good defence to an action of this kind to say an agreement was made with a Glasgow agent that a litigant should not be responsible in connection with an action. It seems to me clear that where defender admits that the action was carried on with his knowledge by the Edinburgh agents, and that he himself was examined as a witness *in causa*, that he must be held to be the client of the Edinburgh agents. Arriving at this result, I think the oath affirmative of the reference." . . .

No. 117.
Mar. 16, 1881.
M'Larens v.
M'Dougall.

him on the subject. It was a month or six weeks after Mr Ampleford told me this that I had a note from Mr M'Laren asking me to call upon him. I did not say to Mr M'Laren when I saw him either to go on or not to go on, but I said to him that if he did go on it was at his own risk. He said the case was in already. He did not say that anybody was acting for him in Edinburgh, and I did not know that anybody was until I went to Edinburgh. The conversation began with Mr M'Laren's clerk, but he was present at the end. . . . He precognosced both my daughter and me as witnesses to the false imprisonment on the first occasion. I saw a young man whom I understood to be a clerk to the writers in Edinburgh that were conducting the case for Mr Fisher M'Laren of Glasgow. I told the clerk it was a speculation case of Mr M'Laren in Glasgow, and that I was not responsible for the expenses. He said he thought it was a good case; he knew well enough I had no means to give them. I don't think I ever saw the writers themselves—only the young man that I believed to be their clerk, and he knew that it was a speculation case of Mr M'Laren in Glasgow. I have paid nothing to Mr Fisher M'Laren in Glasgow. I did not know there were any agents in Edinburgh at all till I went through at Mr Fisher M'Laren's request and saw the clerk, and then I told him it was a speculation case of Mr Fisher M'Laren's, and that I was not to be liable for any expenses. *Interrogated for the defender.*—The first time Mr Ampleford told me he had been at Mr Fisher M'Laren's and had explained the case to him, he said that Mr M'Laren was going to raise an action against Campbell and Middleton, and was not to hold either me or him (Ampleford) liable for the expenses. I was quite willing to let him do what he liked with it on these terms, and I said that to Ampleford. I had never seen or heard of Mr Fisher M'Laren before Ampleford told me that. Ampleford stayed on the same stairhead with me for many years—was a great friend of mine, and is now married to my daughter. He was not married to her at that time. He was a debt collector, and was acquainted with Mr Fisher M'Laren. The first time I saw Mr Fisher M'Laren he told me he was not to hold me responsible for any charges. I did not know that any Edinburgh agent was required at all, and I did not know that any one was employed. It was two days before the trial that Mr Fisher M'Laren sent me to Edinburgh, and I first saw the clerk of the agents that were conducting the case there. I never saw themselves."

Parties were then reheard.

Argued for M'Dougall;—There having been no employment in the ordinary sense here the defender was not liable. He had expressly stipulated that though the Glasgow agent might use his name he was not to be liable in expenses. As regarded the pursuers he had never heard of them till shortly before the trial. Their remedy was against their Glasgow correspondent, if, indeed, they had any remedy at all, as they had been warned through their clerk that the case was a purely speculative one.

Argued for Messrs M'Laren;—The oath was affirmative of the reference. There could be no private limitation of employment as a general agent as regarded third parties, unless the knowledge of such a limitation was brought home to them,¹ which was not the case here.

Under the provisions of the 21st section of the Law-Agents Act, 1873,² the Edinburgh agents were entitled to look to the client, and not to their country correspondent, for payment. The defender knew that the action was going on in his name in the Court of Session and conducted

¹ Storey on Agency, sec. 127.

² Stat. 36 and 37 Vict. cap. 63, sec. 21.

by the pursuers, with whom he had no special agreement, and yet he never objected. No. 117.

Mar. 16, 1881.
M'Laren v.
M'Dougall.

LORD YOUNG.—I am very clearly of opinion that this oath is negative of the reference, and I cannot assent to the view on which the Sheriff proceeded, or to the view of the oath submitted by the pursuers' counsel.

The Sheriff-substitute is of opinion that if it is established by the deposition on oath that the action was raised, and the defender was aware that it was, then no more is necessary to make him liable. I do not think that is maintainable. It may be sufficient in the case of a party raising his action for his account within the period of prescription to say that the defender knew that the action had been raised in his name, and that he did not disapprove of it. That, I say, may be sufficient to infer liability when the action is raised in time, but we are not in such a case here; the action has been delayed beyond the period of prescription, and the question of employment so as to establish liability has been referred to the defender's oath. Now, in a reference to oath, it must be proved that the debt sued for was incurred and is resting owing. The deponent, after saying that he was aware that the action was raised in his name, and that he did not disapprove of it, is entitled to go on to explain—as he has done—the circumstances under which the action came to be raised. It seems he had been put in gaol under circumstances which a friend thought would found a claim for damages, and this friend told the affair to a Mr Fisher M'Laren, an agent, who was of opinion that there was a clear case for an action of damages for wrongous imprisonment. The defender himself had no idea of going to law, but the agent sent for him and asked him his story. He told it, and he has now sworn that he added that the agent might raise an action if he liked, but it would be at his own risk, as he himself had no money. That is all the authority he gave, and upon that authority the agent proceeded. I assume that the story is true, as it was given on oath. The agent, not being able to conduct the case in the Court of Session himself, employed Edinburgh agents. He did not communicate that to the defender at the time, and the defender says he did not know any such employment was necessary, and that he never heard of the Edinburgh agents until he was sent through to Edinburgh, and that when he did go there he told the clerk who met him that it was well known that the case was a speculative case of the Glasgow agent's. These being the facts of the case the pursuers have raised their action for their expenses, but they have delayed it so long that this story of the defender's is all the evidence we can get, and such as it is I must hold it negative of the reference.

I cannot assent to the argument founded upon the section of the Law-Agents Act, in which it is provided that where a law-agent, acting under the authority of his client, employs an agent in town, the client, and not the country agent, shall be responsible. The point of that provision is that the country agent must be acting with the authority of his client. If he exceeds his authority he will himself become liable. It is conceded that if he have no authority he is liable. But to exceed his authority is the same. An agent exceeding his authority will bind himself. He may sometimes bind his principal, but he always binds himself if he fails to bind his principal. If the pursuers here understood this case to be a totally different one from what it truly was their remedy is to hold the Glasgow agent liable. Unfortunately speculative cases do exist, but in a case which is really of that character there is no claim against

No. 117. the client. If the one agent has deceived the other then he will be liable personally. I must assume this to be a case of that character, as the deposition on oath, which is the only evidence we can have, is to that effect.

Mar. 16, 1881.
M'Larens v.
M'Dougall.

LORD CRAIGHILL.—I am of the same opinion, and for the reasons assigned by your Lordship. There is no satisfactory explanation of the employment, and the defender on oath denies any employment. The question having been referred to the defender's oath we must now consider whether his deposition is affirmative or negative of the reference.

It is plain enough that this Glasgow agent took up the case as a speculation. The pursuers, however, say that they were never told that it was a speculation, and that they are therefore entitled to come upon the client. If the condition mentioned in the deposition really was communicated, then the Edinburgh agents are in no better position than the Glasgow one. It appears to me that if the deposition is correct it was communicated, at all events, to the clerk of the Edinburgh agents.

I entirely concur in the construction put by your Lordship on the section of the Law-Agents Act.

LORD JUSTICE-CLERK.—I entirely concur. The judgment must proceed upon the deposition on oath. The pursuers have perilled their case upon that, and I am clearly of opinion that it is negative of the reference.

THE COURT pronounced this interlocutor :—" Having heard counsel for the parties on the appeal, find the oath of the defender negative of the reference; therefore sustain the appeal; recall the judgments appealed against; assolvie the defender from the conclusions of the action, and decern: Find the defender entitled to expenses in the inferior Court and in this Court, and remit," &c.

T. & W. A. M'LAREN, W.S.—BEGG & MURRAY, Solicitors—Agents.

No. 118. J. A. MOLLESON, C.A., and HALL GRIGOR (Voluntary Liquidators of the Inverkeithing Foundry and Shipbuilding Company, Limited),
Petitioners.—*Kinnear—Lorimer.*
Mrs JESSIE HENDERSON or FRASER and OTHERS (William Fraser's Trustees), Respondents.—*Asher—Mackintosh.*

Mar. 17, 1881.
Molleson and
Grigor v.
Fraser's Trustees.

Public Company—Winding up—List of Contributories—Constitution of Membership.—In the winding up of a joint stock company registered under the Companies Acts, 1862 and 1867, to entitle the liquidators to place the representatives of a deceased person upon the list of contributories they must prove that before his death he was a registered shareholder, or was bound to the company to become so.

A person who had been a chief originator and adviser in the formation of a company, and who, along with others, had signed a paper agreeing to subscribe £1000 towards the capital of the company if it were started, died the day after the memorandum of association was registered, and previously to the allocation of the shares. Further, he had been one of the seven signatories required for the memorandum of association, where his name was entered for the statutory single share. *Held* that the deceased had incurred no liability to the company except as a party to the memorandum of association, by which he became bound to take one share.

ON 16th October 1876 the Inverkeithing Foundry and Shipbuilding No. 118. premises, belonging to John Scott & Son's sequestrated estate, were purchased for £4400 by James Cruickshanks, Inverkeithing, for himself, Mr William Fraser, town-clerk of Inverkeithing, and two other persons. Mar. 17, 1881.
Molleson and
Grigor v.
Fraser's Trustees.

Thereafter the following memorandum, holograph of Mr Fraser, was drawn up:—"Inverkeithing Foundry and Shipbuilding Yard.—This foundry having been purchased at the low price of £4400, which is considered to be not nearly half its value, it has been proposed to form a joint stock company to carry the works on. The proposed capital to be £20,000, the half of which, it is expected, will be sufficient, leaving the half uncalled up. On the company being formed, the works will be made over by the purchaser to the company." It was signed by Fraser and the other three purchasers of the works, and also by about a dozen other persons. Against their names were the amounts (*in toto* £5650) which they severally subscribed. Opposite Fraser's signature there was entered—"£1000. Paid £500."

1ST DIVISION.
B.

Meetings of persons interested in the proposed scheme were thereafter held to consider whether the works should be resold or a company formed to carry them on.

On 23d January 1877, in view of the formation of a company, two persons were appointed a committee "to get the capital so far up privately, and thereafter to issue a prospectus, which Mr Fraser was authorised to prepare." Fraser accordingly prepared a prospectus, in which he was designed as "secretary and solicitor," and it was set forth that "£6000 of the capital has been taken." Of that £6000 Mr Fraser's £1000 and the other sums subscribed by the promoters formed a part.

It was shortly afterwards resolved that a company, with a capital of £25,000, divided into 2500 shares of £10 each, should be formed and registered, and on 28th February the memorandum of association was approved by the promoters, and ordered to be printed. On 1st March it was signed, in terms of the Companies Acts of 1862 and 1867, by seven of these gentlemen, including Mr Fraser, each for one share of £10. The company was registered upon 3d March 1877, the statutory notice which had been sent to the registrar of joint stock companies being signed by two of the directors, and by Fraser as "secretary and solicitor of the company."

Mr Fraser died upon the next day, viz., the 4th March.

The first meeting of the company was held on 10th March 1877, when Mr Hall Grigor was appointed "secretary and solicitor" in Mr Fraser's stead, and subsequently, on 4th June, the directors allotted shares to those who had applied, and to fifteen others, also named, "who had agreed to become shareholders of the company, in terms of the prospectus and articles of association of the company." In the latter list was the name—"William Fraser, Inverkeithing (dead), 100 shares," and the names of the others who had signed the original memorandum which followed upon the purchase of the property, with the exception of two, who declined to join.

A share register of the company was thereafter made up in terms of that allotment.

At a general meeting of the company, held upon 23d December 1878, it was unanimously resolved to wind it up voluntarily, under the Companies Acts, 1862 and 1867, and joint liquidators were appointed for that purpose. A list of contributories was made up, and the names of the trustees and executors of William Fraser were placed on the second part of it, in respect of a holding of 100 shares, the half of which, amounting to £500, had been paid.

No. 118.

Mar. 17, 1881.
Molleson and
Grigor v.
Fraser's Trus-
tees.

This was a petition brought, under the 101st and 138th section of the Companies Act, 1862, to enforce payment of calls, the call alleged to be due by Fraser's representatives being the remaining £500 upon the 100 shares.

In the answers it was stated that Mr Fraser had subscribed the memorandum and articles of association to the extent of one share only, and that the petitioners had no authority to place his name upon the register for more than the one. There were these further averments:—"The deceased never became, and never agreed to become, a shareholder of the said company except to the extent above explained, and the petitioners have failed to produce any evidence to the respondents of his having done so. . . . The respondents submit that, if the petitioners conceive they have any just claim for the calls now sued for, they should proceed to constitute the same in the usual way, and that there is no call, in the circumstances, for any extraordinary procedure, or for the exercise by the Court of its summary powers under the statute. In any view, the petitioners are called upon to condescend on the evidence, if any, on which they rely, as establishing an agreement by the deceased to take 100 shares in the said company."

A proof was led, the result of which sufficiently appears from the opinions of the Court.

Argued for the petitioners;—1. It was not essential that Fraser should have been a shareholder in order to make him a contributory. It was enough that he had agreed to take shares.¹ This case was not distinguishable from *Sharpus's* and *Lord Mansfield's* cases in England. What was narrated by 7 and 8 Vict. cap. 110 in England, as these cases shewed, was the common law of Scotland. There was here an agreement by certain parties to become partners and to take shares in a company to be formed, which was enough without any formal contract of copartnership.² 2. The company was not a separate *persona* from the promoters.³ The latter brought it into existence, and it took benefit by their actings. They were parties to the contract which eminently promoted the interests of the company, and was therefore binding upon it.⁴ It was absolutely necessary for the formation of the company, for it was through it that the company was floated. It was laid upon the company's table by the promoters, which surely bound them, whether the company were bound or not. 3. If the contract was binding, and Fraser had agreed to become a member of the company, the agreement did not fall by his death.

Argued for the respondents;—1. This was a voluntary liquidation, and the liquidators represented the company alone, and neither creditors nor contributories. Fraser had not agreed to become a member of the company. The "agreement" specified in the 23d section of the Companies Act, 1862, was one with the company. Both parties must be bound, or neither. Membership of a company was usually constituted (1) by application for shares, and (2) by allotment, and communication of allotment to allottee.⁵ The

¹ Lindley on Partnership, 1337, 1369; *In re The Universal Salvage Company*, *Sharpus's* case and *Lord Mansfield's* case, 1849, 3 De Gex and Smal, 49; *ex parte Cookney*, Nov. 3, 1858, 28 L. J., Chanc., 12.

² Lindley on Partnership, 1371.

³ Joint Stock Companies Act, 1862 (30 and 31 Vict.), cap. 131, sec. 38.

⁴ *Helensburgh Harbour Trustees v. Caledonian and Dumbartonshire Railway Co.*, Dec. 2, 1862, 15 D. 148, revd. H. of L., 2 Macq., 391; *Palmer's* case, 1868, 2 Irish Equity, 573.

⁵ *Pellet's* case, April 13, 1867, L. R., 2 Chanc. Apps., 527; *Deas on Railways*, p. 3; Lindley on Partnership, 395.

directors had an absolute discretion in the allocation. 2. A company was not bound by the contracts of its promoters, where these were not found in the memorandum or in the articles of association. The cases of *Sharpus* and *Cookney* belonged to a distinctly recognised class, which fell under the Act of 1844 (7 and 8 Vict. cap. 110), and did not apply. *Palmer's* case was decided upon the footing that after the formation of the company he had admitted that there was a contract binding on him. 3. This was like the case of an abortive company, where the promoters were not even bound as partners *inter se*, and were not liable to contribute.¹ 4. Fraser did not bind himself with the promoters to get up the company; it was only inchoate, and all might resile. At the best, it was only a conditional acceptance of shares, upon the footing that the capital was subscribed. 5. All mandates fell by death, except such as were protected by statute.

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Fraser's Trustees.

At advising,—

LORD PRESIDENT.—In this voluntary liquidation the liquidator has placed upon the second part of the list of contributories the names of the trustees and executors of the late William Fraser. In the ordinary case that imports that they are so entered as the representatives of a deceased shareholder. I do not say that, in order to entitle the liquidator so to enter parties in such a representative character, the deceased shareholder must, during life, have been entered upon the register of shareholders. But, in order to justify such an entry, it must be proved that the deceased had agreed to become a member of the company, and by that I mean that he had agreed with the company to become a member. The liquidator represents the company, and no one else. He represents neither the individual shareholder nor the creditor, and therefore, unless Mr Fraser was bound to the company to become a member, the liquidator cannot succeed in this application.

The history of this company is not very remarkable, and resembles that of a number of others which we have seen. It started with the purchase of the Inverkeithing Foundry in 1876. Four parties were the purchasers, and they bought the works at a price which they thought very much below their value, thus considering that they were entering into a profitable transaction. They induced others to take shares, their proposal to form a company being expressed in the following memorandum :—"This foundry having been purchased at the low price of £4400, which is considered to be not nearly half its value, it has been proposed to form a joint stock company to carry the works on. The proposed capital to be £20,000, the half of which it is expected will be sufficient, leaving the half uncalled up. On the company being formed the works will be made over by the purchaser to the company." That memorandum or note was written by Mr Fraser, and was signed by a number of other persons, who indicated after their signatures the sums they were prepared to subscribe for the purpose of paying for the works. These figures were also intended to represent the interest which each was to have in the joint stock company when it was ultimately formed.

The question is, what is the effect of this memorandum, in the first place, as between the parties who subscribed it. I think it is no more than that they are liable for the sums opposite their names with a view to provide the funds

¹ Lindley on Partnership, 1374.

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requisite to vest them in the property of the foundry works and to entitle them to deal with them as their own. The memorandum does not explain, and I do not think it at all follows from it, that in the event of a company being formed the subscribers will take shares in it. That is not implied as a matter of contract or of undertaking between the parties, although, at the same time, I do not doubt that it was agreed that if the money was subscribed the subscribers would take shares. It was not certain that a company would be started. There was obviously this alternative present to the minds of the subscribers, viz., that the foundry works might sell at a greater price than had been paid for them. At the meeting which took place in November 1876, after the purchase of the foundry, that was adopted as the view of the meeting. That course recommended itself not merely because it might be found difficult to subscribe the capital, as indeed was actually the case, but also because the owners thought they would be able to sell at a larger profit than they could otherwise make. The case of the petitioners, in so far as it is rested upon the memorandum, cannot be advanced further than this, that there was a general undertaking that the parties named had entered into a speculation to the extent of the funds opposite their names, but they were not bound by any mutual contract beyond that.

The company was thereafter formed, not without difficulty, but the capital was subscribed by persons outside, though, judging from the allocation of the shares, only a very small amount of it was got from the general public. The company did not start under the most favourable auspices, but Fraser had got so much encouragement that it was resolved to launch it, and accordingly a memorandum of association was subscribed and registered. It was subscribed by seven persons, of whom Fraser was one, and the other six were all parties to the original memorandum of October 1876. They were each subscribers for one share, which was all that was necessary under the Act of Parliament. The effect was to make these seven persons, representing £70 of stock, the joint stock company. The memorandum of association bears that—"We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names."

The company was registered upon 3d March 1877. Mr Fraser died the next day, and it certainly cannot be assumed, and it was not the case, that anything happened after the registration of the memorandum of association which could in any way affect Mr Fraser's position. The company so formed had also articles of association drawn up, which (art. 83) provided that—"The first directors shall be Douglas Donald Cameron Menzies, Inverkeithing, James Ross, shipowner, Inverkeithing, Thomas Law, farmer, Boreland, Inverkeithing, Peter M. Thomson, Inverkeithing, Daniel Duncan, shipowner, Rothesay, Robert Slimon, merchant, Leith, with power to add to their number;" and it was further provided that each of these parties, in order to qualify him, should hold ten shares in the company. So soon as they began to act in the capacity of directors they thereby undertook to take ten shares in the company. That was in addition to the £70 in the memorandum of association. They had an important duty to perform upon coming into office. It fell to them to allot the shares at the meeting held upon 4th June 1877. The secretary intimated that he had received applications for shares from certain parties, and forty-four

shares were thereupon allotted to these parties by the directors. They then proceeded to allot to those who had subscribed the memorandum of October 1876. But the list of those to whom allotments were made does not contain the whole of the names appended to that memorandum. Mr Daniel Duncan declined to take shares, and his name is not inserted, and accordingly no shares were allotted to him. Mr Strachan, too, had withdrawn, and none were allotted to him. But shares were allotted to Mr Fraser. That seems to have been a blunder. It is impossible to regard Mr Fraser as upon the register of shareholders. Still that is hardly of importance as affecting the question raised in the present case.

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The question is, whether the circumstances which happened during Mr Fraser's lifetime constituted him a member of the company, and subject to liabilities as such. In order to that result it seems to me that it will be necessary for the company to shew that he had contracted with them so as to make him a member. Even supposing he were bound by the contract into which he entered under the memorandum of October 1876, that would not have been a contract with the company. I do not think the company would have been bound to give him shares. Still less was he bound to the company to make an application for shares. His brother promoters who signed the memorandum might have a claim against him. I do not think so; but assuming that he was bound to them, they might enforce the obligation against him to make good the terms and stipulations of the memorandum. But the binding character of that contract would not regulate in any way his position as regards the company.

I think it is unnecessary to go over more in detail the circumstances of this case. I do not find that there exists what I hold to be indispensable in order to make Mr Fraser's representatives liable to be placed upon the list of contributories, viz., an undertaking by Mr Fraser, their constituent, during his lifetime, to take shares in this company.

LORD DEAS and LORD MURE concurred.

LORD SHAND.—It is impossible to read the evidence in this case without coming to the conclusion that most of the shareholders were induced to take shares in the company by Mr Fraser, and that, too, upon the footing that he was himself to take £1000 of stock, for which amount the liquidators now seek to make his representatives liable. It is quite true that in the original memorandum the parties to it were not committed to any particular form of joint stock company. But the proposal was made which ultimately led to the formation and registration of the company. Between the date of the original memorandum and the date when Fraser indorsed the printed private prospectus of the company, there were several meetings of the promoters which shew distinctly that Fraser was to hold £1000 of stock. No doubt he was registered for one share only, but we have Mr Cruickshanks' evidence in regard to that, that when Mr Fraser's attention was drawn to it, and he was asked "what was meant by one share," he (Mr Fraser) replied, "Oh, that is a mere form. You know I have £1000 and you have £500. That putting one share is a mere form. It makes no difference. It is known what you have and what I have." So that, if I had seen legal grounds upon which I could have proceeded, I would have held Mr Fraser's representatives liable to be put upon the list of contributories.

But, upon consideration of the evidence, I cannot see any good grounds for

No. 118. holding that Mr Fraser agreed to become a partner of this company. It was maintained by the Dean of Faculty that the company were bound to give Mr Fraser shares, because the incorporators had arranged amongst themselves that he should take shares. But that contention is unsound, because the company were not bound by any such agreement, which was not part of the articles of association. Besides, as was pointed out by Mr Asher, there is a clause in the articles of association to the effect that the directors shall have an unfettered discretion in the allocation of the shares. On the other hand, there was an agreement between the promoters binding Mr Fraser to take shares as between themselves. But the point in which the case of the liquidators fails is that, if there was an agreement between the promoters themselves, there never was any with the company. I do not think that Mr Fraser ever undertook such an obligation to the company itself after it was registered. Such an undertaking would have required writing as between him and the company, or, at least, an unequivocal mandate entitling the other promoters to take shares upon his behalf. But Fraser having died immediately after the registration of the company, and nothing having been done to allocate the shares before that time, I do not think the company were entitled to allocate any to him, as they subsequently did. And therefore I do not think the liquidators of the company are now entitled to place his representatives upon the list of contributories in the liquidation.

THE COURT refused the prayer of the petition.

BOYD, MACDONALD, & Co., W.S.—R. W. WALLACE, W.S.—Agents.

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JOHN DODDS AINSLIE, Pursuer.—*Gloag—M'Kechnie.*

MURRAY, AINSLIE, & COMPANY, Pursuers.—*Gloag—M'Kechnie.*

Mar. 17, 1881.
Ainslie, &c. v.
Murrays.

JAMES MURRAY AND JOHN MACKIE MURRAY, Defenders.—*J. Burnet—
R. V. Campbell.*

Foreign—Contracts—Locus solutionis.—The pursuers and defenders of an action in the Court of Session, who were themselves resident in Scotland, entered into a compromise of it, by which the defenders became bound (1) to grant a power of attorney to the pursuers' firm in Rangoon to sell certain property there, and to the extent of £4250 to retain the proceeds on behalf of the pursuers, and (2) in the event of the properties not realising the said sum then to pay the deficiency. The property was sold, and the price, which did not amount in any view to £4250, was paid in rupees. The value of the rupee in Rangoon was 2s.; at the current rate of exchange with this country it was only 1s. 8d.

A question having arisen whether the payment in rupees was to be credited as of its value in Rangoon or its value in England, *held (diss. Lord Deas)* that the payment was to be credited at its value in England—the Lord President and Lord Mure holding that Scotland was the *locus solutionis*—Lord Shand holding that although Rangoon was the *locus solutionis*, the payment fell to be made in English money in terms of the contract.

1ST DIVISION.
B.

THIS action was raised by John Dodds Ainslie, sometime merchant in Rangoon, now in Glasgow, and residing there, and who at one time traded at Rangoon under the firm of Murray, Ainslie, & Company, of which firm he was the sole partner, and also by the said Murray, Ainslie, & Company, against James Murray, of Callands, in the county of Peebles, and John Mackie Murray, his son, who was at one time in business in Rangoon, but afterwards resided in Edinburgh.

In an action raised in the Court of Session in 1878 by the firm of

Murray, Ainslie, & Company against the defenders this agreement or compromise was entered into upon the narrative that certain claims had been made upon both sides,—“1st, The second parties” (the defenders) “shall grant a power or powers of attorney to each and either of Messrs Ainslie, Warren, & Company of Rangoon,” of which firm the pursuer Mr Ainslie was a partner, “and Alexander Dixon Warren, merchant there, partner of that firm, to realise by public sale or otherwise, to the best advantage, the whole properties in Rangoon belonging to the second parties or either of them; 2d, the proceeds of sale of the said properties, to the extent of £4250, are to be paid to and retained by the said Ainslie, Warren, & Company on behalf of the first parties (the pursuers) in satisfaction and discharge of their claims; any surplus above that sum is to be accounted for and paid to the said James Murray; and in the event of the said properties not realising the said sum of £4250, then the deficiency shall be made up and paid by the second parties, jointly and severally, to the first parties; 3d, failing payment being made to the said first parties of the said sum of £4250 within one year from the date hereof, any right which the first parties may have to payment of the whole sums sued for and interest will in their option revive, and if this option is exercised, then the second parties’ objections thereto will also revive; 4th, all claims on the first parties at the instance of the second parties are hereby discharged, subject, however, to the declaration that if the first parties proceed with the said action then this discharge shall not be effectual, and the said claims shall revive. The rents of the said properties in Rangoon down to this date shall belong to the first parties, and shall be paid to or retained by Messrs Ainslie, Warren, & Company on their behalf, over and above the said sum of £4250. From and after this date the said rents shall belong to the said James Murray; 5th, upon payment to the first parties of the said sum of £4250, . . . their whole claims will be discharged.” This agreement was dated in May and June 1879.

A power of attorney was executed in terms of the agreement, and the property was realised by Ainslie, Warren, & Company. The amount of sales and of rents collected, as stated in the accounts which were rendered, was Rs. 32,099 : 15 : 6. At 1s. 8d. per rupee, the current rate of exchange between Rangoon and this country, that sum amounted to £2675 sterling. The defenders contended that the value of each rupee recovered under the power of attorney fell to be taken at 2s., its value in Rangoon.

The defenders had paid a part of the £4250 to the pursuers, and this was an action for the remainder. The only question ultimately contested by the parties was that raised upon the subject of the standard of value at which the Rangoon properties fell to be estimated. It was dealt with in the defenders’ first plea in law, which was—“The minute of agreement betwixt the parties having stipulated that the price of the properties sold under the power of attorney should be paid to or retained by the pursuers’ firm of Ainslie, Warren, & Company, merchants in Rangoon, the defenders are entitled to have the value of each rupee so recovered estimated as at the value of 2s., its value in Rangoon.”

The Lord Ordinary decerned against the defenders.

The defenders reclaimed, and argued;—The agreement dealt with real property situated in Rangoon. There was nothing said about sending the money to England. The *locus solutionis* was Rangoon.¹

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¹ Campbell v. Hannay, Feb. 15, 1809, F. C.; Scott v. Bevan, 1831, 2 Barn. and Adolph. 78; Chitty on Contracts, 93; Story’s Conflict of Laws, secs. 271a, 272; Savigny’s Conflict of Laws (Guthrie’s ed.), sec. 374, p. 245; Barr’s Private International Law, sec. 70, p. 253; Thomson on Bills (Wilson’s ed.), 439;

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Argued for the pursuers;—They had bargained to be paid in English money, and were entitled to get it. This was a Scotch debt being sued for in a Scotch Court. It was not the same case as that of a bill being granted payable in India.¹

At advising,—

LORD PRESIDENT.—The sum here sued for is said to be due under an agreement between the pursuers and defenders, which was concluded for the purpose of settling a previous action of accounting between these parties. The sum agreed to be paid was £4250, and it was also a part of the arrangement that to provide that sum, or a portion of it, certain house property belonging to the defenders was to be sold in Rangoon.

It is stated that, a power of attorney having been sent out to Rangoon by the defenders, the property was brought to sale, and the amount of the sales and the amount of rents collected realised the sum of Rs. 32,099 : 15 : 6. "This sum," the pursuers state, "at 1s. 8d. per rupee—which is the current rate of exchange—amounts to £2675 sterling. This sum," it is further stated, "includes Rs. 17,800, being the price at which part of the property mentioned in the said power of attorney has been sold, and which represents, at the same rate of exchange, £1483, 6s. 8d., but this sum has not yet been paid, and it thus falls to be deducted from the said £2675 sterling."

The answer is, that the properties specified in the power of attorney have been sold, with one exception. The defenders' explanation is, that they have always been willing to settle with the pursuers upon the footing of the rupee being estimated as of the value of 2s., which is its value in Rangoon. The ground upon which the defenders maintain that contention is, that under the contract the *locus solutionis* was India. I do not think the defence rests upon any other basis than that. So that a question is raised upon the construction and effect of the contract between the parties, What is the *locus solutionis*? If it be not India, the defenders are wrong.

Although, at first sight, I had an impression that as regards the proceeds of the sale at Rangoon, the contract was one which fell to be performed in India, I am now satisfied, upon a review of the clauses of the contract, that Scotland is the place of performance. The subject of the contract is a settlement or compromise of an action in this Court, and the subject-matter of it is that for a discharge of their liabilities the defenders shall pay the sum of £4250. If that sum be not paid within a year, it is stipulated that the former claims shall revive and may be again insisted in. But if it be paid within a year, then the defenders are to be entitled to a discharge, and all imputations made against them upon record are to be withdrawn. There is a further point which I think is ancillary or subsidiary. It consists in the stipulation that the defenders shall give a power of attorney to the pursuers' agents in Rangoon to bring certain properties to sale, to realise these and impute them, *pro tanto*, in payment of the sum in question. It is contemplated that the properties may sell for a sum large enough to meet the whole debt, but that it may also fall short of it. But in either event the

Cary v. Courtenay, 1869, 4 American Reps. 559; Parsons on Bills, i. 664; Don v. Lippman, May 26, 1837 (H. of L.) 2 Shaw and Maclean's, 682; Valery v. Scott, July 4, 1876, *ante*, vol. iii. 965.

¹ Wallis v. Brightwell, 1722, 2 Peere Williams, 88; Lansdowne v. Lansdowne, 1820, 2 Bligh's (H. of L.) Reps. 60.

condition is that the sum in question is to be paid within a year from the date of the agreement. No. 119.

The settlement of the accounts under that agreement must be in Scotland, and consequently Scotland is the *locus solutionis*. Mar. 17, 1881. Ainslie, &c. v. Murrays.

LORD DEAS.—The facts of this case assume a somewhat complicated appearance from the way in which the agreement, which is not itself before us, is narrated in the record.

They may be simplified by keeping in view that John Dodds Ainslie, for himself and his partners, is the sole creditor and pursuer, and James Murray of Callands is substantially the sole debtor and defender, so that the names of Ainslie as the first party, and of Murray as the second party, may be held to represent all interested.

Adopting this abbreviated phraseology, an agreement was entered into, dated in May and June 1879, between Ainslie of the first part, and James Murray of the second part, who had each of them formerly been resident in Rangoon, but were both then in Scotland, to the effect that certain claims which Mr Ainslie and his partners had against Mr James Murray (the amount, but not the existence, of which was disputed) should be settled in this way, viz., that Murray should grant a power or powers of attorney to each and either of Messrs Ainslie, Warren, & Company, of Rangoon, and Alexander Dixon Warren, merchant there, a partner of that firm, to realise, by public sale or otherwise, to the best advantage, the whole properties in Rangoon belonging to him, "the proceeds of sale of the said properties to the extent of £4250 to be paid to and retained by the said Ainslie, Warren, & Company on behalf of the first parties (viz., Ainslie and his partners), in satisfaction and discharge of their claims; any surplus above that sum is to be accounted for and paid to the said James Murray; and in the event of the said properties not realising the said sum of £4250, then the deficiency shall be made up and paid by" Murray to Ainslie and his partners. The only additional words which it seems necessary to quote from the agreement to elicit the question now to be decided are the following:—"The rents of the said properties in Rangoon down to this date shall belong to the first parties" (viz., Ainslie and his partners), "and shall be paid to or retained by Messrs Ainslie, Warren, and Company on their behalf over and above the said sum of £4250. From and after this date the said rents shall belong to the said James Murray."

The stipulated power of attorney was executed by James Murray in July 1879, authorising the attornies to manage, sell, and dispose of all lands, hereditaments, mortgages, and other subjects, effects, and chattels of what kind soever, real or personal, which belonged to him, or in which he was interested, in or near the town of Rangoon, or in British Burmah, and particularly to sell and absolutely dispose of, first, a piece or parcel of land in the town of Rangoon, situated and measuring as therein mentioned; second, the house therein described; third, another house also therein described; fourth, certain pieces of ground situated on the right bank of the Pan Hlang Creek, at its junction with Hline or Rangoon River, with the buildings thereon; "and to apply the proceeds of the sale or sales in terms of and for the purposes of the said agreement,—in the first place, in payment of the said sum of £4250 sterling; and to render a just account, reckoning, and payment of the balance, if any, to the said James Murray, or those empowered by him, of his or their intromissions," under deduction of expenses and commission as therein mentioned.

No. 119. The property, except that at Pan Hlang (which was agreed to be retained),
 Mar. 17, 1881. was sold under the power of attorney, and the price, together with rents collected,
 Ainslie, &c. v. amounted, after deducting commissions and other charges, to within a trifle of
 Murrays. 33,000 rupees. Accounts were rendered on this footing, as to which the only,
 or at least the main, dispute appears to have been, what it still is in this action
 at the instance of Ainslie and his partners for the balance due to them, namely,
 whether the rupee, as they contend, is to be estimated at 1s. 8d., which is said
 to be its value in this country, or, as Mr James Murray contends, at 2s., which
 it does not seem to be disputed is its value in Rangoon.

I am humbly of opinion that Mr Murray's contention is well founded. Every principle, both of law and equity involved, appears to me to favour it.

Rangoon was the place where the contract was to be performed, and where its performance took place accordingly. The subject-matter of the contract consisted wholly, or all but wholly, of land and houses in Rangoon. So soon as the stipulated power of attorney was executed and delivered the sole right and interest in such land and houses, subject merely to an accounting for the proceeds, passed irrevocably from the debtor, Mr James Murray, to the creditors, Mr Ainslie and his partners. The sole object of the contract was the payment of a debt due by Mr Murray to them. The *locus solutionis* of that debt was Rangoon, and when the property was sold at a price (including past-due rents) of 33,000 rupees or thereby, and this sum paid to Mr Ainslie and his partners, the debt due by Mr Murray to them was to that extent extinguished.

The important fact is not to be overlooked that although Mr Ainslie happens to be at present in this country he and his partners are still carrying on business in Rangoon, which is the *locus solutionis* of the debt stipulated for by the contract. This appears distinctly from article first of the pursuers' condescendence in the present record, the commencement of which is in these terms : — "The pursuer, John Dodds Ainslie, who at one time carried on business at Rangoon under the firm of Murray, Ainslie, & Company, is at present residing in Glasgow, and he now, along with others, his copartners, carries on business in Rangoon under the firm of Ainslie, Warren, & Company." The power of attorney stipulated for by the first article of the agreement was, it has been seen, "a power or powers of attorney to each and either of Messrs Ainslie, Warren, & Company, of Rangoon, and Alexander Dickson Warren, merchant there, partner of that firm," to sell, &c. The power of attorney actually executed, as stated by the pursuers, in the outset of the fourth article of their condescendence, was a power of attorney whereby Mr James Murray "constituted and appointed the said Alexander Dixon Warren, merchant in Rangoon, and the said Ainslie, Warren, & Co., jointly or separately, his true and lawful attorney or attorneys," for the purposes already mentioned, so that the money not only might have been, but actually was, available in Rangoon for the purposes of the trade carried on there by Mr Ainslie and his partners, and I can find nothing in the agreement or condescendence entitling him or them to deduct from the current value of the rupees received and appropriated by them in Rangoon the exchange which would have been payable in this country. I had occasion to study the authorities on this branch of the law on being put forward by my senior counsel, the then Dean of Faculty (Hope), upwards of half a century ago, to plead the important question raised in *Glyn v. Johnston & Co.*, 8th June 1830, *Wac. Coll.*, also 8 S. and D. 889, and more fully, 3 Deas and Anderson's Reports,

105. I have no intention of resuming the authorities which I then had fully before me, but they left an impression on my mind favourable to the views I have now expressed. In the case of *Glyn & Co.* the Judges were all against my argument except Lord Craigie. That case is not itself in point. But the judgment of the House of Lords delivered by Lord Brougham 21st May 1837, 2 Shaw and Maclean, 682, in which the authority of *Glyn's* case was repudiated, and Lord Craigie's opinion approved of, will be found to contain matter deserving of attention in connection with what I have now said.

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I am of opinion that the defender's first plea in law ought to be sustained.

LORD MURE.—I agree with your Lordship in the chair that the interlocutor of the Lord Ordinary should be adhered to. We are here dealing with a Scotch contract, the place for enforcing which is Scotland, and the pursuers are therefore, I think, entitled to be paid in Scotch currency. The grounds on which it appears to me that the agreement should be so construed are that it was made in Scotland between parties who were resident in Scotland at the time, and that it related to the settlement or compromise of an action depending between them in the Scotch Courts, and which is in one view still in dependence here; because provision is made in the agreement for a revival of the action in the events mentioned in the agreement. Now, when this is done in Scotland, with reference to an action depending in the Scotch Courts, it is natural to expect that the *locus solutionis* of such an agreement would be in Scotland; and if nothing had been said in it about Rangoon I do not suppose that any doubt could have been entertained on that question. But the provisions as to realising certain properties in Rangoon, the proceeds of which were to be applied in part-payment of the sums due, are said to have the effect of making Rangoon the place of payment. I am unable to adopt that view. By the second clause of the contract, no doubt, a power is given to sell certain properties in Rangoon, the proceeds of which, to the extent of £4250, are to be paid to and retained by certain parties there on the pursuers' behalf. But in the event of the properties not realising the £4250, the deficiency is to be made up by the defenders and paid by them to the pursuer. Now, supposing the proceeds had not realised the required sum, it is quite clear that the deficiency would require to have been paid here in the current coin of this country. I cannot, therefore, hold that Rangoon is the *locus solutionis* of this contract, and that the defence rested on that ground is well-founded.

LORD SHAND.—In the view I take of this case it is immaterial whether the place of payment under the contract be this country or Rangoon, for I think in either case the result is the same, and the judgment of the Lord Ordinary is right. I agree, however, with Lord Deas in thinking that, so far as regards the sums realised from the Indian properties, Rangoon is the place of payment—while if these sums proved insufficient to extinguish the amount of £4250 payable the place of payment of the balance is this country.

This is, it appears to me, the true meaning of the simple language of the contract. The defenders placed their properties in the hands of the pursuers' Rangoon firm, not only in security, but for realisation in payment and extinction of the debt admitted to be due to the pursuers. These properties were in Rangoon, and to be sold there, and the proceeds of sale were to be there paid to and retained by the pursuers' firm on behalf of the pursuers, to use the words

No. 119. of the contract, "in satisfaction and discharge of their claims." It seems to me to be very difficult to hold that this country is the *locus solutionis* of a debt the payment of which is stipulated to be *de facto* made and received in Rangoon, and there accepted by the creditor, a merchant trading in Rangoon, in satisfaction of a debt due to him; and I am unable to agree with your Lordships who have expressed an opinion to that effect.

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But, taking Rangoon as the place of payment, to what is the pursuer entitled? £4250 of sterling money. If the defenders do not pay this sum in sovereigns or in Bank of England notes they must give money which is equivalent in value. It is not disputed that at the time when the payment was made twelve rupees was the equivalent of £1 at the current rate of exchange; and I confess I can see no good reason for holding that the pursuer must take ten rupees to the pound, being less than an equivalent for each pound sterling of his debt to the extent of 3s. 4d. It would, I think, require a very clear stipulation to that effect in the contract to support the argument for the reclamer, for the obvious result of the argument would be that if the properties had realised Rs. 9,500 more, or a sum sufficient in the reclamer's view to meet the debt, the actual sum paid would leave the pursuer with a deficit of upwards of £700 on his debt of £4250, with a corresponding advantage to the defenders, who would be in the fortunate position of having paid a debt of £4250 with £3550, or its equivalent in value.

A practical illustration of the result of the defenders' argument was suggested in the course of the debate. If one of two persons on the point of leaving this country for Rangoon should lend the other £100, to be repaid in Rangoon a short time after their arrival there, I presume there could be no doubt that Rangoon would have been the *locus solutionis*. It appears to me there could be equally little doubt that the lender would be entitled to payment of the £100 lent in gold or notes of legal tender, or the equivalent in Indian money. According to the defenders' argument the claim would be met by repayment of ten rupees for each £1, although the value of the rupee at the time, according to the current rate of exchange, was 1s. 8d. only, making twelve rupees the equivalent of £1, and in this way the borrower would be able to repay his debt of £100 by rupees of value equivalent to £83, 6s. 8d. only, and the lender must be content to accept that sum. The borrower would thus, in addition to the accommodation, be a gainer of £16, 13s. 4d. It appears to me that the statement of this illustration in a case in which the *locus solutionis* is India, with such a result, is sufficient to demonstrate the unsoundness of the defenders' argument, and I am unable to distinguish this case from the one now supposed. I am, therefore, of opinion that the judgment of the Lord Ordinary is sound.

THE COURT adhered.

J. & R. A. ROBERTSON, S.S.C.—CAIRNS, M'INTOSH, & MORTON, W.S.—Agents.

No. 120.
Mar. 17, 1881.
Meier & Co.
v. Küchen-
meister.

R. MEIER & COMPANY, Pursuers.—*Trayner—Taylor Innes.*
PAUL KÜCHENMEISTER, Defender.—*Salvesen.*

Agent and Principal—Election—Ship—Owner and Master.—Shipbrokers having made certain disbursements for a German vessel took bills for the amount from the master drawn upon the owner. The owner returned the bills unaccepted. The brokers then sued the master on the bills in the German Courts, but failed in obtaining decree, on the technical plea that the action was

not brought within three months. They then raised an action in the Court of Session against the owner on the original debt. The defender pleaded that the pursuers, by electing to take the master as their debtor, were barred from suing the owner. *Held* (rev. judgment of Lord Rutherford Clark) that the doctrine of election did not apply, as the pursuers had not obtained a judgment. No. 120.
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Observations (per Lord Young and Lord Craighill) on the liabilities of the owner and master of a ship for advances made to the master.

Priestley v. Fernie, June 23, 1865, 34 L. J. Exch. 172, commented on.

MESSRS R. MEIER & Co., shipbrokers in Newcastle-on-Tyne, raised this action against Paul Küchenmeister, of Rostock in Germany (against whom arrestments had been used in Scotland *ad fundandam jurisdictionem*), as registered owner of the vessel "Jacob Rothenburg," for payment of an account of £90, odds, with interest. They averred (Cond. 2)—"In the end of 1878 and beginning of 1879 the pursuers made on the defender's employment and behalf various disbursements, and earned a certain commission as agents for the vessel 'Jacob Rothenburg,' of which the defender was then owner," and that the defender refused or delayed to pay them for the same. Küchenmeister defended the action, and stated in explanation that the "Jacob Rothenburg" had been stranded in November 1878, near Shields, and that Captain Wilde, the master, had entered into a contract of salvage with the pursuers, the sums under which had been duly paid by the owner, but that subsequently the pursuers had made on the authority of the master, and without the owner's consent or knowledge, other disbursements for the ship, which were those now sued for, and for which they induced the master to grant bills drawn on the owner. These bills he had refused to accept. He then added that the pursuers had sued Captain Wilde in the German Courts on the bills, and obtained a favourable judgment in the lower Court, which, however, was reversed on appeal. On this statement the following plea was founded:—(2) The pursuers having elected to take the said Captain Wilde as their debtor are barred from suing the present action. 2D DIVISION.
Lord Rutherford Clark.
R.

The following minute of admissions was adjusted by the parties with a view to getting a judgment on the above plea:—"Admitted that in respect of the disbursements mentioned on record the pursuers received from Captain Wilde, the master of the 'Jacob Rothenburg' two bills drawn by the said Captain Wilde in favour of the pursuers, under the name of R. Meier (being a name occasionally used by the pursuers' firm in their business) upon Küchenmeister & Völling, Rostock, for £200 and £26, 4s. 6d. respectively, both dated 23d January 1879, and both payable at three months after date. The said bills were duly presented to the drawees, who refused acceptance, and the bills were thereupon protested at the pursuers' instance against the drawees for non-acceptance, and the drawer for non-payment. That on 11th February 1880 the pursuers arrested the said ship, and took proceedings in Admiralty against the shipowners, which were unopposed. Under said proceedings the ship was sold on or about 19th May 1879, by order of the Court of Admiralty in London, and the pursuers placed to the credit of the account sued for the sum of £85, 4s. 11d. derived from the proceeds of the sale, and the further sum of £60 which they entered as a payment received from Captain Wilde, as on 1st May 1879. That the said bills having matured and been dishonoured on 23d April 1879 the pursuers thereafter raised an action against Captain Wilde, as drawer of said bills, in the German Court of his domicile, for the alleged balance thereon, being the sum now sued for, and obtained judgment against the said

No. 120. drawer in the lower Court; but on appeal the judgment was reversed, and the action dismissed on the ground that by German law the suit against the drawer should have been brought within three months from the date of the bills falling due.”

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On 3d February 1881 the Lord Ordinary assolized the defender from the conclusions of the summons.*

The pursuers reclaimed, and argued;—The doctrine of election did not come into this case. It only applied when the claim had been sued out to judgment.¹ The action in Germany was only on the bills, not on the debt, and it having been dismissed on a purely technical ground, did not bar the pursuers from insisting in this action. *Priestley's*² case, which was founded on for the defender, was a different one altogether, and did not go so far as the defender contended.

Argued for the defender;—In a question of election successful judgment was not necessary;³ the intention of the creditor was enough, if sufficiently indicated.³

LORD JUSTICE-CLERK.—The stake involved in this case is not large, but the question argued is of considerable importance. The action is by a Newcastle firm of shipbrokers against a shipowner in Rostock, for furnishings said to have been made to a vessel by order of the master. Jurisdiction has been founded by arrestments in Scotland. The answer to the claim is that the master granted bills of the amount to the shipbrokers, and that they have sued him on them in Germany. It is not denied that the master is liable along with the owner, but the master is said to have been successful in the German Courts. This action is now brought against the owner, and he pleads that there cannot be an action both against him and the master, and that the shipbrokers having sued the master, although without success, must be held to have elected to accept him as the debtor, and cannot now sue the owner. The Lord Ordinary has sustained this plea upon the authority of the case of *Priestley*, but I think he has erred in doing so.

Election is no doubt recognised in our law. In the case of a shipmaster and shipowner, where the master is sued on his own obligation and decree is given against him, he having relief against the owner, there is no doubt that the owner

* “NOTE.—The parties requested that the case should be sent to the Procedure-roll, in order to a decision on the defender's second plea in law. They stated that the first plea for the defender involved an inquiry into German law, which they were both desirous to avoid until the question raised by the second should be determined.

“The Lord Ordinary heard the defender, but no appearance was made by the pursuers. He has, nevertheless, thought it better to decide the case rather than give decree by default.

“In the opinion of the Lord Ordinary the pursuers elected to take the master as their debtor. They sued him to judgment on the bills which he had granted, and which were binding on him alone. It does not matter that they were ultimately unsuccessful. They took judgment in a question with him, and though they were defeated on a plea which seems to resemble our plea of prescription, they may still sue him for the debt. The principles recognised in the case of *Priestley*, 34 L. J., Exch. 172, seem to the Lord Ordinary to sustain the plea of the defender.”

¹ *Curtis v. Williamson*, Dec. 10, 1874, L. R., 10 Q. B. 57.

² *Priestley v. Fernie*, June 23, 1865, 34 L. J. Exch. 172.

³ *Young v. Smart*, Dec. 14, 1831, 10 Sh. 130, 4 Scot. Jur. 184; *Ferrier v. Dodds*, Feb. 23, 1865, 3 Macph. 561, 37 Scot. Jur. 270; *Bell's Com.* i. 536; *McLachlan on Shipping*, 131.

cannot be sued also for the same debt. That is common sense. But where the master has not been sued to judgment, or the action fails from some technical reason or another, the case is different. The fact of the pursuer having sued the wrong man will not bar him from suing the right one. And the same rule must apply if he have failed to recover. That rule seems to be clearly laid down in the case of *Curtis*, which has been referred to. It is clear from the language used by Bramwell, B., in delivering the judgment of the Court, that it was considered that whilst judgment against the agent, even without satisfaction, would constitute a conclusive election, yet that no legal proceedings short of judgment would have that effect, for he distinctly pointed out that by the word "sue" he means "sue to judgment." I apprehend that means successful judgment.

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On the whole matter it seems to me that here we have no case of election truly, and that no plea has been stated to exclude the action. I think the process should therefore go on.

LORD YOUNG.—I am of the same opinion. Indeed, the only difficulty I have had is whether the pursuers should not be left to their remedy in the German Courts. It seems inconvenient to have one end of the case in Rostock and the other end in Newcastle, neither coming near Scotland. We must, however, obey the law, and arrestments having been used here the case can competently be decided in this Court.

In other respects I entirely agree with your Lordship. I do not think that in this case the questions raised and decided in *Priestley's* case arise. According to the pursuers' averments their ground of action implies no liability on the part of the master. They say they have a good claim against the owner. It may be that they may make out in point of fact that the master is liable also, but on the case as stated I cannot assume the master to be liable at all. The averment made is (Cond. 2)—"In the end of 1878 and beginning of 1879 the pursuers made on the defender's employment and behalf various disbursements, and earned a certain commission as agents for the vessel 'Jacob Rothenburg,' of which the defender was then owner." That is a very good ground of action. It is that, on the employment of the owner, the pursuers made these disbursements. It may afterwards appear that it was on the employment of the master, but it is not so stated. I cannot infer here that any other than the owner was trusted or is responsible.

It is then stated in answer that the master drew bills on the owner to pay these furnishings. But that is quite consistent with the view that the owner alone is liable. The master may incur a liability not previously on him by drawing a bill, but that is quite consistent with his being under no previous liability. The shipbrokers now sue on the original debt and not on the bills. They tried to enforce the bills against the master in Germany, but failed, and they now bring an action on the debt and not on the subsequent obligation. I cannot throw out that action on the ground that they had a choice between suing the master or the owner and have exercised it. I must therefore hold, irrespective of the decision in *Priestley's* case, that this action is not to be dismissed upon the doctrine of election.

There is one point on which I have considerable difficulty. I was under the impression that the master of a ship was in a different position from an agent with an undisclosed principal, and that in every relation.

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The general rule is that if a person really acting for another goes into the market and buys as if for himself, he binds himself; but if the party from whom he buys finds out his true position then he can treat him as an agent only. He cannot have two principals to deal with, and no double remedy is allowed. The only other rule is that an agent acting for a disclosed principal does not bind himself at all.

The case of a master of a ship is exceptional; he is an agent acting for a known and registered owner, and yet he incurs personal liability. Now, I am not prepared to assent to the doctrine that a person who furnishes supplies to a ship on the order of the master must elect to sue either the master or the owner. I should have thought it was a joint liability, and that the creditor could sue both.

In this case, however, this point does not arise, as there was no proceeding to judgment, and I only referred to the other ground because your Lordship had exhausted this part of the case. I do not think that suing to judgment means to judgment of absolver. I am of opinion that the Judges in *Priestley's* case never contemplated that their language should be construed to mean only a judgment on a technical plea. The true meaning is if the creditor has converted the liability of the master into a "judgment debt" then his claim against the owner shall cease, as he will be liable in relief.

LORD CRAIGHILL.—I am of the same opinion, and have very little to add.

As regards the plea sustained by the Lord Ordinary, I confess his decision came upon me with surprise, because I shared very much the impression stated by Lord Young, that the owner and master were liable together for goods supplied to the ship on the master's order. Until the case of *Priestley* was quoted I had no doubt that both were liable as principals. I do not, however, need to give an opinion upon that point. I am of opinion that what was here done by the pursuers is not of the same nature as what took place in *Priestley's* case. The result of their litigation was that instead of getting a judgment it was found that the bills, in consequence of the lapse of time, had no effect. It therefore appears to me that the case of *Priestley* is no authority here.

I entirely concur in the proposed judgment.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against: Repel the second plea in law stated for the defender, and remit to the Lord Ordinary to proceed with the cause, reserving all questions of expenses."

BOYD, MACDONALD, & Co., S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

No. 121.

Mar. 18, 1881.
Paterson v.
M'Ewan's
Trustees.

THOMAS LUCAS PATERSON, Pursuer.—*Asher—Jameson.*

JAMES M'EWAN and WILLIAM CLAPPERTON and OTHERS (M'Ewan's Trustees), Defenders.—*D.-F. Kinnear—Urc.*

Superior and Vassal—Feuar bound to make a road in front of his feu when road is made through adjoining ground is not bound to make the road by becoming proprietor of the adjoining ground.—In August 1863 a proprietor feued a piece of ground (part of the estate of D), bounded on the north by a proposed road, on the east by the adjoining estate of K, belonging to a different proprietor, which lay between D and the city of Glasgow, subject to the condition

that, in the event (which was then improbable) of a street being formed through K in connection with the proposed road, the feuar should be bound to form and maintain one-half of the said road in front of his feu. No. 121.

In February 1864 the feuar, to take advantage of a wall which had been built by the proprietor of K four and a half feet within his boundary, bought from him the strip of ground lying between his feu and the wall, extending northwards from the south-east corner of the feu, the whole length of the feu and twice that distance beyond. Mar. 18, 1881.
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In 1872 the proprietor of D bought a part of the estate of K, which would have enabled him to form a street through K in connection with the proposed road, had it not been for the intervening strip acquired by the feuar.

In an action brought by the proprietor of D, against the feuar, concluding, *inter alia*, for declarator that the defender was bound to form a road forty feet wide over the strip, upon payment of such compensation as the Court should fix, held by seven Judges that the defender was under no obligation, express or implied, to make, or allow to be made, a road over the part of K acquired by him.

By feu-contract, dated 1st December 1863, Thomas Lucas Paterson, 1st Division, proprietor of the estate of Dowanhill, near Glasgow, feued to James M'Ewan a portion of these lands, amounting to 1 rood and 30 poles or thereby, adjoining the estate of Kelvinside, which bounded Dowanhill on the north-east, and which then belonged to Messrs Montgomerie & Fleming. At that time there was no communication between the properties, which were separated by a mutual fence, consisting of a feal dyke, surmounted by an old hedge, and supported on the Dowanhill side by a stone retaining wall. Mr Paterson was very desirous that a road on his property of Dowanhill, called the "Victoria Circus Road," should be connected with roads on Kelvinside, so as to secure a direct access between Dowanhill and the Great Western Road, which lay on the other side of Kelvinside. Messrs Montgomerie & Fleming, however, had positively declined to allow any such connection to be made. with three consulted Judges. I.d. Curriehill. M.

The ground feued by Mr Paterson to Mr M'Ewan was on the south side of the contemplated prolongation of Victoria Circus Road, along which it extended 108 feet 3 inches or thereby, and in the hope that eventually the system of roads on the two properties might be connected, this obligation was inserted in the feu-contract:—"The said James M'Ewan and his foresaids shall be bound and obliged, if required by the first party, as soon as a road shall be opened up and completed through the lands of Kelvinside to the Great Western Road in connection with the said road or street called Victoria Circus Road, to open up, make, and continue one-half of Victoria Circus Road, so far as the said road bounds the said plot or area of ground above disposed on the north, and to maintain the same in good order in all time thereafter for mutual communication between the lands of Kelvinside and the first party's lands of Dowanhill." A declaration was added, to the effect "that the said second party, and his foresaids, shall in the meantime, and until the said road or street is opened and continued as aforesaid, be entitled to the use and privilege of that portion of said plot of ground above disposed, intended for the one-half of the said road or street as a garden or pleasure ground, and to enclose the same with such ornamental fence as the said second party may, with consent of the said first party, erect, until said space is required for the formation and continuation of said road, as above mentioned."

Four and a-half feet east of the mutual fence above referred to as separating Kelvinside from Dowanhill Messrs Montgomerie & Fleming, the proprietors of Kelvinside, had erected a stone and lime wall, and the original missive in which Mr M'Ewan offered to take the feu expressly

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mentioned that wall as the boundary of the feu, and contained a stipulation that the feuar should have right to the stones in the old wall free of charge. This offer was accepted by Mr Paterson. The price offered was £35 per acre. M'Ewan for some months treated the strip of ground between the new wall and the old as his own, and removed the old wall. Ultimately, and when interrupted by Montgomerie & Fleming he, to save litigation and the expense of building a boundary-wall, leaving a waste space between the walls, purchased not only the strip on his eastern boundary but a continuation of the strip northwards (in all, 590½ feet, the proprietors refusing to sell less) for £142. This bargain was completed in February 1864, but the disposition was dated September and October, 1864. He was thus enabled to carry his garden ground attached to his house (called Thorncliffe) up to the wall and up to the centre of the plot intended ultimately to form the continuation of Victoria Circus Road.

In 1873 Mr Paterson purchased from the then proprietor of Kelvinside an area of ground, being part of that estate called Horslethill. He was thereby enabled to form a road up to the Dowanhill march, which communicated with the roads in Kelvinside leading to the Great Western Road. So that all that was then required to complete the connection of the Victoria Circus Road upon the Dowanhill estate with that leading through Kelvinside to the Great Western Road was that they should meet across the strip of ground purchased from Kelvinside by M'Ewan.

In February 1880 Paterson brought this action against M'Ewan and his marriage-contract trustees, to whom he had conveyed both subjects, for declarator that the defender "is bound forthwith to open up, make, and continue, and that the other defenders are bound to permit him to open up, make, and continue one-half of Victoria Circus Road, of 40 feet in breadth, so far as the said road bounds the plot or area of ground now or lately belonging to him, called Thorncliffe, . . . and that the defenders are bound to permit the pursuer to open up, make, and continue the said road of 40 feet in breadth through the adjoining strip of ground, about 4½ feet wide, . . . so as to form a continuation of said Victoria Circus Road, until it joins a road of 40 feet in breadth, already formed, from the Great Western Road, through the estate of Kelvinside, near Glasgow, the south-west termination of which last-mentioned road immediately adjoins said strip of ground, upon payment to the defenders, or one or other of them, of such compensation . . . as our said Lords may fix : " And also for decree ordaining the defender, James M'Ewan, " forthwith to open up, make, and continue, and the other defenders . . . to allow him to open up, make, and continue one half of said Victoria Circus Road, in so far as the said road bounds the said plot or area of ground called Thorncliffe ; and to permit the pursuer to open up, make, and continue the said road, 40 feet in breadth through the said adjoining strip of ground, so as to form a continuation of said Victoria Circus Road, until it joins said road, which runs to the Great Western Road, and that upon payment to the defenders, or one or other of them, of such compensation, if any, as our said Lords may fix and determine in the course of the process to follow hereon."

The pursuer averred that M'Ewan's purchase of the strip in question " was made in fraud of the contract " between them, and without his knowledge, and " for the sole purpose of enabling Mr M'Ewan to attempt to prevent the road contemplated in the said feu-contract being made, and to evade his obligations to give ground for and to make, so far as passing through the ground feued to him by the pursuer, one-half of the said road."

There was also this averment,— " The defender was called upon by the

pursuer and the parties who had by that time become co-owners with him in Dowanhill to form the continuation of Victoria Circus Road through his land, in terms of the provisions in his feu-contract, and to allow said road to be formed across the said strip of ground purchased by him as before mentioned, full compensation being made for the right of passage over said strip of ground. This Mr M'Ewan refused. He also refused an offer by the proprietors of Dowanhill to pay him for the said strip of ground, so far as required for the said intended road or street, and extending to the north-west thereof, the sum of £400. This sum was more than the cost to him of the whole strip, with compound interest at five per cent per annum, and all expenditure by Mr M'Ewan. It was a condition of the said arrangement that Mr M'Ewan, in addition to said payment, should retain, free of cost, so much of the said strip of ground as lay south of the said intended road, and on the east of the plot of ground feued by him from the pursuer. This offer, which was made to avoid litigation, Mr M'Ewan also refused." No. 121.
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The defenders denied that the purchase of the strip of ground in question was made fraudulently or without the knowledge of the pursuer, and averred, *inter alia*,—"As regards the pursuer's demands in the present action, the defender M'Ewan, without admitting any legal obligation on him to do so, is ready and willing, and has never refused, to open, make, and continue one-half of Victoria Circus Road, so far as the road bounds on the north the plot or area of ground disposed by said feu-contract, and the other defenders are ready and willing, and have never refused, to permit this to be done. As regards the portion of Kelvinside acquired by the defender M'Ewan as aforesaid, and now belonging to the other defenders, their titles thereto do not contain any restriction or obligation on them as regards the formation of any road, and they have refused to recognise any right on the part of the pursuer to compel them to make, or permit to be made, any such road, although they are, as they all along have been, ready and willing to negotiate for the formation of a road on such reasonable terms as may be mutually agreed on."

The pursuer pleaded;—(2) The event having happened, or falling to be held as having happened, on which the defender M'Ewan undertook to make and continue the road in question, the pursuer is entitled to decree as craved. (3) The defender M'Ewan, and the other defenders, so far as their concurrence is necessary, not being entitled to defeat without just cause the foresaid obligation undertaken by M'Ewan, or to prevent said road from being opened up, made, and continued from the Victoria Circus Road to the Great Western Road, by any act of theirs, and the only obstacle to the said road being opened up, made, and continued being the unreasonable and unjustifiable refusal of the defenders to continue said road through said strip, the pursuer is entitled to decree as craved.

The defenders pleaded;—(1) As regards the conclusion which relates to the strip of ground libelled,—1. The pursuer has no title to sue. 2. The pursuer's averments are irrelevant, and insufficient to support the conclusions of the action. 3. The defenders are entitled to absolvitor, in respect they are under no legal obligation to comply with the pursuer's demands. 4. The pursuer is barred by his actings from complaining of the defender M'Ewan having acquired a right of property in said strip of ground, unfettered by any restrictions or obligations as to the formation of a road. 5. The defenders are entitled to absolvitor, in respect the pursuer's averments, so far as material, are unfounded in fact. (2) As regards the opening up, formation, and continuation of the Victoria Circus Road, so far as the line of said road bounds the defenders' feu foresaid,

No. 121. the conclusions of declarator and *ad factum præstandum* are nimious and unnecessary.

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The Lord Ordinary, after proof, both documentary and oral, the import of which is given in the Lord Ordinary's note, dismissed the action.*

The pursuer reclaimed.

After being argued before the Judges of the First Division, the case was re-heard before them along with the Judges of the Second Division.

Argued for the pursuer;—By the feu-contract the defender had undertaken to prolong the Victoria Circus Road through his feu upon fulfilment of a condition precedent. That condition was the completion of a connection from the Great Western Road through Kelvinside to the Dowanhill march. The defender, by now refusing to carry the road through the strip of $4\frac{1}{2}$ feet wide which he had purchased, was illegally preventing the fulfilment of the condition, and seeking to relieve himself from the obligations of his feu-contract. As the non-fulfilment was due to the defender's own act, the condition must be taken as fulfilled against

* "NOTE.—(After stating the facts)—It must be borne in mind that the obligation on the defender to form the road on his Dowanhill feu was conditional on a road being opened to the Dowanhill march by the proprietors of Kelvinside. But the purification of that condition depended entirely upon the will of the proprietors of Kelvinside for the time. They might never make the road, and it is certain neither the pursuer nor the defender could compel them to do so, and until such road was made on Kelvinside the defender's obligation could not take effect. But if so, are the rights of parties altered by the fact that the defender is now proprietor of that part of Kelvinside which immediately adjoins Dowanhill? I apprehend that, *prima facie*, the defender is under no obligation to allow a road to be formed through his ground into Dowanhill. If, instead of acquiring this isolated strip of Kelvinside by purchase, he had succeeded to it as heir, or if he had in any lawful way acquired the whole of Kelvinside estate, I think it is clear that the pursuer could not have for a moment maintained his present demand.

"The mere fact, therefore, that the defender has acquired the property of this strip of ground since he acquired his Dowanhill feu is not of itself sufficient to render his obligation operative. Something more is necessary, and accordingly, in order to make his action relevant, the pursuer alleges in his condescendence, art. 6, that this piece of ground was purchased 'in fraud of the contract between the pursuer and the said James M'Ewan, without the knowledge of the pursuer; and it was made for the sole purpose of enabling Mr M'Ewan to attempt to prevent the road contemplated in the feu-contract being made, and to evade his obligations to give ground for and to make, so far as passing through the ground feued to him by the pursuer, one-half of the said road.' Now, it was in consequence of that statement that a proof was allowed, and the question, and the only one, is, whether the pursuer has succeeded in his proof? I think he has failed. I am quite satisfied, on the evidence of the defender, of his agent Mr Macleod, and of Mr Alexander, taken in connection with the letters referred to in the proof, that the pursuer was, between August and December 1863, aware that the strip of ground might be had from Montgomerie & Fleming on moderate terms; that the defender was not himself anxious of having the ground, unless perhaps the part immediately adjoining his own feu, but that he was desirous that the pursuer should purchase the whole; and that the pursuer might have purchased it when the defender did if he had been so inclined. Indeed, I think the evidence shews that the purchase was in a measure forced upon the defender, and that it was not made for the purpose of enabling him to evade his obligations in the feu-contract.

"The pursuer having thus failed to prove his allegations of fraud, the relevancy of the action falls, and the result is that the action must be dismissed, with expenses."

him, and he was bound to make and continue the road.¹ The terms of No. 121. the obligation imported a potestative condition, for it was one in the power of either party.² The defender was at least bound to sell to the pursuer at a price to be fixed by the Court whatever part of the ground was necessary for the execution of the road. No one who was a party to a contract was at liberty to do anything at variance with it.³

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Argued for the defender;—On the facts: When the feu-contract was entered into it was not contemplated that the stipulation would ever come into operation. It was a distant as well as a contingent obligation. The defender did not buy the strip for the purpose of obstructing the pursuer. The pursuer had himself had an opportunity of acquiring the ground. The arrival of the contingency was dependent upon the will of a third party. The action was of an unprecedented kind. It sought to have the defender ordained to do something in order that specific performance of an obligation might follow.

On the law: The rule of law that where a party himself prevented the fulfilment of a condition which was binding upon him, it is to be held as fulfilled, had no place in this case. The condition was not a potestative one, binding upon both sides. It was a casual one, and depended upon a contingency. It did not arise under the deed.⁴ The pursuer had therefore failed to establish an obligation by contract, either express or implied. The Court could not impose an obligation which was never undertaken. There could be no specific performance unless there was a contract. The only remedy was one of damages.

At advising,—

LORD PRESIDENT.—In the year 1863, when the parties made the feu-contract which has given rise to the present question, the pursuer Mr Paterson was the proprietor of certain lands called Dowanhill, and immediately adjoining these lands, and lying between Dowanhill and the Great Western Road, there lay the lands of Kelvinside, belonging to Messrs Montgomerie & Fleming. Both of these properties were in the immediate neighbourhood of Glasgow, and were adapted and laid out for building purposes; and the pursuer, as the proprietor of Dowanhill, was very anxious to establish a connection by road between his lands and the Great Western Road through the adjoining lands of Kelvinside. But the proprietors of Kelvinside, on the other hand, were quite against any such communication being made, and positively refused to entertain any proposal to that effect. There seemed to be no prospect at all at that time of such a communication being made. But the pursuer, as proprietor of Dowanhill, did

¹ Pirie v. Pirie, July 19, 1873, 11 Macph. 941; Dig. lib. 35, tit. 1, sec. 81; lib. 45, tit. 1, sec. 85-7; lib. 50, tit. 17, sec. 161; Pothier on Obligations, ii. 3, 212, Evans' Translation, p. 121; Hotham v. The East India Co., 1 T. R. 638; Addison on Contracts (7th ed.), 243; Dick and Stevenson v. Mackay, May 21, 1880, ante, vol. vii. p. 778; Domat, vol. i., bk. 1, tit. 1, sec. 18.

² Bell's Principles, 50; Stair, i. 3, 8; Erskine, iii. 3, 85.

³ Smith v. Cameron, June 28, 1879, 6 Macph. 1107, 16 S. L. R. 685; Campbell v. Watt, June 18, 1795, Hume's Decisions, 788; Stirling v. Maitland and Boyd, Nov. 15, 1864, 5 Best and Smith, 840; M'Intyre v. Belcher, June 5, 1863, 14 Scott's C. B., N. S., 654.

⁴ Beswick v. Swindells, June 18, 1835, 3 Adolphus and Ellis, 868; Hall v. Conder and Others, June 17, 1857, 26 L. J. C. P. 288; Clark v. Westgrove, 1856, 25 L. J. C. P. 287; Telegraph, Despatch, and Intelligence Co. v. Maclean, May 8, 1873, L. R., 8 Chan. 658; Rhodes v. Forwood and Paton, May 4, 1876, L. R., 1 App. Cas. 256; in re English and Scottish Insurance Co., 1870, L. R., 5 Chanc. 737.

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not altogether give up the expectation that such a communication might at some time be established, and therefore when he feued out to the defender M'Ewan the feu called Thorncliffe, which immediately adjoins the boundary between Dowanhill and Kelvinside, he inserted a condition in the feu-contract which provided for the possibility of such a communication being made hereafter. The subject itself is described as being part "of the lands of Dowanhill situated on the south side of an intended continuation of Victoria Circus Road, to measure 40 feet in breadth, within the parish of Govan and shire of Lanark," containing so many poles, "in which measurement both parties acquiesce"; and it is described as "bounded on the north by the central line of said intended continuation of Victoria Circus Road, along which it extends 108 feet 3 inches or thereby; on the west by the central line of the mutual wall"—which part of the description is immaterial; "and on the east by the lands of Kelvinside, along which it extends 263 feet 9 inches or thereby to the centre of the said intended continuation of Victoria Circus Road, following the bend and taken along a line at a mean distance from the west face of the old retaining wall or stone facing and the centre of the thorn hedge, as the said plot or area of ground is delineated on a plan or sketch thereof." Now, this Victoria Circus Road was intended to go up to the march between Dowanhill and Kelvinside, and in the event of a road being made through the lands of Kelvinside so as to join with the Great Western Road this part of the Victoria Circus Road lying to the south-west of Kelvinside would have immediately connected with the road leading through Kelvin-side to that Great Western Road. Accordingly, the feuar is taken bound, "if required by the said first party, so soon as a road shall be opened up and completed through the lands of Kelvinside to the Great Western Road, in connection with the said road or street called Victoria Circus Road, to open up, make, and continue one-half of Victoria Circus Road, so far as the said road bounds the said plot or area of ground above disposed on the north, and to maintain the same in good order in all time thereafter, for mutual communication between the lands of Kelvin-side and the first party's lands of Dowanhill, and also to defray a rateable proportional part of the whole expenses of making, keeping up, and maintaining in good order in all time coming the drains or sewers formed or to be formed in said road."

The other clauses of the feu-contract appear to me to be immaterial in the question which we are now to determine. But this condition, or rather conditional obligation, which was imposed upon the feuar depended upon the fulfilment of a condition which was not within the power of either of the parties to the feu-contract. It was simply a casual condition, depending for its fulfilment upon an accident or upon the will of some third parties. As matters stood at that time, it was impossible that that condition could be fulfilled except with the consent of the proprietor of Kelvinside, and that consent was not at all likely to be obtained. It certainly could neither be fulfilled nor prevented by anything to be done by either the one party or the other to this feu-contract. The subject which Mr M'Ewan obtained possession of under this feu-contract was ground sufficient to build a villa upon, and he was entitled, in terms of his feu-contract, to occupy one-half of the width of Victoria Circus Road, as contemplated to be prolonged, in so far as it lay opposite to his grounds. Indeed, one-half of the *solum* of the road lay within the description of his feu, and therefore until he could be required to make that road he was entitled to occupy the *solum* of that part of the road as pleasure ground, which he accordingly did.

But there was another part of his feu—the eastern part—about which there was a misunderstanding. I do not think it is in the least degree of importance to inquire to whose fault that misunderstanding was attributable; but Mr M'Ewan was led to believe that his feu went up to a dry-stone wall on the east, which had been erected by Montgomerie & Fleming, apparently with the purpose of shewing their determination that there never should be any communication between the two properties of Dowanhill and Kelvinside. But they had built that wall $4\frac{1}{2}$ feet within their own boundary, and the actual boundary between Dowanhill and Kelvinside was an old retaining wall and hedge, which lay $4\frac{1}{2}$ feet west of the wall they built. Now, Mr M'Ewan, the defender, was under the impression that that dry-stone wall was his boundary, and he was proceeding to deal with the ground within that wall and to the west of it as part of his feu. He was interrupted in so doing, and it then became a question how this matter should be settled, and consequently he became very desirous, not unnaturally, if he could, to obtain that $4\frac{1}{2}$ feet in breadth within what he conceived to be the boundary of his own feu from Messrs Montgomerie & Fleming. But Messrs Montgomerie & Fleming were not willing to sell to him the part opposite to his own feu only, but would sell only the whole length of it as it is shewn on the plan before us coloured green; and the strip of ground, as there shewn, extends not merely along the east side of the defender's feu, but across the line of the intended road, and still further on to the north. In short, the portion opposite to Mr M'Ewan's feu is not much above one-third of the whole in length. Mr M'Ewan in the end bought $590\frac{1}{2}$ feet of that strip of ground from Montgomerie & Fleming, and obtained a conveyance to it upon payment of the price of £142. It seems to be suggested—but I think there is no ground for the suggestion—that this property was acquired by Mr M'Ewan without the knowledge of the pursuer Mr Paterson, and that it was done with the intention of preventing the possibility of the fulfilment of that condition, viz., the making of the road through Kelvinside, or the junction of it with the Victoria Circus Road, which would have brought into operation the obligation that lay upon Mr M'Ewan under his feu-contract.

After full consideration I have come to be very clearly of opinion, in the first place, that Mr Paterson, the pursuer, might himself have acquired this ground, if he had chosen. The sale was not gone about in a hurry. He was made aware of it, and he had an opportunity of purchasing it if he had chosen; and I am just as clear, in the second place, that Mr M'Ewan did not acquire it for any sinister purpose—that his great object in buying it, to begin with, was to make his own feu complete up to the dry-stone wall, which bounded it on the east. I mention this circumstance, because I think it only fair to the defender to do so; but I am not by any means sure that even if the fact were otherwise it would at all affect the question of law which we have to decide.

Now, what has happened is this, that the pursuer has acquired as much of the estate of Kelvinside as would enable him to fulfil the condition under which Mr M'Ewan's obligation stands in the feu-contract,—that is to say, he is in a condition now to obtain a road through Kelvinside from the Great Western Road down to the margin of the Dowanhill estate, but for the green strip of ground which has in the meantime been acquired in property by the defender. But so long as that green strip belongs to Mr M'Ewan, the defender Mr Paterson cannot make the junction between the road through Kelvinside and the Victoria Circus Road, unless he can compel the defender

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to consent to that road being made through the green strip. This action is brought for the purpose of compelling that assent on the part of Mr M'Ewan, and the question comes to be, whether he is entitled to prevail in that demand?

It is contended that the case falls to be decided by the application of the well-known rule of law, that where a condition is prevented from being fulfilled by the party who is bound in the conditional obligation it shall be held as fulfilled, and the doctrine of potestative conditions has been largely dwelt upon in the argument. I am of opinion that that rule of law has no application to the present case. It is quite true that if a man has it in his power to perform conditions the fulfilment of which gives rise to a binding obligation against himself, then he is not entitled to refuse so to do; and still further, if he obstructs or prevents the condition from being fulfilled, the condition will be held in law as being fulfilled. But that relates only to the subject-matter of the contract in which the conditional obligation is contained, and I am not aware that the rule has ever been extended thus far, that whatever other rights or properties he may have the use of which might conduce to the fulfilment of the condition, he is bound in law to make that use of those independent rights and properties. And yet that seems, in truth, to be the contention of the pursuer here. It was put in argument against the pursuer—Supposing that the defender had acquired the entire estate of Kelvinside, whether by purchase or succession, would he have been obliged in that case to consent to the making of a road through that estate, so as to join the lands of Dowanhill to the Great Western Road?—and I do not think that the pursuer's counsel faced that question or gave it an affirmative answer. And yet, unless that could be maintained, I cannot see how he can prevail in the present case. Surely the accident of a man's property being more or less will not make the rule more or less applicable. It is said that this is a very narrow strip of land, and that the possession of the whole estate of Kelvinside would have been a very different matter. So it would, in point of fact, but is it a different matter in point of principle? Is a man bound, in order to enable a condition to be fulfilled, the fulfilment of which brings into operation a binding obligation against himself—is he bound to give or sacrifice another property which he has acquired? I think that must be answered in the negative, whether the property be large or small. And therefore it appears to me that the doctrine which is founded upon is quite inapplicable to the present case.

But if it were otherwise, I do not think it would benefit the pursuer. What is the obligation that would be brought into operation by holding this condition as fulfilled? It is an obligation to form the part of the road which is represented by the yellow colour upon the plan. That is the whole obligation in the feu-contract. But suppose that were done to-morrow, it would not serve the pursuer's purpose unless he could also force his way through the green strip. To hold a condition as purified or fulfilled is a very different thing from the condition being purified or fulfilled in point of fact, and in this case the condition cannot be fulfilled in point of fact without the green strip being placed at the disposal of the pursuer; and therefore it always comes back to the same question—Is the pursuer entitled to deal with this green strip as if it were his property instead of being the property of the defender, and is he entitled to compel the defender, the absolute and unqualified owner of that strip of ground, to submit either to sell it to him or to have a servitude constituted over it in this

way? I apprehend there is no doctrine of law that can possibly reach a case of No. 121. this kind.

It is said, no doubt, in another view of the case, that there is an implied obligation in this feu-contract to do everything that is necessary to lead to the fulfilment of this contract—an obligation that whenever it comes to be within the power of the defender to further the fulfilment of this condition which is to lead to the conditional obligation being operative against himself, he is bound to do so. Now, I can only say that that is an implication of a very startling kind indeed. I do not doubt that a man may so contract as to bind himself to sell a property that he may afterwards acquire at a price to be fixed by arbitration. Such a thing is possible; but it would be a very anomalous contract, and I think it would require to be very clearly expressed in order to be binding. That such an obligation should be implied in any contract is to me a very novel idea. I know of no way in which a man can be bound beforehand to sell or submit to a servitude being created upon a property that he shall afterwards acquire, unless it shall be either by express contract or by force of an Act of Parliament; and as we have neither the one nor the other in this case, I am very clearly of opinion that that argument on the part of the pursuer fails also.

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I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD JUSTICE-CLERK.—Divested of many details, and interminable correspondence, the important facts in this case are few, and, as I think, not doubtful. In 1863, the pursuer was proprietor of Dowanhill, M'Ewan held a feu of a part of Dowanhill from the pursuer, and Montgomerie and Fleming were the proprietors of all the ground, namely, the lands of Kelvinside, to the north-east of that feu. The feu in favour of M'Ewan was dated in December 1863, and in the feu-contract in his favour occurs the following clause (reads the clause importing the obligation as above quoted).

The road here contemplated was one intended to open from a more important thoroughfare, called the Great Western Road, some way to the north of M'Ewan's feu, and running at right angles to the proposed line of road. No part of the intervening land, through which the intended roadway was to be formed, belonged to the pursuer.

It is thus clear that the formation of the road depended entirely on the will of the proprietors of the intervening ground. It is also clear that either the pursuer or M'Ewan was free to purchase any part of this ground, and that if he did so he was as free to make or not make the road as were those from whom he might purchase it.

What happened was this: Shortly after his purchase, M'Ewan got into a dispute with Montgomerie and Fleming, as to the boundary of his feu to the north; and in the end, in order to avoid a law-suit, he agreed to purchase a strip of ground, $4\frac{1}{2}$ feet in width, lying, as it appeared, outside his northern boundary, and extending for some distance beyond the limits of his feu. This strip lay across the line of the proposed road. This ground he acquired in 1864. At this time the pursuer had no property north of this strip.

A matter of fact, which, however, seems to me to be immaterial, has been controverted as to this transaction. It is said that the motive which induced this purchase, on the part of M'Ewan, was to enable him to prevent the making of the road up to his original boundary, and so evade the fulfilment of his

No. 121. obligation. But I am quite satisfied that this is not the fact. M'Ewan made the purchase for the purpose of avoiding a law-suit with the coterminous proprietors, Montgomerie & Fleming, and with no other object. The whole course of the correspondence makes this clear; and the fact, which cannot be disputed, that M'Ewan, before his purchase, was desirous that the pursuer should acquire the ground, and asked Alexander, a coterminous feuar, to ascertain the pursuer's views, is conclusive on this subject. The pursuer, no doubt, denies that Alexander ever made the proposition to him, but that is of no consequence on this head. The only matter of any importance is that M'Ewan made this proposal to Alexander, which is entirely inconsistent with the idea that his object in making the purchase was to avoid fulfilling his obligation to make the road. I do not, however, doubt that M'Ewan was induced to give the price he did for this otherwise useless strip of $4\frac{1}{2}$ feet, by the knowledge that it would enable him to part with it on his own terms. Before the road could be made, if it was ever made, the pursuer or any one else would have had to buy him out, as he would have had to buy out Montgomerie & Fleming. There could be no reason why the pursuer should obtain his wayleave from M'Ewan more cheaply than he could have got it from Montgomerie & Fleming. He was not injured by the transaction, and had no concern with it whatever.

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So stood matters in 1864, and so they continued for nearly ten years, during which the pursuer had no right to the ground over which the projected road had been intended to be made, and no steps had been taken towards its construction. During this interval, M'Ewan was the unrestricted owner of this strip, and might have sold it, or built over it as he pleased. In 1873, the pursuer at last bought up the proprietary interests in the ground to the north by a series of conveyances, the details of which are immaterial; he has made the road to the margin of the strip, and he now contends that he is entitled to a wayleave over this property without payment. I am of opinion that there is no foundation whatever for the demand.

It was attempted at the debate to bring this case within the well-known category of law, expressed by the 161st *regula juris*, on which the civil law and our own law on this subject is founded. The whole of this important branch of our jurisprudence was fully considered in the case of *Pirie*, 11 Macph., 941, and I do not propose to enter on any general discussion in regard to it now, because I am of opinion that the rule can have no application here.

But some distinctions must be attended to. The rule in question only applies to conditions which qualify contracts which are capable of being specifically performed independently of the condition. But when a contract relates to a subject-matter, the existence of which depends on an uncertain and future contingency or event, then, if the contingency or event never happen, the only result is, that there is no obligation. It is plain that, in such a case, there is no room for holding the condition as fulfilled, because, unless the contingency or event happen, the contract becomes incapable of the only implement the parties intended.

The rule contended for is that, if the condition is prevented by the party bound, it is to be held as completed. But suppose that rule were applied here, and the road were held as completed. The only effect of that would be to bring the contract into operation before the event occurred on which alone it was capable of fulfilment, and to oblige the defenders to make the road on their own feu, which when made would be useless. But this never could have the

effect of entitling the pursuer to make a road through property which never belonged to him, and in regard to which the contract is absolutely silent. No. 121.

I am therefore inclined to think that this is not a condition annexed to an obligation otherwise complete, but a *causa sine qua non*, something outside the contract altogether, an event without the occurrence of which neither party was under any obligation or responsibility, and which was left to take place or not as the proprietors of the ground for the time might see fit. Nor will it escape observation that, while on one hand the contract gives no right to the pursuer to perform any act on the ground which he feued out, on the other, if his present demand succeeds, he will have all which his contract provides for him in the most favourable event, and, in addition, a right of way through land which was not within the contract, and without giving for it any consideration.

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But, secondly, this rule or brocard of the civil law has no application in cases in which the act done is an incident of other transactions in the exercise of a separate and independent right. This was laid down in the case of *Pirie*, and is the teaching of the civil law in all the authorities referred to in that case—See especially the passages in Pothier's work on Obligations which are there referred to. This is an allowance of common sense; for it is too plain to require illustration that, if in 1863 M'Ewan had bought all the intervening ground between his feu and the Great Western Road, he might have made the road or not made it as he pleased, and that the pursuer could not have interfered with any use to which the property might be placed. I think the plea of the pursuer is a misapplication of a very sound and important principle of law to a state of facts lying entirely outside of it. It seems to fall within another and much more simple category. The pursuer wishes to have the use of the defender's land without paying for it, although he can shew neither title nor contract to support his demand. If he wishes it, he must acquire it, as M'Ewan did, on the usual terms.

LORD DEAR.—This action bears to be founded upon the clauses of a feu-contract entered into between Mr Paterson and Mr M'Ewan, dated 30th November and 1st December 1863, and registered on 3d December in the same year. I will shortly notice the clauses which are chiefly founded on. (After referring to the clauses quoted above, his Lordship proceeded):—

Now, it will be observed that this contemplated junction of the two roads so as to make a continuous passage between Dowanhill and the Great Western Road could not be effected without the consent of the proprietors of Kelvinside—then Messrs Montgomerie & Fleming—whose boundary with Dowanhill included what is now called the green strip, or at least that part of it which Mr M'Ewan acquired. It will further be observed that by the clauses in this feu-contract now relied upon by Mr Paterson, neither he nor Mr M'Ewan are expressly taken bound to acquire from the proprietor of Kelvinside the necessary ground or the necessary consent for carrying the Victoria Circus Road through Kelvinside so as to join the Great Western Road. Mr M'Ewan could not be said to be bound by the clauses of his contract to do so, for he is not bound to do anything till the road had been opened up and completed through Kelvinside in connection with the Victoria Circus Road, and his obligation then was conditional on Mr Paterson requiring him to implement that obligation. His

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obligation was "to open up, make, and continue one-half of Victoria Circus Road, so far as the said road bounds the said plot or area of ground above disposed on the north, and to maintain the same in good order in all time thereafter for mutual communication between the lands of Kelvinside and the first party's lands of Dowanhill." It is difficult to find in this anything beyond an obligation on the part of M'Ewan to be at the expense of making and maintaining a specified portion of road when Mr Paterson should find himself in a situation to require this to be done, and then only if Mr Paterson should require him to do it. This leads me very strongly to the result that if Mr Paterson meant to enforce against Mr M'Ewan his obligation to pay the expense of forming and maintaining the specified portion of the road, it was incumbent on him (Paterson), as a condition precedent, to find the means of making that condition prestable by transacting with those without whose consent that portion of the road could not be made at all.

If, however, in this state of matters M'Ewan, without the knowledge of Paterson, or without his having the ability to interfere, had purchased the property of the green strip, and pleaded that purchase against his obligation to make a portion of the road, I should certainly have thought that this was not according to good faith, although even then there might have been a legal difficulty as to the principle on which it was competent for Paterson to claim redress. But the decision in the case of *Pirie*, and the citation of authorities as to conditional obligations given in the voluminous opinion in that case by the Lord Justice-Clerk, and rightly applied to the circumstances that occurred there, would certainly not suffice to solve the present case, unless the circumstances under which M'Ewan purchased the green strip were those which I have just supposed. In *Pirie's* case the rule applied was that if he who is under a conditional obligation himself renders the accomplishment of the condition impracticable the condition shall be held as fulfilled. But the soundness of this rule can carry us no length at all in solving this case. I shall not follow out the supposed case of a purchase of the ground in bad faith any further, because it cannot be said to have occurred in the present case. The case which actually occurred is, that when the *solum* of the strip came into the market, although no offer of it was made to Paterson, he was made quite aware that it was for sale, and it was not till after Paterson had expressed his intention not to become the purchaser that M'Ewan came forward and made an offer, which the seller, after a correspondence on the subject, accepted. Circumstances known to your Lordship in the chair prevented me from reading the somewhat voluminous papers in this case till after Mr Asher had concluded his very able argument for Mr Paterson, which had been briefly replied to by the Dean of Faculty, who had more encouragement than Mr Asher had to be brief. I have now, however, read the whole of these papers, and particularly the parole evidence bearing upon the point to which I have just alluded, viz., the knowledge of Paterson that the strip in question was for sale. Paterson does not admit that he even knew that the strip of ground in question was in the market, or that M'Ewan might immediately purchase it if he did not. So far there is an apparent conflict between his evidence and the evidence of some of the other witnesses. But I am satisfied it is a conflict of memory rather than a conflict of testimony. I see no reason to think that Mr Paterson stated other than what he believed to have occurred. But we have a want of

recollection on his part to an extent which ought to satisfy himself that his defective memory ought not to be put against the distinct recollection of other and impartial witnesses, such as Mr Alexander, who evidently is as favourable to Mr Paterson as he is to Mr M'Ewan, and who, in a letter of 11th November 1863, gave the import of a conversation he had had with Mr Paterson the day before, to the effect that Mr Paterson would decline to purchase the solum of the strip if it were offered to him. At the date of that letter the contract with M'Ewan had not been executed. Its terms were adjusted in February 1864, and it was signed by M'Ewan two days thereafter. Now, I cannot say I am satisfied that one of the objects or prospective objects of acquiring this strip of ground had relation to the obstruction it might make to this road.

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But even though the preventing of the continuation of the road had something to do with the purchase, I do not see that that will entitle the pursuer to succeed in this action. It was for the pursuer to find the means of continuing that road, and without that it is plain that M'Ewan could not be called upon to fulfil the obligation of making his portion of the road. And even if there had been more to the same purpose, I do not see that that in point of law would enable the pursuer (whose obligation, as I read it, was all along to find the ground), to succeed. If he let that ground slip through his fingers, I do not see that that gives him any right now to the specific kind of relief that is concluded for in this action. It was Paterson's duty to acquire the ground for the making of the road, and he could not have understood that it was to be got for nothing. And then M'Ewan comes forward and purchases it. Whatever may be said about it, it is exceedingly unreasonable to suppose that he would allow this road to be made at the rate of the price of £142 which he paid for the ground. We cannot give any power to compel the defender to part with it except upon his own terms. It is admitted on all hands that if the pursuer wants this strip of ground he must pay for it—either the price of the land or compensation for a servitude over it. But how are we to fix the sum that is to be paid either as the price of the land or the price of a servitude? There is no arbitration practicable. I am not aware that we have any power to compel the parties to go into an arbitration in order to fix this price. In short, I cannot see any power that we have, upon any principle or practice known in our law, to fix a price for this ground or servitude, or to compel the parties to agree to it. That appears to me to be an obstacle to the success of this action.

I am of opinion, therefore, that in point of law we have no power to decern in terms of the conclusions of the summons.

LORD MURE.—On the question of fact raised in this case I have had no difficulty in coming to the conclusion at which the Lord Ordinary has arrived, viz., that the pursuer has entirely failed to prove the allegation of fraudulent acquisition of the ground in question on the part of the defender, upon which the pursuer's case as laid appears to me mainly to rely. The allegation is very distinct as put in the sixth article of the condescendence, and it appears to me that there is not only no proof of this allegation, but that it is, on the other hand, very clearly proved—(1) That the defender was obliged to buy the ground in question in 1864 in order to avoid a lawsuit with the proprietors of Kelvinside, into which he was likely to be led through the mistake of the pursuer, in giving a wrong description of the boundary of the defender's feu in the disposition of the property ;

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and (2) that the pursuer might at that time have himself acquired the ground in question, but declined to do so; and that it was only after the pursuer had so declined to acquire the ground that it was purchased by the defender. That, I think, is clear upon the evidence of Mr Alexander and Mr Macleod, and the correspondence which passed between the parties at the time—particularly Mr Alexander's letter of 11th November 1863, in which he narrates in writing, to the agent for the defender, the import of a conversation he had had with the pursuer on the previous day, in which the pursuer positively declined to acquire that property, and he depones to that in his evidence.

The ground therefore having been fairly acquired in open market, and being absolutely necessary for the defender in the position in which he had been placed, through the act of the pursuer, relative to the misdescription of the boundary, the question of law arises, whether the defender is bound to give up the use of that ground to the pursuer, in order to enable him to open up a road through Kelvinside to the boundary of the Dowanhill ground. On that question I entirely concur in the result at which the Lord Ordinary and your Lordships have arrived, and substantially on the same grounds. I think the doctrine of law upon which the pursuer relies has no application to the circumstances of the present case. It was next to conceded at the discussion that that doctrine would have had no application if the whole property of Kelvinside had been acquired by the defender either by succession or by purchase, and I am of opinion with the Lord Ordinary that it would not; and that being so, I can see no grounds in law upon which the pursuer can maintain that it can be held to apply to a part of that property. For the plea would in effect come to this, that in a possible event the ground in question was to be made subject to a servitude of road, in favour and in the option of the pursuer, of which there is no mention in the titles, and to which it would not be subject in the hands of any other party. I think that there is nothing in the circumstances of this case to lead to such a conclusion in law, and I cannot hold that the defender was debarred from purchasing the property except under an obligation to make it subject to a servitude of having a road made through it, at the request of the pursuer, when it suited the convenience of the pursuer to have that done. I see no foundation for such a claim on the part of the pursuer, and I accordingly concur in thinking that the interlocutor of the Lord Ordinary should be adhered to.

LORD SHAND.—The defender, Mr M'Ewan, by the feu-contract of 1863, bound himself to open up and make and maintain one-half of a public road through the ground of his feu, if required to do so by the pursuer, so soon as a road should be opened up and completed through the lands of Kelvinside to the Great Western Road, in connection with Victoria Circus Road on the pursuer's lands of Dowanhill. It may be assumed, and it was no doubt the fact, that the defender obtained his feu at a rate of feu-duty considerably lower than he would otherwise have paid if he had undertaken no such obligation; for the performance of the obligation inferred not only the giving up of a part of the ground feued, but the expense of making and maintaining a road and footpath, and an ornamental railing of a particular description specified in the feu-contract.

The defender's obligation was conditional. He became bound to make the road only when a road of communication was opened up directly with the lands

of Kelvinside, adjoining his feu on the east, towards the Great Western Road, No. 121. and now when he is asked to perform his obligation it is maintained on his behalf that the condition which alone can make the obligation enforceable has not been purified. It appears to me that, so far as regards the ground of the defender's feu to which the obligation applies, this defence cannot be successfully maintained, because the defender is himself the party who, by his voluntary act, has rendered the fulfilment of the condition in his own favour on which he now insists impossible. The right of ownership acquired by him in the strip of the ground of Kelvinside, on the eastern boundary of his feu, prevents the pursuer from opening up a road through the lands of Kelvinside to the Great Western Road, without the defender's consent, though he is otherwise now in a position to do so, and that consent is withheld. I am of opinion that on principle, and in accordance with the authorities cited by the pursuer, the defender cannot plead the non-fulfilment of the condition as a ground for freedom from his obligation—the fulfilment of the condition having been rendered impossible by himself.

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But this observation applies only to the obligation which the defender undertook, and that obligation in its terms refers only and exclusively to that part of the lands of Dowanhill which the defender acquired by his feu-right. The projected road cannot be made without passing over the strip of the lands of Kelvinside which the defender has acquired, and he refuses to allow the road to pass over this ground. The pursuer maintains his right, on payment of reasonable compensation, to make the road over this strip of the defender's property also, on the ground that it was an implied condition or obligation of the feu-right of 1863 that the defender should do nothing voluntarily for the sole purpose of frustrating the making of the road in question on the Kelvinside end of his feu, and that he cannot be allowed in violation of this obligation to prevent the road being made over ground which he now holds, for the purpose only of enabling him to defeat an implied condition of his contract, which, I may observe, is a totally different case from that of an acquisition or possession of part of the estate of Kelvinside for some other object or purpose.

The decision of the case really turns on the question whether there is such an implied condition in the feu-contract, for if there be not, and if the pursuer cannot insist on his right to make the road over the strip of Kelvinside belonging to the defender, and so cannot open up a communication between his property of Dowanhill and the estate of Kelvinside, he has no interest and no right to have the road made through the defender's feu. The defender denies that there is any implied condition or obligation on him of the nature contended for which could prevent his acquiring an independent right to ground on the Kelvinside boundary of his feu, and using that right in the same way as any other proprietor, and he contends that even if the contract could be construed as containing the implied obligation contended for his violation of that obligation would give rise to a claim of damages only, but would not entitle the pursuer to insist on the road being made through his property, not forming part of his feu. On this latter point I shall only say that if it could be shewn that, according to the sound construction of the feu-contract, the defender had undertaken not to do any act by which the pursuer's purpose of making the road through Kelvinside should be frustrated or prevented, it appears to me to be clear that his acquisition or possession of a strip of ground now held in violation of his obligation could

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not prevent justice being done between the parties, and that the pursuer would be entitled to the remedy he asks, and not limited to a claim of damages, to which he should only be driven if it could be shewn that the defender could not still fulfil his obligation by suffering the road to be made.

On the question whether, according to a sound construction of the contract, there was an implied obligation on the defender of the nature contended for, I confess I was throughout the argument, and till its close, disposed to think the pursuer was right in his contention. It is, I think, impossible to read the feu-contract, with its careful provisions which relate to the subject in dispute, without seeing that it was in the contemplation of both parties that the road in question would be opened up, at least would in all probability be opened up, though some time might elapse before the pursuer would be in a position to have this done. It was obviously of much importance to the pursuer that he should have the road opened up sooner or later for the benefit of his unfueled lands of Dowanhill, and in order, as the contract expresses it, to make a "mutual communication between the lands of Kelvinside and the first party's lands of Dowanhill." The defender was, of course, well aware that it was to secure this object and advantage that the pursuer stipulated that a part of the feu should form one-half of the breadth of the road as soon as he could arrange with the owners of Kelvinside to have the communication made, and there can, I presume, be no doubt that the defender obtained his feu on lower terms than he would otherwise have done, because of his obligation to give up a part of it, and to make the road in dispute through it. These considerations point at least very strongly to this, that it must have been the understanding of parties that the defender should not by his voluntary act seek to defeat the pursuer's purpose of opening up the communication contemplated. This purpose was avowed on the face of the contract. It was recognised in the terms of the defender's obligation, and in consequence the defender got his feu at a lower rate or price than he would otherwise have done; and for my part I would willingly, in the circumstances, have construed the contract as containing the implied obligation on the defender for which the pursuer contends. But on full consideration, I feel constrained to agree with your Lordships in holding that the deed cannot be read as having this effect, and that whatever may have been the understanding of parties, or either of them, the defender was left free, if he thought fit, by the purchase of a piece of ground on his Kelvinside boundary practically to secure that the road should never be made, and that in this way he should thus virtually become free from the obligation he had undertaken. In the case of *M'Intyre v. Belcher* (14 Scott's C. B. Reps., N. S., 654), referred to in the discussion, Mr Justice Williams is reported to have said that "the Court should be careful not to infringe the golden rule that contracts are to be construed not by what one feels would be right, but by what is expressed in, or is necessarily to be inferred from the language of the parties," and applying that rule to the present case, I have come to the conclusion that the legal obligation on the defender which, it is said, is implied from the terms of the contract, is unfortunately neither expressed nor necessarily to be inferred from the language of the deed. I have only to add, that if such an obligation had been made out, I should have held that the defender was not relieved of it by the circumstances which immediately led to his purchase of the strip of ground in question, for I think it is proved that one of the objects he had in view was that he would thereby acquire the key

to Dowanhill at this point. He says in his evidence, "I knew quite well that the acquisition of the strip made me master of the road." Apart from this, confessedly the only value to him of the $4\frac{1}{2}$ feet of ground *ex adverso* of his feu is to enable him to block the road, and avoid his obligation to the defender, for, again referring to the evidence, when the defender is asked in regard to the strip in question, "Apart from the power it gives you of blocking the road, has it any commercial value?" he answers, "I cannot say; it has a commercial value, but I have not gone into that question." I must farther say that I should not hold the pursuer barred from making his present demand on account of his failure to buy the ground when the defender purchased it, for it appears to me that the only ground offered to the pursuer was a much larger extent than that which the defender got, and of no possible use to him at the time, and I think he was fairly entitled to believe from the terms of the feu-contract of 1863, that if the defender became the purchaser, he would not use his acquired right to defeat entirely the obligation he had thereby undertaken by putting a prohibitive price on the privilege of using the ground. But the pursuer's case fails on the question of legal obligation on the defender, under the deed of 1863, to refrain from acquiring the independent right he now pleads, and on that ground I agree, with regret, in thinking the interlocutor of the Lord Ordinary should be adhered to.

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LORD YOUNG.—In the view which I take of this case it is a very short and clear one, depending exclusively upon the clause in the feu-contract between the parties, Mr Paterson and Mr M'Ewan, being the only passage to which we were referred in the argument. The material—I think the only material—conclusion of the summons—there are formally four—but I think the only material conclusion, is that which I am going to read. It is for declarator that the defenders are bound to permit the pursuer "to open up, make, and continue the said road of forty feet in breadth through the adjoining strip of ground about $4\frac{1}{2}$ feet wide, also now or lately belonging to the said James M'Ewan"—I omit words superfluous, and proceed—"upon payment to the defenders, or one or other of them, of such compensation, if any, for the said permission as our said Lords may fix and determine." There is to that a corresponding decerniture concluded for—that is to say, to enforce the right by the conclusion which I have read sought to be declared. The only other conclusion of declarator, with the corresponding conclusion for decerniture, is, I think, of no significance in the case. It relates to the formation of the road through the feu which the defender—I speak in the singular, for convenience omitting all notice of the trustees—holds of the pursuer Mr Paterson. The conclusion with regard to it is of no significance, for a reason which I pointed out at an early stage of the debate, viz. that the defender by his averments and pleas says he is not concerned about it at all. He says that "as regards the pursuer's demands in the present action, the defender M'Ewan, without admitting any legal obligation on him to do so, is ready and willing, and has never refused, to open, make, and continue one-half of Victoria Circus Road, so far as the road bounds on the north the plot or area of ground disposed by said feu-contract, and the other defenders are ready and willing, and have never refused, to permit this to be done." And the plea with reference to that conclusion—for the pleas are divided into two heads, and this is the second head—is, "As regards the opening up, formation,

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and continuation of the Victoria Circus Road, so far as the line of said road bounds the defenders' feu foresaid, the conclusions of declarator and *ad factum præstandum* are nimious and unnecessary." I repeat, therefore, that the material, and the only material, conclusion is that which I have read, seeking to have it declared that the defender is under an obligation to the pursuer to permit him to acquire, at a price to be fixed by this Court, a servitude over a piece of ground, admittedly the defenders' property in fee-simple. Well, if such an obligation exists—and it conceivably might—this Court undoubtedly has jurisdiction to enforce it. If the fee-simple proprietor of any piece of ground, whether it be $4\frac{1}{2}$ feet wide or $4\frac{1}{2}$ miles wide, is under an obligation to anybody to permit a servitude of road to be constituted over it, and the road to be formed, upon being paid such price as the value of the road as this Court should appoint, we might enforce that obligation, though perhaps we should think it was taking some little liberty for the parties so contracting to appoint this Court as referee to determine the price.

Now, I put it at a very early stage of the argument to the pursuer's counsel—Is the defender under any obligation to the pursuer except that which is expressed or implied in the feu-contract? and he said—"No, there is nothing else." There is plenty of printing here, but there is nothing else to impose any obligation upon the defender in favour of the pursuer except what is expressed or implied in the clause of the feu-contract to which I have referred. Then the question is, Does that clause express or imply an obligation upon the defender in the event—then a future and unknown event—of his acquiring a portion, greater or less, of Kelvinside, to sell a servitude over it at such a price as the Court may appoint? That is really the whole question in the case. It is admitted that it does not express any such obligation. It is admitted that it does not imply any such obligation if the whole of Kelvinside had been acquired, or even a considerable part of it. But it is said that as the strip of ground is only $4\frac{1}{2}$ feet wide there is implied an obligation to sell a servitude over the $4\frac{1}{2}$ feet. I asked Mr Asher to formulate the obligation under this head, not expressed, but which, he said, was implied by this clause, that if the feuar shall hereafter acquire a strip of Kelvinside $4\frac{1}{2}$ feet wide, or perhaps of somewhat but not much greater width, or anything less he shall then be under an obligation to sell a servitude of way over it to the superior of his adjoining feu upon such terms as this Court should fix. Now, that is reducing it to absolute extravagance; and that is the whole case. There is nothing else in it. If the obligation is not in that clause, expressed there—which it is not—or implied there—which it just as clearly is not—it is nowhere to be found at all.

I should like only to add this, that I think a proof ought not to have been allowed here. I think there was no room for evidence at all. I think there was no relevant allegation of any obligation to the effect sought to be declared, for it appears upon the record that the pursuer can found upon nothing except this clause of the feu-contract, and it is for the Court to read that and determine the import and effect of it; and I do not think that the averment of the pursuer is of any relevancy at all. Of course nobody is entitled to act in fraud of an obligation which he has come under, and he is not entitled to plead anything which he has done voluntarily, even although quite honestly, as a reason why he shall not fulfil his obligation. But what is sought to be enforced here is an obligation arising in respect of the purchase of a piece of Kelvinside. He

could be under no obligation to grant a servitude of road over that until he bought it. If after he bought it he was under the obligation, why, the pursuer would prevail by force of the obligation which he established to that effect. But if he was not under the obligation, and refused to allow the thing to be done voluntarily, what in the world can it signify that he had it in his mind when he made the purchase that he would not be under the obligation and would refuse to do the thing voluntarily?—that is to say, when he made the purchase he intended to do the thing which he is doing, and which we find he is entitled to do. I do not see any significance in that at all.

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I am of opinion that the action should be dismissed. That is the form in which the Lord Ordinary has put the interlocutor, and it is probably not necessary to interfere with it. I should myself rather have assoilzied the defenders from the conclusions of the summons.

LORD CRAIGHILL.—I agree with all the members of the Court in thinking that the interlocutor of the Lord Ordinary should be adhered to. I have come to this conclusion without any hesitation, because it appears to me on a consideration of that which is to be found in the printed papers and of the argument and of the authorities which we have had from the bar, that the case is not attended with any difficulty. The defender M'Ewan is the vassal of the pursuer Mr Paterson, the ground forming the feu of Thorncliffe being held of the pursuer, and the purpose of the present action, as I understand, is to enforce an obligation said to have been undertaken by the pursuer in this feu-contract, which is the ground of action.

There are two conclusions, with reference to one of which there is, in truth, no controversy between the parties, that conclusion having reference to the opening up of the road so far as that road was to be a boundary of the defender's feu. The other conclusion, strange to say, is a conclusion which relates to a piece of land which is no part of the feu, and which, so far as I can discover, is not made matter of obligation or of contract between the parties. The only thing, so far as I can discover, about which there is a contract between the parties is this feu held by the defender of the pursuer; and as regards the formation of roads, the only obligation imposed upon or undertaken by the defender is that relative to the opening up of the Victoria Circus Road in so far as that road is *ex adverso* of the defender's feu. The condition upon which the defender became bound to open up this part of the road was that there should be a connection formed through the lands of Kelvinside from the Great Western Road to Dowanhill. At the time this feu-contract was entered into these lands of Kelvinside did not belong to the pursuer, and they did not belong to the defender, and we look in vain in the contract for any obligation undertaken by the pursuer to acquire these lands, or, if he acquired them, to open up a road through from the Great Western Road to his lands of Dowanhill. He might have acquired them, and yet, for anything the feu-contract contains, he might have dedicated these lands to an entirely different purpose from that to which reference was made in the feu-contract. It is not said that the pursuer was under any obligation to get these lands. It is not said that if he got them he was bound to form a road through them; and certainly, even if it were said, I should think we should look in vain through the feu-charter for anything by which such an obligation would be constituted. Now, is there anything by which an obligation not

No. 121. imposed by the pursuer is imposed upon the defender,—was he bound to acquire these lands? It is not stated. If he did acquire these lands, was he bound to use them to any extent in opening up a road from the Great Western Road to the march of Dowanhill? There is nothing in the contract about that—nothing whatever. The only thing about which he entered into a contract with or undertook an obligation to the pursuer was this, that once there was a road opened up through Kelvinside to the march of Dowanhill, and once he was called upon by the pursuer to open up this Victoria Circus Road so far as opposite to his feu, then that obligation would be upon him. But the parties made no reference to Kelvinside. There was no obligation undertaken by the one to the other with reference to the acquisition of these lands or with reference to the use to which these lands were to be put once they were acquired.

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It appears to me that the reasons which were urged on the part of the pursuer for asking decree in terms of the second conclusion of the summons are reasons which are not supported, in so far as fact is concerned, by the proof which has been led; and in so far as legal principle is concerned, they are not supported by those principles and those authorities to which reference was made in the argument. It would be in vain for me to go over or bring forward the reasons by which I am influenced in coming to this conclusion as regards this last point, because I think those reasons have been made plain in the opinions that have already been given.

THE COURT adhered.

J. & J. ROSS, W.S.—SMITH & MASON, S.S.C.—Agents.

No. 122. JESSIE BLACK AND MRS AGNES BLACK OR SCOTT, Pursuers.—
R. V. Campbell.
ALEXANDER MASON, Defender.—*D.-F. Kinnear.*

Mar. 18, 1881.
Black v.
Mason.

Expenses—Jury Trial—Fees to Counsel.—In a jury trial relating to a right of way, which lasted from 10 a.m. till 6.30 p.m. of each of three days, the Court refused to allow as charges against the losing party more than the usual fees to counsel, viz, twenty, fifteen, and ten guineas to senior counsel, and fifteen, ten, and seven guineas to junior counsel.

1ST DIVISION. *Vide, ante*, p. 497.
B.

The defender in this jury trial, which had lasted three days, objected to the Auditor's report on his account of expenses, in so far as it taxed off and disallowed the following items:—(1) £5, 5s. each from fees to junior counsel of £21, and £15, 15s. for the first two days, and £8, 8s. from a fee of £15, 15s. for the third; and (2) £5, 5s. from a fee of £15, 15s. to his senior counsel for the third day. He argued that the case being one of right of way was difficult, and involved intricate questions of law as well as of fact. Farther, the Court had sat to 6.30 on each day.

The pursuers replied that there was no reason why the rule laid down in the cases of *Hubback v. North British Railway Co.*, June 25, 1864, 2 Macph. 1291, and *Neilson v. Barclay*, July 19, 1870, 8 Macph. 1011, should not be applied to this case.

LORD PRESIDENT.—As to the amount of fees, I think that this case is just an

ordinary jury trial, and that we are bound to follow the rule which was laid down No. 122. in the cases which have been cited by Mr Campbell. It is a rule which has Mar. 18, 1881. been acted upon in both Divisions of the Court, and the reasons for which are Black v. carefully set forth by the late Lord President in the case of *Cooper and Wood Mason* v. *The North British Railway Co.*, Dec. 19, 1863, 2 Macph. 346.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT refused the note of objections.

A. WYLIE, W.S.—A. MORISON, S.S.C.—Agents.

JAMES DOUGLAS, Petitioner.—*Sym.*
JAMES M'VEIGH, Compearer.—*J. M. Gibson.*

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Mar. 18, 1881.
Douglas v.
M'Veigh.

Poor's Roll—Time of stating objections where admission applied for.—*Held*, following *Allan v. Allan*, Feb. 28, 1872, 10 Macph. 510, that objections to admission to the benefit of the poor's-roll (on grounds other than the want of *probabilis causa*) should be stated when the application is moved in the Single Bills, and before a remit is made to the reporters on *probabilis causa*.

THIS was an application for admission to the poor's-roll. The applicant, James Douglas, in compliance with the provisions of the Act of Sederunt of 21st December 1842, had appeared before the minister and elders of his parish, and made the requisite declaration. Notice was thereafter given in the minute-book, and the Court remitted to the reporters "to state whether there was a *probabilis causa litigandi*." 1ST DIVISION. C.

M'Veigh then, for the first time, appeared to object to the application for admission to the poor's-roll, on the ground that the applicant had means of support which he had not disclosed.

The reporters declined to consider the objection, on the ground that it came too late, and reported that the applicant had a *probabilis causa*.

M'Veigh now urged the same objection to the Court.¹

The petitioner argued that it came too late.²

LORD PRESIDENT.—I think the rule laid down in the case of *Allan* in the Second Division on the construction of the Act of Sederunt of 1842 is the sound rule, and I am not for disturbing it. The Act of Sederunt provides that the applicant cannot come here at all until he has got a certificate from the kirk-session, and in order that he may obtain this certificate the 4th section requires "that ten days' previous intimation, by letter post-paid, shall be given to the adverse party of the time and place fixed for making the said declaration or statement before the minister and elders." The 5th section provides "that the said declaration of the party and certificate of the minister and elders, with the certificate of intimation to the adverse party, shall be transmitted free of expense, to one of the agents for conducting the causes for the poor for the time, and shall, at the distance of not more than three months from the date of the declaration, and as much sooner as circumstances will

¹ *Duncan v. Morrison*, Jan. 16, 1863, 1 Macph. 257; *Inglis v. Inglis' Trustee*, Feb. 10, 1863, 1 Macph. 391; *Robertson*, July 8, 1880, *ante*, vol. vii., 1092.

² *Allan v. Allan and Others*, Feb. 28, 1872, 10 Macph. 510; *Key v. Mackintosh*, June 15, 1878, *ante*, vol. v. 524.

No. 123. permit, be lodged, with an inventory thereof, in the office of one of the principal Clerks of Session; and if the same shall appear to him or his assistant to be correct, notice thereof shall be forthwith entered in the minute-book in the form of the intimation at present given on applications for admission to the benefit of the poor's-roll; and on the elapse of eight days after the date of insertion in the minute-book, the party's agent shall box a note to the Lord President of the Division, simply stating the name and designations of the parties, and craving a remit to the reporters on the *probabilis causa*."

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M'Veigh.

It is quite plain that the meaning of these sections is that the adverse party, as he is called, is to have abundant notice, first, of the time when the declaration is to be made before the kirk-session, in order that he may, if he pleases, attend there; and secondly, of the time at which the Court are to be moved to remit the application to the reporters on the *probabilis causa*, in order that he may attend on this second occasion, and state objections. The Act then goes on to provide that, "on moving which, the Court may, on hearing any objections, either refuse the application *de plano*, or remit to the reporters, who on considering the party's case, and hearing all objections, shall report whether the applicant has a *probabilis causa litigandi*, and otherwise merits the benefit of the poor's-roll." It appears to me that the reporters will report either simply on the *probabilis causa*, or on other matters relating to the merits of the application for the benefit of the poor's-roll, according to the terms of the remit which is made to them. It is not intended that they shall go beyond the terms of the remit when the remit is merely to inquire into the *probabilis causa*. The adverse party has had ample opportunity to state his objections when the case was first moved in Court, and it would be highly inexpedient to go back upon these objections after the reporters have taken the trouble—and no small trouble it is in many cases—of considering the merits of the applicant's case, and his chance of success.

I think the rule laid down in *Allan's* case is not only in perfect consistency with the Act of Sederunt, but is also in accordance with the practice, which was well settled even before the case of *Allan*, for in that case the reporters on the *probabilis causa* in their report to the Court stated—"An objection was stated to the reporters that the circumstances of the applicant do not entitle him to the benefit of the poor's-roll; but the reporters, following what they understood to have been the practice for many years, declined to consider it, as such an objection is usually stated and disposed of by the Court before the remit to the reporters is made." Now, taking that report, and the Act of Sederunt, and the practice, the Judges expressed themselves thus:—Lord Neaves observed—"This objection comes too late. Notice is given in the minute-book for the express purpose that objections may be stated when the case appears in the Single Bills. The change in the Act of Sederunt of 1842 from that of 1819 was made in order to alter the system formerly pursued." And Lord Cowan observed—"I think it very important that the present practice should be adhered to. According to it an opportunity for objecting on the ground of the poverty not being established is always given when the case is in the Single Bills, notwithstanding the power which the adverse party has under the Act of Sederunt to appear before the minister and elders. . . . But when no appearance is made, and no good ground stated to account for this, I am very clear that the

objection on the ground of poverty not being proved comes too late." It is quite true, as Mr Gibson has observed, that parties have been heard in other cases after the remit to the reporters, but these were cases in which the objection does not seem to have been taken, and the Court did not advert to the matter. It must now, however, be distinctly understood that objections must be stated at the first stage when the applicant comes to the Court.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT admitted the applicant to the benefit of the poor's-roll.

T. M'NAUGHT, S.S.C.—W. S. HARRIS, L.A.—Agents.

JAMES HALDANE, Petitioner.—*D.-F. Kinnear—Murray.*
GIRVAN AND PORTPATRICK JUNCTION RAILWAY COMPANY, Respondents.—
J. P. B. Robertson.

THOMAS LEVER RUSHTON AND ANOTHER, Respondents.—*Asher—Mackintosh.*

No. 124.

Mar. 18, 1881.
Haldane v.
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Railway—Judicial Factor—Powers—Management—Railway Companies (Scotland) Act, 1867 (30 and 31 Vict. cap. 126), sec. 4.—Held that a judicial factor appointed under the Railway Companies Act of 1867 has under and by virtue of his appointment the sole and exclusive power of management of the undertaking of the railway company, and of the whole works and property connected therewith.

ON 3d July 1879 Mr James Haldane, C.A., Edinburgh, was on the petition of creditors appointed judicial factor on the undertaking of the Girvan and Portpatrick Junction Railway in terms of the fourth section of the Railway Companies Act of 1867 (30 and 31 Vict. cap. 126), with the usual powers. The Girvan and Portpatrick line was then being worked by the Glasgow and South-Western Railway under a working agreement. Under this agreement there had since the date of Mr Haldane's appointment been a large, though to some extent diminishing, excess of expenditure over revenue. The position of the Girvan and Portpatrick Company was otherwise very embarrassed. No interest had been paid on the debentures since Martinmas 1878, and the debentures as they fell due could not be renewed. In these circumstances it appeared to the judicial factor necessary that the working agreement with the Glasgow and South-Western Company should be brought to an end. He therefore gave notice to that company that it would not be renewed after the 31st January 1881, and this notice the working company accepted; but in consequence of difficulties as to the respective powers of the judicial factor and the directors of the Girvan and Portpatrick Company to enter into a new agreement with the working company, and generally as to the management of the Girvan Company, the factor found it necessary to present this note, in which he prayed the Court "to grant power to and authorise the judicial factor to manage the undertaking of the Girvan and Portpatrick Junction Railway Company, and whole works and property connected therewith, or otherwise to find and declare that under and by virtue of his appointment as aforesaid the sole and exclusive power of management of the said undertaking, works, and property is vested in the said judicial factor."

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The note was opposed by the Girvan and Portpatrick Railway, and by T. L. Rushton and James Ormrod, two of the original petitioners for the appointment of a factor. Both sets of respondents maintained that under the Act 30 and 31 Vict. cap. 126, sec. 4, it was not competent to appoint a judicial factor to undertake the actual management of the company's undertaking, and that if it was competent to do so in some circumstances, the present was not a case in which the directors should thus be superseded by a factor. The Railway Companies (Scotland) Act, 1867 (30 and 31 Vict. cap. 126), sec. 4, provides that "the engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling stock and plant used or provided by a company for the purpose of the traffic on their railway, or of their stations and workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be attached by diligence at any time after the passing of this Act and before the 1st day of September 1868, where the decree on which diligence proceeds is obtained in an action on a contract entered into after the passing of this Act, or in an action not on contract commenced after the passing of this Act, or on a protested promissory-note or bill of exchange, or a deed containing a clause of registration registered after the passing of this Act; but the person who has obtained any such decree may obtain the appointment of a judicial factor on the undertaking of the company, on application by petition in a summary manner to the Court, and all money received by such judicial factor shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein, and on payment of the amount due to every such person who has obtained decree as aforesaid, the Court may, if it think fit, discharge such factor."

The corresponding English Act (30 and 31 Vict. cap. 127) contains a similar provision (sec. 4), the only important difference being that instead of a "judicial factor" it authorises "the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company."

The 56th section of the Companies Clauses Consolidation (Scotland) Act of 1845 (8 Vict. cap. 17) provides that "where by the special Act the mortgagees of the company shall be empowered to enforce the payment of arrears of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a judicial factor, then, if within thirty days after the interest accruing upon any such mortgage or bond has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any competent Court, require the appointment of a judicial factor by application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage or bond has become payable, and after demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest in any competent Court, may, if his debt amount to the prescribed sum, alone, or if his debt does not amount to the prescribed sum, he may, in conjunction with other mortgagees whose debts, being so in arrear after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a judicial factor, by an application to be made as hereinafter provided."

The 57th section of the same statute provides that "every application for a judicial factor in the cases aforesaid shall be made to the Court of Session, and on any application so made, and after hearing the parties, it shall be lawful for the said Court, by order in writing, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or until such principal and interest, as the case may be, together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made, all such tolls and sums of money as aforesaid shall be paid to and received by the person so to be appointed; and the money so to be received shall be so much money received by or to the use of the party to whom such interest, or such principal and interest, as the case may be, shall be then due, and on whose behalf such judicial factor shall have been appointed; and after such interest and costs, or such principal, interest, and costs, have been so received, the power of such judicial factor shall cease, and he shall be bound to account to the company for his intromissions or the sums received by him, and to pay over to their treasurer any balance that may be in his hands."

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The corresponding English Act (8 Vict. cap. 16, secs. 53 and 54) contains similar provisions, except that the officer to be appointed is styled "a receiver," not "a judicial factor," and his appointment is to be made by two Justices of the Peace, not by the Court of Chancery.

The Companies Clauses Act of 1863 (26 and 27 Vict. cap. 118), secs. 25 and 26, confers upon debenture-holders similar privileges to those conferred by the Acts of 1845 upon mortgagees. As in that Act, the officer is, as regards Scotland, termed a judicial factor, as regards England a receiver; and in the former case the appointment is to be made by the Court of Session, in the latter by two Justices.

Down to the date of the decision in the present case the line of the Girvan and Portpatrick Company continued to be worked by the Glasgow and South-Western Company, but under reservation of their rights to have the contract terminated as at 31st January, in terms of the notice sent by the judicial factor.

Argued for the petitioner;—The English Act of 1867 expressly conferred on the Court of Chancery the power of appointing a receiver, "and if necessary also of a manager." That was an alteration of the common law of England, for it had been held—*Gardner v. London, Chatham, and Dover Railway, infra*—that for the Court to appoint a manager of a railway was *ultra vires*. Such a decision had never been pronounced in Scotland, but it was the obvious intention of the legislation of 1867 to put the two countries on the same footing in this respect. Creditors of railways in both countries were deprived of their common rights of diligence, and that obviously in the public interest, and in return they received the remedy of a judicial factor in Scotland, and of a receiver, and if necessary also of a manager, in England. When then would a manager be appointed in England? Whenever there was a business to be managed, as the necessary result of appointing a receiver only on an undertaking was to stop the business—*Manchester and Milford Railway, infra*. There was in the present case a business to be managed; it followed therefore (unless the Scotch Act was to have a radically different effect from the English) that the judicial factor here must have the powers of a manager. The directors were by his appointment entirely superseded. The earlier Acts had obviously a different object, and probably officers appointed under them had smaller powers. This was by no means certain, however, as regarded factors under the

No. 124. Scotch Acts—*Primrose v. Caledonian Railway, infra, per Lord Fullerton*.¹

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Argued for the respondents;—To decide what was meant by “factor” in the Act of 1867 it was necessary to compare that Act with the earlier Acts. In them “factor” was plainly used as equivalent to the English receiver. In the Act of 1863, which applied to both countries, the words were used as synonymous. In the last of this series of legislation—the Act of 1867—judicial factor must therefore be taken as equivalent to the English receiver, not to the English receiver and manager. But even if the factor might have power to manage in some cases, that was not a necessary consequence of his appointment, and in the present case was inexpedient. He had had no experience of railway management, however excellent an accountant; indeed, the nature of his profession shewed what the Court had in view when they appointed him. Against the directors’ business qualifications nothing had been alleged. They ought not, therefore, to be superseded.¹

At advising,—

LORD PRESIDENT.—In this case Mr Haldane was appointed “judicial factor on the undertaking of the Girvan and Portpatrick Railway mentioned in the petition, with the usual powers, he finding caution before extract in common form.” The application was presented and the appointment was made under the 4th section of the Railway Companies Act of 1867, and the factor now presents this note, in which he craves the Court “to grant power to and authorise the judicial factor to manage the undertaking of the Girvan and Portpatrick Junction Railway Company, and whole works and property connected therewith, or otherwise to find and declare that under and by virtue of his appointment as aforesaid, the sole and exclusive power of management of the said undertaking, works, and property, is vested in the said judicial factor.” The Girvan and Portpatrick Railway at the time of Mr Haldane’s appointment was under a working agreement with the Glasgow and South-Western Railway Company, and in consequence was not actually working its own line; and the duties of a judicial factor under the Railway Companies Act of 1867 depend very much upon what is the condition of the company in respect of its being in the course of working its own line, or of having it worked by another company. But the appointment of a factor under the Act of 1867 is a very different thing from an appointment under the Companies Act of 1845. It is quite clear from the terms of this earlier statute that it was not intended that a judicial factor appointed under its provisions should have any greater power than that of merely receiving the surplus proceeds of the railway company, whether working its own line or getting it worked by another, and of applying these funds in payment of creditors according to their preferences. Nor does the succeeding statute of 1863 make any difference in this respect, because it merely extends to a different class of creditors—to debenture-holders—the same remedy which the earlier statute had conferred on mortgagees. But in the statute with which we are now dealing it appears to me that it was intended to confer a very different

¹ *Authorities*.—Gardner v. London, Chatham, and Dover Railway, 22d Jan. 1867, L. R., 2 Chan. Apps. 201; Manchester and Milford Railway, 14th April 1880, L. R., 14 Chan. Div. 645; Midland Waggon Company, 4th Nov. 1880, 6 Q. B. Div. 36; *Primrose v. Caledonian Railway*, 21st June 1851, 13 D. 1214, 23 Scot. Jur. 194; *Glover’s Trustees v. City of Glasgow Union Railway*, 8th Jan. 1869, 7 Macph. 338, 41 Scot. Jur. 202.

class of powers on the factor at his appointment. The section begins by depriving creditors of a right which they had at common law—the right, namely, to attach the moveable effects of the company. The provision is in these terms:—
 “The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling-stock and plant used or provided by a company for the purpose of the traffic on their railway, or of their stations and workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be attached by diligence at any time after the passing of this Act and before the 1st day of September 1868, where the decree on which diligence proceeds is obtained in an action on a contract entered into after the passing of this Act, or in an action not on contract commenced after the passing of this Act, or on a protested promissory-note or bill of exchange, or a deed containing a clause of registration registered after the passing of this Act.”

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Now, the effect of this provision, which by a subsequent statute was made perpetual, is that no creditor could thereafter do diligence against the moveable property of a railway company. This is a very important right, of which all creditors were by force of this statute deprived. Indeed, it is almost the only kind of diligence that can very well be available against the peculiar corporation and property of a railway company. It is only to be expected therefore, and it is only just, when the Legislature deprives creditors of this right, and that purely in the public interest, and for the sake of preventing a going railway from being stopped by a creditor using diligence against the plant, that something should be given in return. And accordingly the right which the creditor gets in return appears to me to be a right which it would be very difficult for anyone to interfere with. It is itself a kind of diligence which is conferred on the creditor in place of that of which he is deprived. Now, the right which is thus conferred on the creditor is described in these terms:—“But the person who has obtained any such decree may obtain the appointment of a judicial factor on the undertaking of the company on application by petition in a summary manner to the Court, and all money received by such judicial factor shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein, and on payment of the amount due to every such person who has obtained decree as aforesaid, the Court may, if it think fit, discharge such factor.” This is the right which is given to the creditor in place of the right to use diligence, which is taken away; and, therefore, it appears to me that it would require a very strong reason indeed to induce the Court, when a properly qualified creditor applied for a factor, to refuse to make that appointment.

The next question is, what is the effect of the appointment? It is, I think, tolerably plain that the powers of a factor under the provision I have just quoted are very different from those of factors appointed under the two earlier statutes. He is to be appointed “on the undertaking of the company,” and by the undertaking of the company is meant the railway and its works. Now, whenever a judicial factor is appointed on any estate or interest, the meaning is that he is to undertake the management of the estate or interest, whatever it may be. If it is a partnership, then the factor must either be appointed for the purpose of winding up the business if it falls to be wound up, or, if it is not in that condition, his duty will be to undertake the management of the partnership estate

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in terms of the contract of copartnery—that is, to continue the business. When, therefore, a factor is appointed on the undertaking of a company, that can mean nothing else than that he is thereby invested with the charge and management of the undertaking. But this is made still clearer by the provision that “all money received by such judicial factor shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company.” There is thus to be an allowance made for the working expenses, and also a fixing of the other proper outgoings in respect of the undertaking. Who is to determine what the working expenses ought to be? Certainly the factor, under the direction and superintendence of the Court. And who is to determine what outgoings are proper? Certainly not the company, but the factor, who is in the direction and management of the company. I think, therefore, that the meaning of the provision we are here dealing with is that a creditor properly qualified, whose debt is unpaid, is entitled to come to the Court and to ask the Court to supersede the existing management of the railway, and to put it into the hands of a person or persons appointed by the Court under the name of judicial factor or factors, who shall for the future take the place of the directors, and who shall regulate the expenditure, determine what is necessary to pay working expenses and other proper outlays, and ascertain the balance divisible among creditors, and distribute that balance under the direction of the Court.

It is said that in many circumstances it may be extremely inconvenient to the gentleman appointed judicial factor to take into his own management a great railway concern. That may be so. For aught I know, this may not be the best possible remedy that can be devised to come in place of the creditors' right to do diligence against the moveable property of the company; but it is the remedy which the Legislature has given to the creditors, and it is quite clear that it may be worked out in a way not so inconvenient as the respondents have represented. The railway may be placed in three different positions. It may be working its own line. That is the most difficult case; but even here the factor would be able to give the proper superintendence, while he employed all the usual officials in the actual working of the concern. In the second place, the railway may be leased to another company. This is a very simple case, for all that the factor would have to do is to draw the rent which is paid under the lease. Then, in the third place, the company may have entered into a working agreement with another company; and this was a more complicated position—one of a mixed character—intermediate between the other two. But in all these cases there is no distinction in the powers which the judicial factor possesses. In the one form and in the other he is appointed to undertake the management of the company, whatever that may involve.

It is very possible, indeed, if there be no objection to their appointment, that one or more of the directors or other officials may be chosen to undertake the management under the control of the Court. That is quite a possible case. On the other hand, the directors may be unsuitable; and the creditors are perfectly entitled to come forward and ask that some one else should be appointed. But this, too, is a matter of detail of little value in the construction of the statute. The factor, whoever he may be, is to be manager of the company, and that can mean nothing less than that he is to have the entire control of its affairs under the supervision of the Court.

The respondents have referred to the English statute and to the language which is made use of in it. In England judicial factors are unknown. The law of England has two names—receiver and manager—to denote the office which we know by one name—judicial factor; and the distinction between a receiver and a manager was explained to be—and I think very clearly explained to be—that if a receiver only was appointed the company necessarily came to an end; if the company was to be continued, the receiver must also be appointed manager, and hence in the English Act provision is made for the appointment of both officers. But in the Scotch Act the Court are directed to appoint a judicial factor, and this makes the matter more simple, because the powers of the factor would be limited or extended according to the position of the railway company's affairs. If the line was leased, then there would be nothing to be done but to receive the rent, and the factor would, in that case, be simply what in England is called a receiver. If, however, the company was working its own line, the factor would have to manage it, and thus take the place of the directors. On the whole matter, the conclusion I have come to is, that this application for special powers is unnecessary; but it may be quite proper to make a declaration in terms of the alternative prayer of the note, that in virtue of his appointment the sole and exclusive power of management of the undertaking, works, and property was vested in the judicial factor.

LORD MURE and LORD SHAND concurred.

LORD DEAS was absent.

THE COURT pronounced this interlocutor:—"Find that, in virtue of the judicial factor's appointment under the 4th section of the 30th and 31st Victoria, c. 126, he is vested with the full and exclusive power of managing the undertaking of the Girvan and Portpatrick Junction Railway Company under the direction of the Court, and therefore find it unnecessary to confer any additional powers in terms of the prayer of the said note."

TODS, MURRAY, & JAMIESON, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

THE EARL OF ZETLAND, Pursuer.—*D.-F. Fraser—Moncreiff.*
JOHN HISLOP, Defender.—*Sol.-Gen. Balfour—R. V. Campbell.*

No. 125.

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land v. Hislop.

Superior and vassal—Condition in favour of superior—Vassal not to sell or retail any kind of malt or spirituous liquors—Property.—In the middle of the last century the proprietor of a large estate commenced to feu ground for building at a particular part of the estate, where in course of time a considerable town sprang up. In the titles of all the feuars was inserted as a real burden the condition that it should not be lawful for the vassals "to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating-houses" on the subjects, "unless they shall obtain permission in writing to that effect from the superior."

This prohibition was not enforced in any case from the commencement of the feuing down to 1880, and a number of licensed houses of different kinds were opened in the town. In 1880 the superior, having given some months notice to the vassals, proceeded to enforce the prohibition by action of declarator and interdict. His object was the furtherance of his views for the social reform of the district. *Held (aff. judgment of Lord Rutherford Clark)* that the superior was not entitled to enforce the prohibition, the Lord Justice-Clerk and Lord Craighill being of opinion (with the Lord Ordinary) that he had no interest to do so which the law would recognise, and Lord Young, that the prohibition was repugnant to the absolute right of property conferred on a vassal by the nature of his feu-right.

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2D DIVISION.
Lord Ruth-
furd Clark.
M.

THE town of Grangemouth is built entirely on the property of the Earl of Zetland. It was commenced in the middle of the last century by Sir Lawrence Dundas, a predecessor of the present Earl, who built a number of dwelling-houses in what is now the centre of the town. These houses still belong to the Earl of Zetland. Since then the town has increased till there are now more than 5000 inhabitants. The whole houses and others in the town not belonging to the Earl of Zetland are held of him as superior.

In the feu-rights granted by the Earl of Zetland and his predecessors of ground in Grangemouth there have regularly been inserted certain conditions having reference, *inter alia*, to the uses to which the subjects feued were to be put. Thus by feu-disposition dated 27th November 1814 Thomas Lord Dundas feued to James Simpson a certain piece of ground on the south side of Grange Street, Grangemouth, "but always with and under the burdens, conditions, provisions, and irritancies contained in the precept of sasine after inserted." One of the conditions so inserted in the precept of sasine was as follows:—"Secundo, It shall not be lawful for the said James Simpson or his foresaids, or any tenant or possessor of the buildings to be erected on the foresaid piece of ground, to carry on the business of candle-making, coppersmiths, blacksmiths, slaughtering or butchering of cattle, or any other trade, manufacture, or occupation that shall be deemed nauseous, troublesome, or dangerous to the neighbourhood by the superior, or his baron bailie, who shall have power to determine therein, and whose judgment shall be final; nor shall it be lawful for them to build public brewhouses or bakers' ovens in or upon any part of the premises, at least fronting the street, without prejudice always to them to brew or bake within the same for their own private use allenarly; neither shall it be lawful for the said James Simpson or his foresaids, or any tenant or possessor of the said houses, to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating-houses, unless they shall obtain permission in writing to that effect from the superior."

Subinfeudation was prohibited, and it was declared, *septimo*, that "the purchasers or disponees of the said piece of ground shall be taken bound by the sellers or disponees to hold the same of me and my foresaids in the terms herein prescribed allenarly." And it was farther "expressly provided and declared that the whole burdens, conditions, provisions, and irritancies above written shall be contained and fully engrossed in the infestments to follow hereon, and in all the subsequent charters, rights, and title-deeds of the said subjects, otherwise the same shall be void and null."

Similar conditions and restrictions were inserted in all feu-rights granted by the Earl of Zetland and his predecessors.

Simpson's feu had come by progress into the hands of John Hislop, the defender in this action, who held the same of the Earl of Zetland as his superior, subject to the whole burdens, conditions, &c. above referred to. Upon these subjects certain buildings had been erected which for some years had been used as a public-house for the sale of malt and spirituous liquors.

The Earl of Zetland having resolved to enforce generally the provision inserted in the feu-rights granted by himself and his predecessors against the sale of malt and spirituous liquors on the subjects feued, in January 1880 issued a notice to the following effect:—"Notice.—Whereas the feu-rights of properties in Grangemouth contain prohibitions against using them as public-houses, dram-shops, &c., or for the sale of malt or spirituous liquors, intimation is hereby given to all concerned that these prohibitions will be put in force on and after 15th May 1880."

This notice was delivered to the defender, and he having refused to comply with the prohibition as required, the Earl of Zetland raised against him this action of declarator and interdict, in which he sought to have it declared that the defender, his tenants, &c. were "not entitled, without the consent of the pursuer, to sell or retail any kind of malt or spirituous liquors" within the buildings erected on his feu, and to have them interdicted "from selling or retailing any kind of malt or spirituous liquors, or allowing the same to be sold or retailed within the said buildings."

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Similar actions were raised against Richard Webster, Peter Carmichael, and Margaret and Jane M'Arthur, proprietors of other public-houses in Grangemouth, and their respective tenants. The action against Hislop was treated as the leading case, and the others were disposed of in conformity with the decision pronounced therein.

The admitted state of facts was that at the date of the action there were in Grangemouth two hotels, seven public-houses, four licensed grocers' shops, and a restaurant. That these had been gradually established without objection on the part of the Earl of Zetland and his predecessors. Some had been established without permission. In other cases, as in that of Hislop, permission had been obtained. In Hislop's case the permission had been given in writing in 1868 to Hislop's predecessor, but under an express "reservation of the right of the said Earl and his successors to enforce the prohibition against the sale of malt and spirituous liquors at any time, and without being bound to assign any reason for so doing." The Earl of Zetland's intention was to enforce the prohibition against all the public-houses, but not against the hotels and licensed grocers. And his avowed object was the furtherance of his own views for the moral and social improvement of the inhabitants.

Hislop stated the preliminary plea that the pursuer had "no title or interest to sue."

The Lord Ordinary, on 4th November 1880, pronounced this interlocutor:—"Finds that the pursuer has not set forth any interest to sue this action: Therefore dismisses the action, and decerns: Finds the pursuer liable in expenses," &c. *

The pursuer reclaimed.

After hearing argument the Court allowed the pursuer to amend his summons with the view of averring his interest to insist in the conclusions of the action.

* "NOTE.— . . . In his condescendence the pursuer does not allege any interest which he has to enforce the conditions of the feu-contract. He simply sets forth his title as superior, and his resolution to require the feuars to submit to the restrictions.

"The question has thus arisen, Whether the pursuer has set forth any sufficient interest to sue this action?

"The Lord Ordinary accepts it as law that wherever a feu contains any restriction on property 'the superior or the party in whose favour it is conceived must have an interest to enforce it.' Such is the doctrine laid down in the case of the *Tailors of Aberdeen v. Coutts*, 1 Rob. App. 307.

"Following this view, the Lord Ordinary does not think that the pursuer can prevail. The action is not brought to secure any patrimonial benefit, or to avoid any patrimonial loss. It is, as the Lord Ordinary was given to understand, the result of a desire to enforce, at the discretion of the pursuer, a restriction which affects the entire town, not for the sake of the pursuer himself, but to secure the well-being of the community. Even this interest is not alleged, but if it were, the Lord Ordinary could not hold it to be sufficient to sustain the action."

No. 125. The pursuer accordingly stated (Cond. 10) . . . "The whole of the rest" (*i.e.*, other than certain houses yielding an annual rental of £750 belonging to the pursuer himself) "of the town is built on ground held of the pursuer as superior, and he still has a large extent of ground in and adjacent to the town available for feuing, including upwards of 140 acres within the burgh boundaries. The pursuer's mansion-house of Kerse is also within half-a-mile of the town, and his policy grounds extend considerably nearer to it." (Cond. 11) "The existence of so many public-houses as there at present are in Grangemouth, including the premises embraced in the summons, and the prevalence of drunkenness thence arising, are detrimental to the value of the pursuer's property above referred to, and seriously interfere with the comfort and well-being of many of his tenants and feuars, besides being prejudicial to the comfort and amenity of his mansion-house and policies."

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Argument was then resumed, when

The pursuer argued;—The prohibition in question was not illegal, nor in any way opposed to public policy. It must be admitted that such a prohibition was valid and enforceable against a single feu, for so the Court had determined.¹ If so, then there could be no reason why the feuars in a whole street should not validly be put under the same restriction; and if the feuars in any one street, then the feuars over any larger area, or over the superior's whole estate. The superior's property in his unfeued ground was absolute,² subject only to his refraining from any use of it which would be injurious to his neighbour. If he sold it or feued it out, or gave it away, he might put the purchaser, vassal, or donee under any restriction he chose. If he put his feus under restrictions, he either increased the feu-duty obtainable, or he diminished it according as the restrictions were beneficial to the feuars as a body, or merely detrimental to the individual. But in either case the restriction was taken into account in the price, and formed a material part of the bargain. To allow the vassal to come forward and say, "True, I took the feu subject to the restriction, but no one else wishes the restriction enforced, and it is of no moment to the superior whether it is enforced or not, so I am not bound to comply with it," would simply be to give the vassal what he had not paid for, *viz.*, a subject free from restriction, instead of a subject burdened with a restriction.³ But assuming that the superior must shew a special interest to enforce a restriction to which his vassal had agreed when making his contract, it was sufficient that the superior desired to reduce the means and opportunities of intoxication upon his estate.⁴ Lastly, there was here no question whether the restriction was binding on the defender as a singular successor, because the restriction necessarily, in virtue of the provision to that effect in the original disposition, entered his own title by progress.⁵

Argued for the defender;—(1) The restriction founded on was not made a real burden, and therefore was not binding on the defender as a

¹ *Ewing v. Campbell*, Nov. 23, 1877, *ante*, vol. v. p. 230; *Whatman v. Gibson*, 1838, 9 *Simon*, 196.

² *Ersk.* 2, 3, 10.

³ *Gold v. Houldsworth*, July 16, 1870, 8 *Macph.* 1006, 42 *Scot. Jur.* 617; *Magistrates of Edinburgh v. Macfarlane*, Dec. 2, 1857, 20 *D.* 156, 30 *Scot. Jur.* 86; *Burgh of St Albans v. Battersby*, 1878, *L. R.*, 3 *Q. B. D.* 359.

⁴ *Cowell v. Colorado Springs Co.*, Oct. 1879, 10 *Otto*, *U.S. Rep.* 55; *Sugden on Vendors and Purchaser*, 14th ed., 804.

⁵ *Brown v. Burns*, May 14, 1823, 2 *S.* 298; *Tailors of Aberdeen v. Coutts*, Aug. 3, 1840, 1 *Rob. App.* 296 (*see p.* 306); *Campbell v. Clydesdale Banking Co.*, June 19, 1868, 6 *Macph.* 943, 40 *Scot. Jur.* 539.

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singular successor in the feu. (2) The pursuer was barred from now enforcing the prohibition by the permission given to the defender's predecessor. On the faith of that permission considerable outlay had been made, and the defender had himself given a price far beyond what the subjects as a mere house would have fetched—a price, in fact, which included the value of the goodwill of an existing public-house business. (3) The prohibition founded on and sought to be enforced had been waived from the very beginning, and was inapplicable to the existing circumstances. Its enforcement now would be contrary to the fair meaning and intention of parties when the feu-contract was entered into. (4) To permit a superior to enforce such a restriction, not against an individual feu or feus, with reference to which, as being near his own house or otherwise peculiarly situated, he might be able to shew special reason for the enforcement, but *per aversionem* over a whole district, however large, would be contrary to public policy, and would be to allow an individual to legislate for a district, and to interfere with the authority which in this matter the Legislature had reposed in a certain statutory body. (5) The pursuer had shewn no legitimate interest which the Court could recognise; for by "interest" was meant not the fanciful interest of a philanthropist, but the patrimonial interest of a proprietor.

At advising,—

LORD YOUNG.—The question here is whether a certain condition in a feu-charter is valid, and consequently enforceable according to its terms. The subject of the charter is a small piece of ground in the town of Grangemouth, on which a house now stands, and the condition in question is,—“Neither shall it be lawful for the said James Simpson or his foressaids, or any tenant or possessor of the said houses, to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating houses, unless they shall obtain permission in writing to that effect from the superior.”

The question is important as relating to the restrictions which may lawfully be put upon a proprietor with respect to the use of his property. That this is its character is plain, when it is considered that a feu by charter or other deed of conveyance is the highest real property title known in law, and if I dwell on this topic for a little it is not because I apprehend that it may be thought to involve any doubtful matter, but because I think the importance and practical bearing of it has not always been sufficiently attended to in this class of cases.

I repeat, then, that there is no higher title of property than a feu, and add that it is immaterial to the nature and quality of the proprietor's right whether he holds by virtue of an original charter (i.e., the deed by which the feu was created) or of some subsequent progressive or transmissive deed. The name “feuar,” as familiarly and popularly used, is indeed confined, or at least most commonly applied, to small proprietors, as the name “feu” is, in the like popular speech, confined or usually applied to small properties. But this is mere popular speech, convenient enough if taken only for what it means, and not understood as importing any legal distinction in the matter of title between large and small properties. I need not say to your Lordships that there is no such distinction. *Feudum*, feu, fee, are synonyms, signifying “property,” as distinguished from any inferior title of possession, and it is immaterial to the character and quality of the feuar's (or proprietor's) title, whether the subject of it is half a county or half an acre. The name of the right is, according to the usage of all languages, transferred to the subject of it, and equally applied to both, so that just as houses are called “estates,” or “properties,” so they are called *feuda*, feus, or

No. 125. fees. Now, all land in this country, whether owned in large or small parcels, is, without reference to the size of the parcels, "holden,"—that is to say, "held" by the proprietor as vassal under a superior. Such is our system of real property title. The Crown is the ultimate superior of all the land of the country, for from the Crown all property in land is assumed to have originally flowed. The simplest case is when the beneficial owner holds immediately of the Crown, but this, though common enough, is not the most common case, for subinfeudation being universally allowable, except when restrained by paction, the greater part of the land of the country is held by the owners immediately of subject superiors. But whether the Crown or a subject be in any case the immediate superior, the beneficial owner is a "feuar," and his property is a feu, held by him as vassal under a superior. This, indeed, is the Earl of Zetland's "status," or condition, with respect to all his property in land on the mainland of Scotland, for I do not speak of Zetland, where a different system prevails, at least partially. All I have said only expresses the fact that the feudal law governs land rights in this country, and that the system admits of no distinction whatever between large and small properties.

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I therefore regard the defender as proprietor in fee-simple of his ground with the house on it. I do not use the word "simple" as of any virtue with reference to the question in hand, for it applies only to the destination or succession, signifying that it is simple, *i.e.*, not entailed. That the defender is proprietor in fee is the important matter, and with reference to that fact the validity of the condition in question must be judged of.

Now, it is clear law that land may be burdened with any known servitude, or (if that expression should be thought too limited as not admitting the possibility of a good servitude which has not hitherto occurred and been sanctioned) any lawful servitude, and that the burden will run with the land into whose hands soever it may pass. But it is, I think, material to notice this important feature of every lawful servitude that it must be beneficial to some dominant tenement, not necessarily in fact at any particular time, but capable from its nature of being so, and therefore by the fact of its existence adding more or less to the value of the dominant tenement. The servitude *de non ædificando* is the most familiar example.

The case of land parcelled off for building according to a plan with reference to which the lots are sold to several purchasers, is peculiar. It has been held that thus, or by the terms of the individual titles flowing from a common superior of contiguous building areas in a street or square a community may be established among the vassals, so that each shall have a legitimate interest in, and therefore legal title to enforce, the restrictions put upon, or obligations undertaken by every other. Wherever it is clear that the parties so intended, and that the feus were taken in reliance on the accomplishment of such intention, I do not doubt that the Court will enforce it. I think, and have at least respectable authority with me, that the principles of the law of servitude are sufficient to support the decisions on this subject, but others think otherwise, and it is unnecessary now to dwell on the subject.

But the power of putting upon land a special and exceptional law to which it shall be subject for ever, or at least so long as some one, not the proprietor for the time, may please to maintain it, is certainly limited. The law, following, I believe, prevailing public opinion, favours property and proprietary rights as being, although occasionally abused, on the whole greatly beneficial to the com-

munity. Accordingly, the general rule is, that conditions or limitations in a property title which are repugnant to the common legal notion of property and proprietary rights, shall be deemed invalid. Thus, conditions against selling and alienating, burdening with debt and altering the succession, are all bad, for these are common law incidents of property, and, at common law, inseparable from it. I need hardly say that entails prohibiting these things are bad at common law and stand only on statute, and within strictly regulated limits.

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The condition here is that spirits and beer and provisions shall not be sold on the property. Now, is this repugnant or not to a right of property? I think it is, and the notion that it is not has, I think, no support by analogy from cases of servitudes or building conditions and restrictions among a community of feuars in a street or square, the general rules and limits of which I have endeavoured to point out, as I understand them. If I could think otherwise I should, I own, have much difficulty in drawing the line at spirits, beer, and provisions, and in finding a satisfactory reason for declining to recognise a prohibition against selling any other commodities, or even against consuming them. I can, indeed, see a distinction when I regard a seller (whether a superior or not) with reference to views of social science, which are certainly respectable and may be sound, but I see none in law. The law imposes restrictions on the sale of intoxicating drinks, and to some extent of provisions also. These I must respect and enforce, but what right has Lord Zetland to increase them beyond the limits of his own property? Within these limits he may prohibit intoxicating drinks and many other things in the exercise of his proprietary rights. To retain this power, however, he must retain his property. Should he sell it, although to be held of himself as superior, he could not, I think, by condition, impose on his purchaser the rules of conduct which he approved and had himself followed, and I can find no ground for distinguishing in this matter between a sale of the whole and of a part. It was suggested by way of illustration that a man might have a legitimate interest to prevent a house in a corner of his park from being turned into an alehouse or whisky shop, and so might effectually restrain a purchaser from him accordingly. I see the interest, just as I see an interest to prevent a poacher with dogs and a number of dirty children from taking up his residence in a house standing in a corner of a park, and I allow it to be a good reason why the owner of the park should not part with the property of the house. I am, however, unable to assent to the inference that a title of property may be legally and validly qualified by a condition against poaching or keeping dogs or dirty children. A condition against the sale (or use, for I see no distinction) of drink or provisions is, in my opinion, of the same character in a legal view.

I hardly know whether it is favourable or the reverse to the condition in question, that it prohibits certain lawful acts not absolutely, but without the leave and licence of the superior, or, in other words, of the former owner who sold subject to the condition. The true view, probably, is that this peculiarity makes no difference, it being clear that the prohibition, though ever so absolute, might have been permanently removed, or temporarily suspended by the party in whose favour it was imposed. Still it illustrates the pursuer's contention which is, that a seller of land which he conveys with a *de me* holding (I put it so that I may not be supposed to overlook the existence of the feudal relation, though I myself think it is immaterial) may reserve to himself and his heirs for ever a right to control the buyer in his otherwise lawful, domestic, or business

No. 125. arrangements, licensing them or not as he pleases, and on such terms as he pleases. I think this is an extravagant contention, and altogether repugnant to property. I have said that I think the existence of the feudal relation of superior and vassal is immaterial to the question in hand, and, indeed, the purpose of my introductory remarks on our feudal system of titles was to explain why I think so. The relation is part of our real property law, so that no property can be had in land without it. It exists with respect to the pursuer himself, for he holds his lands, however extensive they may be, as a vassal under a superior, the Crown, or the subject proprietor from whom his ancestor bought, as it happens, according to the paction they made for an *a me* or *de me* holding. I do not wish to venture on a proposition unnecessarily large for the case before me, but I may state as my present impression, that, apart from feudal incidents, which are not *hujus loci*, it is immaterial to the validity or invalidity of a burden imposed on land by condition in the title whether the holding is *a me* or *de me* of the grantor of the conveyance containing the condition. If it is lawful, and not repugnant to property, it shall have effect in either case, and otherwise in neither.

I am therefore for affirming the judgment of the Lord Ordinary, not, indeed, because assuming the condition to be lawful, the pursuer has no interest to enforce it, but because I think it is repugnant to the right of property granted by the deed that contains it. Were it lawful, the pursuer has an obvious interest in it, apart altogether from his social views. For he might exact an annual payment for a license or sell a discharge of the burden. I apprehend the Lord Ordinary's meaning is that this is not a legitimate interest in such a matter, and in this I agree. But I think so, on the grounds which I expressed at the outset in noticing the burdens which may legitimately be put on land. A prohibition of building which was not defensible on the law of servitude as being (or capable of being) beneficial to an adjacent dominant tenement could not, in my opinion, be sustained by the consideration that the creditor therein might, if it were good, sell a release from it for a large sum. This stands on the law of property, and the rules which prescribe the limits within which owners may be restrained in the exercise of their proprietary rights. The pursuer here has interest enough to support any lawful right; indeed he has the most ordinary of all interests, viz., a pecuniary interest; but the right which he claims is in my opinion bad, as repugnant to the property title of the defender, and involving an illegitimate interference with his proprietary rights. A man may contract himself out of any or all of his rights as a proprietor, but to subject land—no matter of what extent—or even a house, to a special and exceptional law, so that the property of it shall not be attended with the ordinary legal incidents of property, is contrary to the policy of the law. I need hardly say that the proprietor of a house or land may by lease give such right of possession and use as he pleases, prescribing some uses and prohibiting others. The lessor remains the proprietor, which a seller does not, though he may have conveyed the property with a *de me* holding, i.e., so that the buyer holds it of him as superior. His infestment, indeed, stands to the effect of supporting the superiority; but the property is gone from him and passed to another with all the rights which the law deems to be inseparable from it, and which it is for the interest of the community should be so. I desire to rest my judgment on this view of the law rather than on the narrower ground that the pursuer has no interest, which, indeed, I can only assent to with reference to the rules of law

which determine the kind of interest necessary to support a servitude, viz., the possession of a dominant tenement which thereby is or may be benefited. I think, in short, that the condition is such that a legal interest in it cannot exist, not that it may or not as it happens, and that the condition shall have effect or not accordingly. Thinking so, I am of opinion that the invalidity of the condition itself is the right ground of judgment.

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LORD CRAIGHILL.—The fundamental plea on which issue has been joined in this action is, Has the pursuer an interest to insist in this action?

The conclusion to which the Lord Ordinary came was that the condition in question is not one which the pursuer has an interest to enforce against his vassals, and the action, therefore, has been dismissed. I concur in this judgment.

That a superior in giving out a feu may, by the recognised rules of the feudal system, retain important rights in the subject of the grant, and may impose burdens and restrictions upon it, has not been and cannot be disputed. The question is, whether the condition in question is such a restriction? Vexatious and capricious conditions cannot be enforced, nor can a restriction upon property be sustained unless the superior or the party in whose favour it is conceived have an interest to enforce it. This, as the Lord Ordinary points out, is a statement of the law which was given in the opinion prepared by Lord Corehouse and concurred in by the other Judges in the case of *Tailors of Aberdeen v. Coutts*, 1 Robinson, p. 296, and it is consistent with all the authorities. The pursuer does not contend that the law thus laid down is not the rule of the law of Scotland. On the contrary, he admits that there must be an interest, and his case is that he has the necessary interest. In considering the merits of this controversy, the condition of the argument is, that the *dominium utile* of the feu becomes the property of the vassal. A superior, therefore, in imposing burdens or conditions upon the estate of his vassal imposes conditions upon the property of another. No doubt the radical right remains with the superior; but the estate of the vassal nevertheless is his own, and, unless so far as effectual stipulation has been made to the contrary, the superior may not interfere with the use which the vassal takes of his property. Analogies, therefore, drawn from restrictions placed by the landlord upon the use of his property by a tenant to whom he has let it can have no application; for a man may, as has truly been said, do as he likes with his own, but he is not entitled in ordinary circumstances to interfere with the use of property belonging to another. It does not appear to me to be necessary to define what are the interests belonging to the superior, which may be protected by a clause like that in the charters granted by the predecessors of the pursuer. Were it necessary I should be disposed to hold that the interest in question must be possessed by the party enforcing it in the character of superior; or, in other words, they must be interests of a proper patrimonial nature. This is the language used by Mr Duff in his work on Feudal Conveyancing, p. 74. All, however, which is necessary to be said on the present occasion is that any interest put forward by a superior, which is not greater than, nor different from, an interest possessed by any member of the community, is not an interest which can be created a real burden upon the estate of the vassal. All are interested in the good order of a community, and all are naturally desirous that nothing by which this may be disturbed should be sanctioned. But men's views differ as to the way in

No. 125. which results admitted to be desirable can best be obtained, and if feu-charters were to be made the vehicles by which opinions on social questions were to be carried out confusion would be the inevitable result. Were the doctrine contended for by the pursuer to be sanctioned any man selling a house might subject the property to the burden which the predecessors of the pursuer have endeavoured to impose upon their vassals. A seller of a property has in any social question the same interest as he would have supposing he were a superior giving a feu of the property. This consideration of itself seems to me to shew that an interest entitling the superior to enforce such a condition as that in question must be an interest of a different character from that which is possessed by the pursuer. The authorities cited in the course of the argument seem to me in most cases to point to and in all cases to be consistent with this conclusion. In the case of *Brown* it was found that there must be an interest, and in the other cases this was assumed. The apparently adverse decision in the case of *Ewing v. Campbell* is not in reality a hostile authority. There the only question which was raised was a question of construction whether a hydro-pathic establishment was in the sense of the clause of restriction a public-house. There was no controversy as to the enforceability of the condition, the reason being that the estate from which the ground feued was given off was an entailed estate; that the ground was feued in virtue of 31 and 32 Vict. cap. 84, under the conditions approved of by the Sheriff; that the clause in question expressed a condition approved of by the Sheriff; and consequently that the condition there came to be of statutory authority.

On the whole, therefore, and without difficulty, I concur in the judgment against which the pursuer has reclaimed.

I may add that, had it been necessary I should have been disposed to hold that the clause of restriction in the charters founded on by the pursuer was invalid, not merely upon the ground that the superior had no interest, but also on the ground that the restriction was void, as being a restriction upon trade, and also as being inconsistent with public policy. These last considerations, however, are not required to be taken into account on the present occasion, and I mention them only because the mention of them is expedient to shew that they have not been disregarded.

LORD JUSTICE-CLERK.—I cannot say that I have found this case unattended with difficulty, not so much as to the conclusion which ought to be reached, as to the precise legal grounds on which that conclusion ought to be supported. We have here four conjoined actions in which, although the facts vary in details, substantially the same questions arise. The defenders in this case are feuars in Grangemouth. Under their rights they all hold of the pursuer as superior of the territory upon which the town of Grangemouth is built. Each of those rights contains the same or corresponding prohibitions, and, in particular, in each the feuar is taken bound not to use any building erected on the feu as a public-house, or as a house for eating or refreshment. I do not state the exact words, but that is the substance of the provision. The question now raised is whether the superior can enforce this condition against these feuars, who are singular successors.

Taking these feu-rights singly, and on their terms, I am of opinion that there is nothing in these conditions which might not be enforced by the superior, or which are in themselves incapable of transmitting against a singular successor.

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It is not necessary to enlarge on the general rules of our jurisprudence on this head, for they are too well fixed to be the subject of controversy. The nature of a feu-right is surely matter too elementary to admit of doubt. It is a sub-infeudation granted mediately or immediately by or from a crown-vassal. The superior remains the owner, burdened by the feu-right; but the *dominium utile*, as opposed to the *dominium directum*, is transferred to the sub-vassal. The superior's right over the property is not and cannot be in any respect one of servitude. His power to introduce such stipulations into the rights of his feuars, and his title to enforce them, depends solely upon his supereminent right in the land, constituted by his own infeftment. The nature and effect of restrictive conditions such as the present contained in grants of the feu was exhaustively considered and explained in Lord Corehouse's opinion in the case of the *Tailors of Aberdeen*, in which the whole Court substantially concurred, which not only places the true doctrine on this head beyond dispute, but supercedes the necessity of any further exposition. When feuars of the same superior endeavour to enforce such restrictions against each other their *jus quæsitum* has more analogy to servitude, but as between superior and vassal servitude is in no sense the foundation of the right. The incidents of a right of servitude are inconsistent with the relation of superior and vassal.

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True, the superior, before he can enforce such stipulations, must have a legal interest to do so. He has always a legal title, but the Court will not allow him to put such stipulations in force, if it be shewn that he has no interest,—that is, if he be trying to enforce an obligation the fulfilment of which can be of no benefit to himself (it is said patrimonial benefit, and I do not differ), and if it be therefore insisted in emulously, capriciously, or oppressively. This, however, is a consideration applicable to the circumstances in which the superior attempts to put the clause in force more than to the nature of the condition. The superior has always a title to bind his vassal and his successors, provided the restriction enter the record, unless the stipulation is illegal, or contrary to public policy, or is in itself incapable of being enforced.

Further, were this a case of a single feu I am of opinion that this particular condition is not illegal, and is capable of being enforced. This was asserted and assumed in the *Dunoon* case (*Ewing v. Campbell*), and the decision is directly in point, and, to my mind, conclusive.

I was surprised to hear it doubted that the case was a direct decision that a clause to the effect of the present was a legal and enforceable stipulation, seeing one of this nature was not only sanctioned but enforced in it.

The question raised in that case was whether a prohibition against using a feu for the purpose of a public-house was contravened by building and keeping a hydropathic establishment. The law was assumed to be so clear that even the party impugning the condition did not venture to say that it was not legal in itself or inconsistent with the rights of property, but rested his whole case, as the Court did its judgment, on the question whether the building in question came to be within the prohibition. I look upon that case as being all the stronger that the general law was not controverted. It was simply the last of a long series of adjudicated cases on cognate conditions, and its application is clear. The practical dispute whether the hydropathic establishment was a public-house could never have arisen unless the condition was in itself effectual. All these matters are trite law, and, in my opinion, do not admit of doubt. There is, however, one peculiarity in the present case, and it is one not without significance, namely, that the superior reserves

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In my view, however, the present case ought to be resolved on other grounds. The practical question is, Whether the pursuer is entitled to enforce these stipulations for the purpose of regulating the social condition of a community amounting to 5000 inhabitants, and in fact incorporated under the police statutes and under a municipal management of its own? It is plain enough that the more the operation of these restrictions extends the more the superior's interest recedes from a real patrimonial character, and necessarily approaches the confines of effects which are at war with important social and public interests. In certain circumstances and within certain limits such prohibitions as this regarding the use to which premises are to be put are intended to protect direct patrimonial rights. In particular quarters of large towns, in which the value of premises depends on the use to which they are put, such restrictions often have a direct effect of enhancing the value of property in the neighbourhood. So a man may reasonably provide in feuing a piece of ground at the corner of his park that it shall not be used as a public-house. No one ever supposed such a condition to be contrary to the principles of property according to our law; it is entirely in conformity with it, according to rules followed in a long series of authorities. But when one dwelling-house is multiplied into 1000, and 5000 persons are interested instead of one, the matter becomes very different. As the public interests grow larger the individual interest necessarily grows less. Here I think it has disappeared altogether, and instead of reflecting the patrimonial interest of the superior, represents only individual opinions, philanthropic and social on his part. On the merits of these views, of course, I say nothing, except that I have quite as much respect for those holding one set of views as for those holding the other. Our opinion on such matters is of no more value, in no respect better, than that of the parties in the case; but I think it is quite clear that we are now asked to enforce this restriction, not for the protection of any property right in the pursuer, but in order to benefit the moral and social well-being of the community of Grangemouth. But this is to enable the pursuer to use his power as superior for the purposes of a benevolent despotism, leading directly to collision with the municipal authorities on the one hand, and in effect putting it in the superior's power to create a trade monopoly on the other. Now, I think we are not bound to give effect to this clause, looking to the admitted object and the necessary result of doing so. Lord Corehouse, in the following passages in his opinion in the case of *Coutts*, expresses the ground of my opinion in the present:—"Thus," he says, "it was often a condition in a feu-charter that the vassal should bring all his malt to the superior's brewery to be made into ale, and to have all his iron-work manufactured at the superior's smiddy. These conditions have fallen into desuetude, but they have never been declared illegal by statute. The Court, however, at present refuses to enforce them, as being inconsistent with public policy, for it would be a plain injury to the community if the proprietor of a piece of land could not employ the brewer or the smith whose work he most approved"—(1 Rob. App. 318). Here circumstances have proved too strong for the superior, and the community which he and his predecessors have helped to create has outgrown bonds which might have been reasonable or useful when first imposed, but which are unsuited times.

I have only to say, in conclusion, that I reserve my opinion on the question whether such clauses would be effectual under a long lease. If the term were equivalent to a perpetuity the same result would probably follow.

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THE COURT adhered.

H. G. & S. DICKSON, W.S.—JAMES WILSON, L.A.—Agents.

DAVID HALL (Collector of Poor-rates for the City Parish of Glasgow), Pursuer.—*R. Johnstone—Jameson.* No. 126.

CITY OF GLASGOW UNION RAILWAY COMPANY, Defenders.—*Trayner—Pearson.* Mar. 18, 1881.
Hall v. City of Glasgow Union Railway Co.

Railway—Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict., c. 19), sec. 127—Deficiency of Poor's-rate, caused by lands being taken, to be made good—Poor.—The 127th section of the Lands Clauses Consolidation Act, 1845, enacts that the promoters of an undertaking shall make good the deficiency in the several assessments for land-tax and poor's-rate and prison assessment, which may occur during the progress of their works, in respect of lands taken for the purposes of their undertaking.

Held that in determining whether or not such deficiency exists in the assessment for poor's-rate in a particular parish, the company's undertaking, so far as within such parish, is to be regarded as a whole, and that whenever such undertaking as a whole affords an assessable value as great as or greater than the subjects taken afforded at the date of the company's special Act, there is, within the meaning of the 127th section, no deficiency to be made good, though certain particular parts of the subjects may still have no assessable value, the works being incomplete, or the land being superfluous land, and vacant.

THE CITY OF GLASGOW UNION RAILWAY COMPANY was incorporated in the year 1864 by the Act 27 and 28 Vict. c. cclxxxvi, and authorised to make certain railways. The lands and others acquired for and in connection with three of these railways or parts thereof, viz., Nos. 1, 6, and 7 in the Act described, lay within the City Parish of Glasgow, and were, at the various dates when so acquired, liable to assessment for the relief of the poor in the said City Parish. A considerable portion of the subjects so acquired were not used for the actual construction of railways and stations, but were either surplus lands, or to be used in the formation of substitute streets, as required by the Act.

2D DIVISION.
Ld. Curriehill
M.

While the company's works were in course of construction various annual sums were paid by the company to the collector of poor-rates of the City Parish in respect of deficiency of poor's-rate, under the 127th section of the Lands Clauses Consolidation Act, 1845,* which was incorporated in the company's special Act. The railway No. 1 was completed and assessed for poor's-rate in 1876, and the railway No. 6 was completed in

* The Lands Clauses Consolidation (Scotland) Act, 1845, sec. 127, provides:—"That if the promoters of the undertaking become possessed, by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land-tax, or liable to be assessed with the poor's-rate or prison-assessment, they shall from time to time, until the works shall be completed and assessed to such land-tax and poor's-rate and prison-assessment, be liable to make good the deficiency in the several assessments for land-tax and poor's-rate and prison-assessment, by reason of such lands having been taken or used for the purposes of the work; and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act; and on demand of such deficiency, the promoters of the undertaking, or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively."

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1878, and assessed for poor's-rate in 1879-80. The railway No. 7 was abandoned. In 1878-79 and 1879-80 the company were still ostensible proprietors of the surplus land above-mentioned, and the land to be devoted to substitute streets, and a considerable portion of it was lying vacant, having no assessable rental. A claim was made upon them, and action raised at the instance of the collector of poor's-rate for the City Parish for deficiency of poor's-rate in respect of the subjects so lying vacant of £11, 8s. 8d. for the year 1878-79, and of £146, 15s. for the year 1879-80, in all, £158, 3s. 8d.

The company admitted the claim for the year 1878-79, and also that for the year 1879-80 to a small extent, but resisted the remainder of the claim for the latter year, on various special grounds, and, in particular, that, though they were *ex facie* of the records still ostensibly proprietors, they had parted with the ground partly to the corporation of Glasgow and partly to the Glasgow and South-Western Railway Company, by concluded agreements, and had given possession prior to the year of assessment.

The Lord Ordinary virtually gave effect to this defence, except as to a small part of the claim.

The pursuer reclaimed.¹

After hearing argument, by order of the Court the following information was furnished by the parties in a joint minute:—"1st, That the *cumulo* valuation of the properties (so far as within the City Parish) from time to time acquired and demolished for the purposes of the defenders' undertaking, was, at the date of the passing of the special Act, about £35,500. 2d, That the valuation of the defenders' railway and stations (so far as within the City Parish), conform to valuation by the assessor of railways and canals, was for the assessing year 1879-80, £31,234. 3d, That the *cumulo* valuations upon which defenders paid assessments, including the rent of the hotel, shops, and arches, all erected upon the *solum* of the subjects specified in article 1, was for the year 1879-80 £46,000.

At advising,—

LORD YOUNG.—This is an action at the instance of the collector of assessment for the relief of the poor of the City Parish of Glasgow against the City of Glasgow Union Railway Company. It is founded upon clause 127 of the Lands Clauses Consolidation (Scotland) Act, 1845, which is incorporated in the defenders' private Act of 1864. That clause of the general Act makes provision for the case of a deficiency in the poor's-rate of a parish arising in consequence of such a party as the present defenders taking land therein for the purposes of their undertaking. The pursuer here says that in the two years 1878-79 and 1879-80 there had thus arisen a deficiency, caused by the defenders taking land in the City Parish, to the amount of £158, 3s. 8d. The parties have come to an agreement as to the former year, the defenders acknowledging that they are due certain sums, which accordingly are decerned for by the Lord Ordinary, but the parties are in conflict as to whether or no there is a deficiency such as the clause of the general Act founded upon provides for in the year 1879-80.

In order to enable us more satisfactorily to determine this in reviewing the Lord Ordinary's judgment on the subject we required the parties to state in a

¹ *Authorities referred to.*—Stratton v. Metropolitan Board of Works (Thames Embankment), Nov. 25, 1874, L. R. 10 C. P. 76; Regina v. Metropolitan District Railway Co., Feb. 1, 1871, L. R. 6 Q. B. 698; East London Railway Co. v. Whitechurch, May 19, 1874, L. R. 7 E. and L. App. 81; Wheeler v. Metropolitan Board of Works, June 22, 1869, L. R. 4 Ex. 303.

minute how the assessment for the poor in the parish stood upon the whole property taken by the defenders at the time of their taking it, and how that assessment stands now. The minute informs us, both parties agreeing, that the assessable value at the time when the properties were taken amounted to the sum of £35,500, and that for the year 1879-80, being the year—and, as I have said, the only year—with respect to which there is any dispute, it had reached a sum of £46,000. *Prima facie* there is here no deficiency, for comparing the two periods there is an excess of assessable value in the latter year of about £10,000.

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But it is said that nevertheless there is a deficiency within the meaning of the clause. I may observe, before adverting particularly to the clause, that this is said to be so by taking, not the actual property in the lump acquired by the railway company for the purposes of their undertaking in the parish in question, but by taking individual houses or plots of building ground. It is maintained that you can pick out of the whole property acquired and taken in the parish for the purposes of the undertaking certain houses or ground now vacant, but at the time of the taking occupied by houses, and that if you confine your attention to these alone there is a deficiency, the excess arising upon other parts of the subjects taken.

I am of opinion—and I may state it before proceeding to express my opinion more particularly upon the terms of the clause—that the undertaking of the defenders is to be regarded as one undertaking. Like every other undertaking of the kind it consists of various parts. There are many things to be done in the accomplishment of it. The company have to make the line—frequently to make branch lines, sidings, stations, accommodation roads—but the land taken for these purposes is land taken for the purposes of the undertaking; and I think the land taken by this railway company within the parish in question—for there is only one parish in question—is all land taken for the purposes of their undertaking.

Now, I refer to the clause, which is stated at length in Cond. 7—“If the promoters of the undertaking become possessed, by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land-tax or liable to be assessed to the poor's-rate or prison assessment, they shall from time to time, until the works shall be completed and assessed to such land-tax, and poor's-rate, and prison assessment, be liable to make good the deficiency in the several assessments for land-tax, and poor's-rate, and prison assessment, by reason of such lands having been taken or used for the purposes of the work; and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act.” Now, I think it strikes one at first sight that this is a provision to guard those who are interested—in the present case the poor-law authorities—against any loss of assessable subjects, or of assessment in respect of the diminished value of the assessable subjects prior to the time of these becoming again assessable after the completion of the works thereon—of their coming into the state into which it is intended they shall be finally put. When they come into that condition the assessment must be according to the actual value, whether that be more or less—I suppose the case has never occurred of land or property acquired in the manner referred to in this case being, when the works were executed, of less assessable value than it was before; but if that should happen there is no provision for any deficiency being made good. But prior to

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the completion of the works, if there be a deficiency—and necessarily only if there be a deficiency—the company shall make it good. I say “necessarily,” because if there is no deficiency there is nothing to make good. Now, here, in the view which I take, there was no deficiency for the year in question, for I think it is clear in principle, and stands upon the only authority on the subject to which we were referred—the *Thames Embankment* case—that the increased revenue by any buildings erected upon any part of the property taken is to be taken into account in estimating whether there is a deficiency or not. And indeed the results of any contrary rule appear extravagant, from the statement of them. It was not intended to make a gift—to bestow a boon—at the expense of the railway company upon the poor-law authorities or collectors of the land-tax or prison-rates; but merely to provide for making good any deficiency. You are to take the assessable rental, for the purposes of these rates, of the property acquired by the company for its undertaking at the date of the acquisition; and if, taking the rental—that is, the assessable value—during the period that the works are in progress, there is a deficiency, that shall be made good as a personal claim—the railway company shall make it good. But if there is no deficiency—if these subjects, taken as a whole, afford as great or a greater assessable rental than they did at the time of the taking, then there is within the meaning of this clause, in my opinion, no deficiency to make good.

Now, that is the case here, upon the statement which we have in the minute, and therefore I am of opinion that, except in so far as the defenders have admitted their liability as applicable to the year 1878-79, this action is not well founded, and the defenders are entitled to be assoilzied, and that without any reference to the particular views on which the Lord Ordinary has proceeded in regard to land rating. It is really not doubtful, and I have not adverted to the subject—I did not think it necessary to advert to it—that the assessable value of the station, and of the shops under the arches, and so on, constructed upon the property taken by the defenders, must be taken into account in considering whether there be a deficiency or no.

My opinion is that the defenders, except in so far as they have admitted liability, are entitled to be assoilzied.

LORD CRAIGHILL.—I am of the same opinion, and I think the case a very clear one upon the facts as these are ultimately before the Court.

Apart from the statutory provision contained in section 127 of the Lands Clauses Act, the railway company would have been dealt with as regards assessment just as other owners of property. The houses or lands taken by them would be taken year by year at that which was their value at the time, but as it was probable that if this were the rule that was to be applied to undertakings such as the defenders' undertaking, there would for a period of years be some loss to the parish, it was thought expedient that provision should be made against such loss being incurred, and accordingly this clause, which is the foundation of the pursuer's claim, was introduced into the statute referred to. But the purpose of that provision was exclusively, as I think, to prevent loss, and it cannot reasonably be construed in such a way as to make it a source of gain to the parish and a source of loss to the railway company. It appears to me that once lands are taken they are to be looked upon as having been taken for the purposes of the undertaking, and up to the time when the assessable value of the undertaking shall reach the original value of the property that has been taken

for those purposes the value of the subjects taken as they appear in the year in which the Act was passed is to be the rule by which the rights of the parochial authorities are to be determined. No. 126.

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Now, it appears that of the properties in question here, while many of them have been turned to account, there are still some whose yearly value is less than the value at which those properties appear in the valuation-roll of 1864. If the question is to be determined simply with reference to these properties, whether or not there is a deficiency, of course the answer must be that there is a deficiency. But we are not to ask that question with reference to each property separately. We are to ask the question with reference to all the properties taken for the purposes of the undertaking. And once we find that the assessable value of the works, so far as completed, and as now subject to assessment, is greater than was the value at the period the properties were taken, then I think the case for which the Act of Parliament made provision no longer exists, because the case for which this clause was passed was the existence of a deficiency, and it was not intended to be applicable to any case where the deficiency had been supplied. Now, the deficiency here has been supplied, is far more than supplied, and therefore I agree with Lord Young that except to the extent to which the defenders have admitted their liability they are entitled to be assolizied.

The LORD JUSTICE-CLERK concurred.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for the pursuer against Lord Curriehill's interlocutors of the 3d and 17th December 1880, adhere to the said interlocutors with respect to the sums amounting to £29, 9s. 2d., for which it is thereby found that defenders admit liability; *quoad ultra* recall the same, and assolzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to additional expenses," &c.

W. & J. BURNES, W.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

THE NEW ZEALAND AND AUSTRALIAN LAND COMPANY (LIMITED),
Petitioners.—*Mackintosh.*

No. 127.

Mar. 19, 1881.
New Zealand
and Australian
Land Co.
(Limited).
1st DIVISION.
B.

Public Company—Reduction of Capital—Companies Act, 1867, secs. 9 to 20—Companies Act, 1877, secs. 3 and 4—Procedure.—The New Zealand and Australian Land Company was formed by the amalgamation of two previously existing companies, and was incorporated under the Companies Acts, 1862 and 1867, with a capital of £2,500,000. Soon after its incorporation it was found advisable upon inquiry to reduce the valuation of the estates held by it in New Zealand and Australia by £250,000, the result of which was that the nominal capital was larger than actually existed in assets. A petition was subsequently brought, founding upon the Companies Acts, 1867, secs. 9 to 20, and 1877, secs. 3 and 4, asking the Court to pronounce an order confirming a reduction of capital by £250,000, to approve of the draft minute proposed to be registered in pursuance of the above sections, to authorise the registration of both, and further, to dispense with the words "and reduced" as part of the name of the company. It was stated that the shares were all fully paid up, and that the reduction proposed was unrepresented by available assets, and did not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital.

No. 127. THE following interlocutors were pronounced :—

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New Zealand
and Australian
Land Co.
(Limited).

"Edinburgh, 5th February 1881.—The Lords appoint this petition to be intimated on the walls and in the Minute-book for fourteen days, and appoint the petitioners to advertise in the 'Scotsman,' 'Courant,' 'Glasgow Herald,' and London 'Times' newspapers the resolutions of the special general meeting of the company, held on 14th December 1880, and this deliverance, the said advertisement to be made twice at an interval of a week in each of the said newspapers, and appoint answers, if any, to be lodged in fourteen days after the first advertisement."

"Edinburgh, 16th March 1881.—The Lords remit to Mr C. B. Logan, W.S., to inquire and report as to the regularity of the proceedings and the reasons for the proposed reduction of capital."

"Edinburgh, 19th March 1881.—The Lords having resumed consideration of the petition, as amended, with Mr Logan's report, No. 22 of process, and heard counsel for the petitioners, confirm the reduction of capital as set forth in the petition; approve of the minute No. 21 of process, authorise the registration of this order and the said minute by the Registrar of Joint Stock Companies; dispense with the addition to the name of the company of the words 'and reduced,' and decern; and appoint this order and said minute to be advertised once in the 'Edinburgh Gazette.'"

DAVIDSON & SYME, W.S., Agents.

No. 128.

Mar. 19, 1881.
Henry v. Morrison.

JOHN HENRY, Pursuer.—*D.-F. Kinnear—Jameson.*

DAVID ALEXANDER MORRISON, Defender.—*Kennedy.*

Process—Competency—Value of Cause—Judicature Act, 1825 (50 Geo. III. cap. 112), sec. 28—Conclusion ad factum præstandum.—Held that an action in the Court of Session for delivery of fifteen I O U's, representing in toto the sum of £16, 18s. 6d. was not incompetent.

1st Division.
Lord Adam.
B.

JOHN HENRY, S.S.C., brought this action against David Alexander Morrison, concluding that the latter, who had been a clerk in his office, should be ordained "to deliver up to the pursuer the following I O U's, granted, or bearing to be granted, by David Andrew Scott, and initialed D. A. S."—[Here followed a specific list of the documents, fifteen in number, and representing in toto the sum of £16, 18s. 6d.] There was no other conclusion, except for expenses.

The defender pleaded that the action was incompetent, the sum concluded for being under £25.

The Lord Ordinary repelled the plea.*

* "NOTE.—The first question in this case is, whether the action is incompetent under the 28th section of 50 Geo. III., cap. 112, in respect that its value does not exceed £25.

"It lies upon the defender, who seeks to oust the jurisdiction of the Court, to prove the affirmative of that proposition, and in order to do so he cannot travel beyond the record in the action, and, it may be, not beyond the conclusions.

"The action is an action for delivery of fifteen I O U's of small amount, amounting in all to £16, 18s. 6d. There are no pecuniary conclusions.

"The action is therefore purely an action *ad factum præstandum*, and is brought by the pursuer for the purpose of recovering possession of certain articles, i.e., I O U's, which he alleges are his property. It is said, however, that it

The defender reclaimed upon leave being given.¹

No. 128.

LORD PRESIDENT.—I cannot say that I participate in the Lord Ordinary's doubts on the question raised here. I think the case is a very clear one. It is an action *ad factum præstandum*; there is no pecuniary conclusion, and it is quite impossible for the Court to estimate what is the real value of the cause. It may far exceed the amount in value of the I O U's, delivery of which is sought, and the object of obtaining possession of these vouchers may be something very different from the recovery of the money. The object, for instance, might be to vindicate the pursuer's character in another action, or to prove the forgery of these or other writings. There are many uses for which documents of this kind may be of great value which the pursuer is not bound to disclose. If he instructs that they are his property he is entitled to delivery of them, and it does not matter what the value of them may be. Looking to all the authorities, I am of opinion that this action is not open to the objection of incompetency.

Mar. 19, 1881.
Henry v. Morison.

LORD DEAS.—It was for a long time a vexed question how the jurisdiction of this Court in causes falling under these statutes fell to be ascertained. I hold it to be now settled that the party objecting to the jurisdiction must shew, if not on the face of the summons, at least on the face of the summons and record taken together, that the value is under £25. If he fails to shew that, the jurisdiction must be sustained. If we were to go back upon that rule we should be unsettling what has been settled after a great deal of litigation. If that view be correct I think there is an end to this case. There is nothing in the summons, or in the summons and record taken together, to shew that the value is below

appears *ex facie* of the articles sought to be recovered that their value is under £25, and that therefore that action is incompetent.

"The Lord Ordinary thinks that the question is a delicate one, but he thinks that the action is competent.

"It is clear on the authorities that where the action is solely for delivery of an article of property, it does not matter, as regards the competency of the action, how trivial the value of the article may be, and such an action only becomes incompetent where the pursuer himself estimates the pecuniary value to him of the article, and therefore of the action, by inserting an alternative pecuniary conclusion shewing that the value of the action is under £25.

"In this case there are no pecuniary conclusions, and it does not appear to the Lord Ordinary necessarily to follow that the value of the I O U's to the pursuer is simply the pecuniary value which they represent. It is clear enough that the action is not brought in respect of the pecuniary value of the I O U's to the pursuer, but for the purpose of aiding his partner, Mr Scott, in his defence to the action raised against him in the Sheriff Court by the present defender. That may or may not be a legitimate object, but it may give them a value in the pursuer's estimation much beyond the sum of £16, 18s. 6d. which they represent. It is not difficult to imagine a case brought for the recovery of certain pieces of the current coin of the realm which would be by no means met by the tender of coins of equal value. A pursuer may have a *pretium affectionis* even for a crooked sixpence, and if he can shew it is his property, wrongfully withheld from him, he is entitled to recover it. The Lord Ordinary therefore thinks that this action is not incompetent.—*Purves v. Brock*, 5 Macph. 1003, 9th July 1867; *Shotts Iron Company v. Kerr*, Dec. 6, 1871, 10 Macph. 195; *Aberdeen v. Wilson*, 10 Macph. 971, July 16, 1872."

¹ *Authorities (in addition to those quoted in the Lord Ordinary's note).—Cameron v. Smith*, Feb. 24, 1857, 19 D. 517; *Inglis v. Smith*, May 17, 1859, 21 D. 822; *Dobbie v. Thomson, &c.* June 22, 1880, *ante*, vol. vii., p. 983.

No. 128. the statutory amount. We do not require to determine particular questions which are not before us, but at present I am not prepared to find that an action for delivery of a "crooked bawbee" may not be competent in this Court. The bawbee may have a great value, which is not apparent. It may, for instance, be a pledge of a private marriage left in the possession of one of the parties. The thing sued for may have a value to the pursuer far beyond its market value. I think the rule is quite settled, and I see no room for doubt in the matter.

LORD MURE and LORD SHAND concurred.

THE COURT adhered.

DOVE & LOCKHART, S.S.C.—D. HOWARD SMITH, L.A.—Agents.

No. 129. COLIN WARD CAMPBELL, First Party.—*Mackintosh—Jameson.*
 Mar. 19, 1881. NEIL CAMPBELL AND OTHERS, Second Parties.—*J. P. B. Robertson—Darling.*
 Campbell v. *Succession—“Lawful issue of her body,” meaning of, when used in settle-*
 Campbell *ment of heritage.*

2D DIVISION. (SEQUEL of case reported May 30, 1843, 5 D. 1083, and Dec. 3, 1852,
 M. 15 D. 173.)

By the former of these decisions the Court determined that Mrs Isabella Anne Campbell took only a liferent of the estate of Leckuary, in Argyllshire, under the settlement of her father, Charles Campbell, of Leckuary, who died in 1808; and by the latter that, though her issue took by implication the fee of the estate, they did so subject to the condition of their surviving their mother. Whether the issue would, in that event, take a joint *pro indiviso* fee, or would take successively, as their mother's heirs in heritage, according to the ordinary rules of law, was left by the Court undetermined. Mrs Campbell having died in 1880, this question was presented to the Court in a special case for Mrs Campbell's eldest son, Colin Ward Campbell, and for Neil Campbell and others, her younger children.

The Court, without determining the general effect of the words "lawful issue of her body" occurring in a deed of settlement of heritage, *held*, in conformity with the opinion expressed in 1852 by Lord Rutherford, Ordinary (15 D. 176), and by Lord Wood in the Inner-House (15 D. 185), that in the particular deed the context shewed that they were to be construed as equivalent to "heirs of her body," and, by implication, destined the estate to Mrs Campbell's children, "as they should successively take as heirs of their parent in heritage," according to the ordinary rules of law.

The clauses of the trust-disposition and settlement under which the question arose will be found at 15 D. 174.

C. & A. S. DOUGLAS, W.S.—JOHN FORRESTER, W.S.—Agents.

No. 130. — BRADY, Appellant.—*Kennedy.*
 — WATSON, Respondent.—*Wallace.*

Mar. 19, 1881.*
 Brady v. Wat- *Expenses—Fees to Counsel where case has extended over more than one day.*
 son. —The fact that the hearing of a case has been continued from one day to another is not in itself a reason why an additional fee should be sent to counsel.

1ST DIVISION. IN this case the facts sufficiently appear from the opinion of the Lord President, *infra*.

At advising,—

No. 130.

LORD PRESIDENT.—In this note objection is taken to the Auditor's report of taxation in respect of three items, the question, however, being just this, whether a certain fee was properly sent on February 17th. The state of facts is simply this—The case was called in the afternoon, and after a very short beginning of an opening speech on the part of the appellant the cause was continued. When the case again came on for hearing a fee of £2, 2s. was sent as a refresher, and the question is, whether this fee was properly disallowed. It was stated to us that this fee was sent and charged in accordance with precedent and invariable custom. Now, we have communicated with the Auditor, and have ascertained that there is no such custom. On the contrary, the practice is, that if a cause is discussed on more days than one, and a greater amount of time, attention, and trouble is required of counsel than fall fairly within the original fee, then a refresher is allowed, but under no other circumstances. The mere fact that a case has extended over more than one day is no reason why an additional fee should be sent.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT approved of the Auditor's report.

JOHN MACPHERSON, W.S.—SMITH & MASON, S.S.C.—Agents.

SUMMER SESSION.

THE SINGER MANUFACTURING COMPANY, Pursuers and Respondents.—

No. 131.

Trayner—Dickson.

JOHN JESSIMAN, Defender and Appellant.—*Shaw.*

May 14, 1881.
Singer Manu-
facturing Co.
v. Jessiman.

Sheriff—Appeal—Competency—Value of the cause—Statute 16 and 17 Vict., c. 80 (Sheriff Court Act, 1853), sec. 22.—A summary petition in a Sheriff Court craved, an order against the defender for delivery of a machine, and failing delivery within a specified time to be fixed by the Court, decree for payment of "£6, 10s. as the value of the said machine."

Held that as the prayer of the petition shewed that the value of the cause did not exceed £25 it was not competent to appeal the case to the Court of Session.

THIS was a petition in the Sheriff Court of Aberdeenshire by the Singer Manufacturing Company against John Jessiman, Aberdeen. The conclusions were,—“To ordain the defender to deliver to the pursuers a medium sewing machine, No. 2,891,385, with its accessories, and failing delivery within a short specified time to be fixed by the Court, to grant a decree against the above named defender, ordaining him to pay to the pursuers the sum of £6, 10s. sterling as the value of the said machine and accessories.”

1st DIVISION.
Sheriff of
Aberdeen-
shire.
C.

The Sheriff-substitute (Dove Wilson) assoilzied the defender.

The Sheriff, on appeal, recalled this interlocutor, and ordained the defender “to deliver to the pursuers the machine and its accessories, as concluded for in the petition.”

The defender appealed.

The Lord President directed the attention of counsel to the value of the cause as appearing from the conclusions of the petition. Counsel for the respondents stated that they were anxious to have a decision on the merits, and would not insist on the question of competency.

No. 131. LORD PRESIDENT.—We cannot discuss the case. The Court have no jurisdiction.

May 14, 1881.
Singer Manufacturing Co.
v. Jessiman.

The appellant then argued that the value did not appear distinctly on the face of the petition to be under £25. Specific performance was asked—not any machine, but a specific machine numbered 2,891,385. Besides, the case involved a principle, and would rule other cases where the company had hired out machines on similar terms.¹

LORD PRESIDENT.—I am of opinion that this appeal is incompetent under the 22d section of 16 and 17 Vict. c. 80, which by very express negative words excludes the jurisdiction of this Court in every case whose value does not exceed £25.

The case of *Aberdeen v. Wilson* is a strong one, and if Mr Shaw had been able to shew distinctly that it applied in the present case we should have been willing to follow it. But in this case the prayer of the petition is for delivery of a sewing machine, or, failing delivery, for payment of £6, 10s. as the value of the sewing machine and its accessories.

In the case of *Aberdeen v. Wilson* the conclusion was for delivery of an article, or, failing delivery, for payment of a sum of money, or “such other sum as shall be ascertained to be the true value.” It was on these words that the judgment of the majority of the Court was rested. The opinion of Lord Mure seems to me a very valuable one, and quite conclusive of this question. He deals with the authorities which have determined the rule of practice, and he clearly holds that appeal is incompetent unless under the conclusions of the application the Sheriff could pronounce decree for more than £25. When there is a conclusion for delivery of an article, and when the value is defined, we must take that definition as conclusive of the value of the cause.

LORD DEAS.—I entertain no doubt whatever. In the recent case of *Henry v. Morrison* our judgment was the other way. But the principles and authorities applicable to that case do not lead to the same result in the present case. The question of competency depends on the value of the cause. Now, here the value of the cause is fixed by the conclusions of the action, which are either to deliver the article or pay £6, 10s. That is all that can be discerned for, and all that can be recovered in this action, and it is of no moment that an action of this kind may be said to involve a principle. Every small-debt case may be said to involve a principle. An action for the aliment of an illegitimate child involves the question of the paternity of the child, but it decides no more than that a certain sum of money is due. If we were to hold that this case extends beyond the question whether £6, 10s. is due or not there would hardly be a small-debt action which would not be appealable.

The value of a cause could not be more definitely fixed than it is in the present petition. The defender can get rid of the action by payment of £6, 10s., and the action will fix nothing beyond.

LORD MURE concurred.

¹ *Shotts Iron Co. v. Kerr*, Dec. 6, 1871, 10 Macph. 195, 44 Scot. Jur. 117; *Aberdeen v. Wilson*, July 16, 1872, 10 Macph. 971, 44 Scot. Jur. 540; *Henry v. Morrison*, March 19, 1881, *supra*, p. 692.

LORD SHAND was absent.

No. 131.

THE COURT pronounced this interlocutor :—" Having heard counsel May 14, 1881.
on this appeal, dismiss the same as incompetent, and decern : Singer Manufacturing Co.
Find the respondents entitled to expenses, and remit," &c. v. Jessiman.

J. W. & J. MACKENZIE, W.S.—R. C. GRAY, S.S.C.—Agents.

AGNES BATHGATE OR BRYDONE AND JAMES BRYDONE, Pursuers.—*Brand.* No. 132.
MALCOLM BRECHIN, Defender.—*Trayner—Jameson.*

May 17, 1881.
Brydone v.
Brechin.

Reparation—Slander—Issue—Innuendo.—A man wrote an anonymous letter to his sister-in-law, whose husband was at sea, in which he stated that Mrs B, the person with whom she lived, had not been her friend in days past, and then " the writer hopes to hear of different behaviour and not going under the roof of any one but the one you should, viz., your mother, or go to some place where drink and your present companions won't get near you, so that temptation will be out of your way." In an action of damages for slander by Mrs B and her husband, *held* (rev. judgment of Lord Adam) that these words would not found an innuendo that Mrs B and her husband were keepers of a house of disreputable character, and action dismissed as irrelevant.

AGNES BATHGATE OR BRYDONE and her husband, James Brydone, grocer 1st Division.
and dairyman, Lawnmarket, Edinburgh, raised this action of damages for Lord Adam.
slander against Malcolm Brechin, butcher, Edinburgh. The pursuers B.
alleged that the defender " wrote, addressed, and forwarded by post an anonymous letter in the following terms to Mrs Macintyre, his wife's sister, who was then residing with the pursuers at Lawnmarket :—" Is it possible that a daughter of Mrs Gray's is living in the Lawnmarket? Things have surely gone to a pitch now, Mrs Macintyre, with you. The day is past when you would spurned at living in such a place, and being the guest of Mrs Brydone, who in days gone past has not been your best friend, but the opposite; the writer is a wellwisher, and would ask you to consider your position, and take heed and turn from such a way of living as the present is with you. The writer hopes to hear of different behaviour, and not going under the roof of any one but the one you should, viz., your mother, or go to some place where drink and your present companions won't get near you, so that temptation will be out of your way. The writer sympathises with your mother under her circumstances with your conduct. YOUR WELLWISHER.' The said statements were intended to mean, and did mean, that the friendship of the pursuer Mrs Brydone for Mrs Macintyre was treacherous, malign, and false in the past, and directed to tempt and lead away the said Mrs Macintyre from the paths of honesty and virtue. Further, the said letter was intended to mean, and did mean, that the pursuers were keepers of a house of disreputable character, where loose and immoral people were allowed to associate with each other, and where Mrs Macintyre would find drunken and profligate companions, and would thereby be exposed to temptation to do wrong."

The following issue was adjusted by the Lord Ordinary :—" Whether the letter No. 6 of process was in whole or in part of and concerning the pursuer Mrs Brydone, and falsely and calumniously represented that the pursuers were keepers of a house of disreputable character, where loose and immoral people were allowed to associate with each other, and where Mrs Macintyre would find drunken and profligate companions, and would thereby be exposed to temptation to do wrong, to the loss, injury, and damage of the pursuers? Damages laid at £500."

No. 132.

May 17, 1881.
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The defender reclaimed, and argued;—(1) The letter was not libellous; and (2) there were no facts stated on record to justify the Court in attaching a libellous meaning to the words of the letter.¹

It was explained at the bar that Mrs Macintyre was married; that her husband was at sea; and that her mother had a house suitable for her residence.

LORD PRESIDENT.—When the words of an alleged libel are not plainly of a libellous character, and require to be construed or have an innuendo put on them, I think the question is, as I stated in the case of *Broomfield v. Greig*, “whether this innuendo in the circumstance and in the state of the record is admissible, for some innuendoes are so unreasonable and forced that it would not do to allow them to go to a jury, merely because a party chooses so to innuendo words which are not actionable.” I think it is very clear that the words of this letter are not of themselves actionable. The plain meaning of them is that the writer disapproved of Mrs Macintyre, his sister-in-law, being with Mrs Brydone or anyone else except her own mother, and that his reason for wishing that was, that she would be exposed to the temptation to drink. That is plain on the face of the letter. The only part where there is anything like an insinuation is—“The writer hopes to hear of different behaviour, and not going under the roof of anyone but one you should, viz., your mother, or go to some place where drink and your present companions won’t get near you, so that temptation will be out of your way.” I think the only reasonable construction is an imputation against Mrs Macintyre, and nothing else. No doubt there is the allegation of the present companions and drink being a temptation. But that does not mean more than that if Mrs Macintyre is thrown in the way of persons who are in the habit of drinking she will be exposed to temptation. Out of this, and the previous statement in the letter that Mrs Brydone had not been a good friend to Mrs Macintyre, the pursuer proposes to construct a libel which charges the defenders with being “keepers of a house of a disreputable character, where loose and immoral people were allowed to associate with each other, and where Mrs Macintyre would find drunken and profligate companions, and would thereby be exposed to temptation to do wrong.” I looked at the record to see if any facts and circumstances were stated which could possibly give that meaning to words which have not got the meaning on the face of them. I never saw so meagre a record. We are not told whether Mrs Macintyre is married or not, what her husband is, or where he is, or where her mother’s house is. We are left in ignorance of all the facts and circumstances surrounding the parties. That being so, I think this is just one of the cases which I contemplated in my remarks in the case of *Broomfield*. I think we should dismiss the action.

LORD DEAR.—It is not pretended that the letter libelled will sustain an action of damages without an innuendo, and I am of opinion that the terms of the letter do not warrant the proposed innuendo. The case is different in this respect from the case cited, *Dun v. Bain*, 24th January 1877, 4 *Rettie*, p. 317. That was an action for libel in a newspaper article, to be read by the whole public,

¹ *Broomfield v. Greig*, March 10, 1868, 6 *Macph.* 563, 40 *Scot. Jur.* 568; *Dun v. Bain*, Jan. 24, 1877, *ante*, vol. iv. p. 317; *M’Iver v. M’Neill*, June 28, 1873, 11 *Macph.* 777, 45 *Scot. Jur.* 510; *Rodger v. MacEwen*, March 9, 1848, 10 *D.* 882, 20 *Scot. Jur.* 329; *Kennedy v. Baillie*, Dec. 5, 1855, 18 *D.* 138, 28 *Scot. Jur.* 53.

and so was the case of *O'Brien v. Clement*, 8th May 1846, 15 Meeson and No. 132. Welsby, 435. But here the matter was between relatives interested in each other, and to whom a certain latitude of speech and communication may be allowed which would not be extended to strangers. Moreover, if there is any slanderous insinuation in the letter it is rather against Mrs Macintyre than against the pursuer. It is that if drink was going (as it is less or more in most of houses) she might be tempted to take it.

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There is a great want of specification of facts and circumstances. We are not told even if Mrs Macintyre is a married woman, who her husband is, or where he is. I am willing in a case like this to take the explanations given at the bar. But all these explanations tell against the relevancy. Mrs Macintyre, it appears, is married, and her husband is at sea. Now, what can be more natural than to say that the proper place for her to live is in her mother's house. In her mother's house she would not be tempted to take drink, and she would not be able to get it if she were inclined. It is quite natural for her brother-in-law to say, "You ought to stay with your mother." The sting of the whole statement is that Mrs Macintyre might get drink in the house of Mrs Brechin, just as she might in the house of any respectable tradesman or other member of society. It is not reasonably possible to innuendo the statement as the pursuer proposes. I am therefore clearly of opinion that the action is not relevant. Plainly it is not expedient to encourage people of that rank of life to enter upon such a litigation.

The only thing that gave me any difficulty was the fact that the letter was anonymous. Although that must be taken into account I do not think it is enough to make the defender liable in damages.

LORD MURE.—I concur. These questions of innuendo are often difficult, but I think the rule is that if the words used substantially exclude the proposed innuendo it is the duty of the Court to stop the case, and not allow it to go to a jury. Now, applying that rule in the present case, it appears to me that there is nothing in the letter founded on to warrant us in sending the case to a jury to say whether the defender intended to describe the pursuers as "keepers of a house of disreputable character, where loose and immoral people were allowed to associate with each other, and where Mrs Macintyre would find drunken and profligate companions." I cannot find any words in the letter that admit of such a meaning. It goes no further, I think, than to warn Mrs Macintyre that she should not have left her mother's house, where she would not be exposed to temptation.

LORD SHAND was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutor; sustain the defender's first plea in law; dismiss the action, and decern: Find the defender entitled to expenses of process, and remit," &c.

DAVID BARCLAY, S.L.—WILLIAM LOWSON, S.L.—Agents.

No. 133.

PATRICK CROAN, Pursuer.—*Campbell Smith—Moncreiff.*THOMAS VALLANCE, Defender.—*J. A. Reid.*May 18, 1881.
Croan v. Vallance.

Sale—Horse—Detention by Seller—Personal bar.—A cab-owner purchased a mare from a horse-dealer, which he returned next day to the seller as having failed to answer the warranty alleged to have been granted with her. The seller wrote insisting on the fulfilment of the contract, but meanwhile kept the mare in his own stables, and worked her in his own business. Held that, by keeping and working the mare, the seller was barred from insisting in an action for implement of the contract and payment of the price.

2D DIVISION.
Sheriff of
Midlothian.
I.

PATRICK CROAN, horse-dealer, Edinburgh, raised an action in the Sheriff Court at Edinburgh against Thomas Vallance, cab-proprietor, Edinburgh, for payment of the sum of £19, 10s., being the price of a mare sold by him to the defender.

The defender, in his defences, averred that he had returned the mare to the seller on 14th May 1881, the day after he had obtained delivery, on the ground that it was vicious, and he also averred that the pursuer had kept it and worked it since that time.

The defender pleaded, *inter alia*, that the pursuer was barred from suing the action, inasmuch as, on the return of the animal, he had retained and worked and used her as his own property and failed to put her into neutral custody.

A proof was allowed, from which it appeared that on 13th May 1880 the pursuer sold to the defender a grey mare for the sum of £19, 10s. Delivery of the mare was taken on the same evening. On the following evening the defender returned it to the pursuer's stables as not answering to the warranty he alleged that he had received with her. The pursuer thereupon sent back the mare to the defender's stables, but on the following morning, 15th May, the mare was again brought to the pursuer's stables and left there.

On 17th May the pursuer communicated with the defender through his agent, informing him that, unless he heard from him offering to take delivery of the mare before the 19th the mare would be put out at livery and an action raised for the price and expenses.

The pursuer deposed that on 13th May he bought the mare, which he sold to the defender the same day. "I knew the animal previously. An honest good working animal. Since I have had it in my possession it has been one of the best animals in my possession. I have worked the animal more since it came back to my possession than if it had not been in dispute. I did so to test its ability. One of my reasons for keeping the mare at work, instead of putting it to a livery stable, was, not only to prove its working capabilities, but also to diminish the expense of its keep."

On 28th January 1881 the Sheriff-substitute (Hallard) pronounced an interlocutor decerning in terms of the libel,* and on 14th February the Sheriff (Davidson) adhered.

* "NOTE.— The defender made a point of the circumstance that the pursuer kept the mare at work after she was sent back. It is not easy to see what harm has been done thereby. As the mare was put into the pursuer's stable against his will, and by the defender's act, it was scarcely for the defender to complain that the pursuer put her to use. The result has been to save expense, and the conclusion for three shillings a week in name of keep has not been insisted in. It is thought that the defender's proceeding in sur-

The defender appealed to the Court of Session.

No. 133.

LORD JUSTICE-CLERK.—In this case we have not heard any discussion on the question whether this horse failed to answer the warranty alleged to have been given by the seller, and whether there is any conclusive proof of the vicious habits attributed to it; but I do not think that is necessary, owing to the way in which the seller dealt with the horse when it was returned upon his hands by the purchaser. The day after the sale the defender brought back the horse to the pursuer, who declined to resile from the bargain, and the horse was sent back. The next day, however, the horse was again sent to the pursuer's stable, and left there. The pursuer communicated with the defender through his agent, asking him to take back the horse, but this was never done. Now, the pursuer, when the horse was sent back to his stable, did not put it out to livery with some neutral party, but kept it at his own stables and used it for his own behoof in his business, working it, according to his own account, "more since it was in my possession than most cab horses in Edinburgh are wrought—more than I work my own." I think that the pursuer having acted in this way, when the horse was returned to his stable under an allegation that it failed to answer the warranty, the present action is untenable, and that we need not go further into the case.

LORD YOUNG.—I am entirely of the same opinion. Of course I give no opinion on the question as to whether the defender was entitled to return this horse as not being fit for the purpose for which he bought it, and not according to the warranty alleged to have been given. But it is important as a fact in the case that the defender did return the horse as not fit for his purpose, and that the pursuer accepted the return, and proceeded to use the animal as his own, for his own profit, and in the course of his trade, and that, not only for a few days before he raised this action, but, so far as we know, down to the present time. I hold that that conduct must be held to have imported an acceptance by him of the return of the horse. He was not, I think, entitled to take these two courses at once,—to raise this action, and to use the animal as his own. The animal was used by the pursuer for the purpose of his trade, and that in such a manner as clearly implied that he thought the horse was well returned. In no other view is his conduct justified.

On these two facts, that the defender returned the horse on the allegation that the horse was not fit for his purpose, and that the pursuer used it for his own purposes when it was so returned, I think that this action is quite untenable.

LORD CRAIGHILL concurred.

THE COURT sustained the appeal, and assolizied the defender.

DANIEL TURNER, S.L.—CHARLES ROBB, L.A.—Agents.

reptitiously replacing the mare in the pursuer's stable deprives him of the benefit of any plea he might urge under the case of *M^r Bey v. Gardner*, 22d June 1858, 20 D. 1151, 30 Scot. Jur. 691."

No. 134. HARRY MARSHALL, Pursuer (Respondent).—*J. P. B. Robertson—Darling.*
MARIE MARSHALL, Defender (Appellant).—*Rhind—Millie.*

May 20, 1881.
Marshall v.
Marshall.

Husband and Wife—Divorce—Lenocinium—Bar.—Where a man, who had married a prostitute, some years after suggested to her that she should return to her former mode of life, and deserted her, *held* that he was barred by his conduct from insisting in an action of divorce for alleged adultery on her part.

2D DIVISION.
Lord Adam.
M.

IN February 1881 Harry Marshall, formerly coffee-planter, Ceylon, raised an action of divorce against his wife, in which he averred that on 9th October 1879 he had married his wife, who was then a prostitute in Edinburgh; that they had lived together in Ceylon, London, and Edinburgh, till May 1880, when he had been obliged to place himself under medical treatment in the Isle of Skye; that since he left her she had continued to live in Edinburgh, and had given herself up to a course of continuous and habitual adultery; that she had been in the constant habit of frequenting brothels, in particular a brothel at No. 7 Falshaw Street, and had there on repeated occasions committed adultery with men whose names were unknown to him.

Mrs Marshall, in her defences, denied the adultery, and averred that "before leaving the defender, as above mentioned, the pursuer recommended and urged the defender to endeavour to find some gentleman who would provide a house for her, and make her his mistress, and proposed that, on this being done, he, the pursuer, would come and visit her there. She was indignant at this suggestion, and refused to accede to it. His whole conduct to her afterwards, in deserting her, concealing his address from her, neglecting to give her any means of support, and having her movements watched by detectives, has been in accordance with this proposal, and the defender avers that he has done it all with a view to induce her to lead a life of prostitution, in order that he might raise an action of divorce against her."

She pleaded that she was entitled to absolvitor, and "(3) *Separatim, Lenocinium*. The pursuer is not entitled to decree in any event, in respect of his conduct towards the defender."

A proof was led on 1st and 2d March. From the evidence it appeared that the pursuer had lived with the defender for some time previous to the marriage, and had married her in the full knowledge of her character. Their married life was very unhappy, owing, in great measure, to the dissipated habits of the pursuer, who was much addicted to drink. On their return to England from Ceylon Mr and Mrs Marshall lived in Burton Crescent, London, for some time. Mr Marshall had at this time no means of his own, but was entirely dependent on his mother for money. When in London a Mr Hooker visited them, on the pursuer's invitation. This gentleman deponed,—“I remember of their having a quarrel about money matters when I was there. Mrs Marshall had been asking him for money, and complaining that he had not given her any for housekeeping purposes. I knew what she had been before her marriage. On that occasion in London the pursuer said something to her about her past life. When she was complaining about not getting money, she said, ‘What are we to do? How are we to live?’ And he distinctly said, ‘Do what you did before.’ At all events, he used words to that effect. He was evidently hinting that she should go on the streets. He seemed to be quite earnest in saying that, though no doubt it was said in heat. He was quite sober when he said it.”

Mr Hooker further deponed that he visited them again in May 1880, after they returned to Edinburgh, and that the pursuer again on that occasion “hinted that he would have no objection to her leading an immoral life.”

Mrs Reppingall, a lodging-house keeper in Broughton Street, deponed No. 134.
to having heard the pursuer on various occasions suggest to his wife "to
go and keep a gay house." There was other evidence to a similar effect. May 20, 1881.
The proof of the adultery alleged against the defender was mainly confined
to the evidence of certain detectives and frequenters of brothels, the
import of which appears sufficiently in the opinions of the Judges in the
Inner-House. Marshall v. Marshall.

It was further proved that when the pursuer went to Skye the defender was ignorant of his address for a considerable time after he left, but she communicated with his agents, saying that she was penniless, and demanding aliment. In answer to this the agents wrote offering aliment to the extent of £30 per annum. This, and a larger offer of £50 per annum, was refused, and a summons for aliment was raised in the Court of Session. Meanwhile this action was raised, and an interim order was granted for aliment at the rate of £50 per annum.

On 2d March 1881 the Lord Ordinary pronounced an interlocutor, finding facts, circumstances, and qualifications proved relevant to infer that the defender had committed adultery, and giving decree of divorce against her.

The defender reclaimed, and argued;—The proof of adultery had failed. The pursuer had deserted his wife in Edinburgh, where she had no friends but those who had been her friends before her marriage. In those circumstances the mere proof that she had been seen in brothels where her friends lived was not conclusive proof against her, as it would have been had her former life been different. *Separatim*, the pursuer had, by his actings, and the advice he had on various occasions given to the defender to return to her former way of life, barred himself from obtaining decree of divorce.

Argued for the pursuer;—There was no case of *lenocinium* here. To set up that plea it was necessary to prove that the husband had acted or spoken with a view to inducing the commission of the adultery complained of. The conduct must arise from deliberate design, and it was not sufficient to set up the plea merely to prove that a husband left his wife in such circumstances as might possibly lead to her committing adultery.¹ The advice to return to her former life was not seriously meant, but was merely a brutal jest on the part of the husband. The proof of adultery was sufficient.

LORD JUSTICE-CLERK.—In this case there are two questions raised, first, whether, on the proof, adultery has been proved against the wife, and, second, whether, if it is proved, or whether it is proved or not, the conduct of the husband has been such as to conduce to it. Something has been said about the contrariety of the two pleas, and the incompetency of pleading more than one of them. I do not, however, think that there is much in that, for the woman can easily say, "I am innocent, but even if the proof of adultery is held to be sufficient, you, my husband, conduced to it." There is no need to go too strictly into this argument; and I shall deal with both pleas. On the first question, though the proof that is offered to us is certainly not of a high class, the witnesses not being of the best description, still, if the case came here solely on the evidence, I should find it very difficult to come to a different conclusion from the Lord Ordinary. If the Lord Ordinary had found the other way, I should

¹ Munro v. Munro, Jan. 25, 1877, *ante*, vol. iv. p. 332; Wemyss v. Wemyss, March 20, 1866, 4 Macph. 660, 38 Scot. Jur. 196; Phillips v. Phillips, Dec. 21, 1844, Robertson's Consistorial and Eccles. Cases, 144.

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not have differed from him, but as it is neither am I inclined to do so now. On the second point, however, I am very strongly of opinion that I have seldom seen a case in which *lenocinium* has been more strongly presented. This woman, whose former life had certainly been of a very bad description, owed a duty to her husband, and there is nothing in the evidence before us to shew that she did not mean to do it. The husband, however, on his part, owed her a very special duty, considering the circumstances of her former life. As he had chosen a wife from that class, it was his special duty to protect her from outside influences, and from herself. Now, it seems to me that, in addition to leading a highly dissipated life, he thought fit, when he was suffering from the pressure of poverty, over and over again to counsel her in what I must characterise as the most brutal and heartless way to return to her former life. This was not done before one witness only, but before several. If that was done before witnesses on several occasions, it is most probable it was done several times when they were alone. After conduct of that kind, I certainly am not prepared to give the husband the remedy he asks. It is perhaps true that the wife was not driven to do what she did by poverty, but her husband thought fit to withdraw from his wife his maintenance and protection, and that in such a way that she did not even know where he was. No wonder, then, that, left to herself entirely, she fell back into the society she had been accustomed to before her marriage. On this ground, I have no hesitation in proposing that we should alter this interlocutor.

I must add that I do not differ in the least from the authorities cited to us, but where it comes to direct advice having been given to the wife to return to her former life, and that advice being given not as a jest, but with serious intention that the woman should follow it, then I think there can be no doubt that the plea of *lenocinium* is applicable.

LORD YOUNG.—I am of the same opinion, and I feel no difficulty whatever about the case. I think that a man who marries a common prostitute knowingly should not easily obtain a divorce from her on the ground of her adultery and immorality. It is not impossible that he should obtain it, but I say it as emphatically as I can that he ought not easily to do so. A divorce is not granted because of the sin of the husband or wife, as the case may be. No doubt the sin of the one or the other is a necessary condition of divorce, but divorce is not granted in punishment to the guilty party, but as a remedy to the injured. Now, can one say that the pursuer here is an injured party? He married a street walker, and lived with her a dissolute and discreditable life. After marriage it seems to have broken on the wife that her husband was impecunious, and entirely dependant on his mother, and utterly incapable of supporting himself and her. When she remonstrated with him he had no hesitation in telling her to return to her old way of living, if indeed she had ever left it. For some time she had been living with certain persons, friends of her's before her marriage, and her husband did not seem to care whether she kept virtuous or not. At last he left her because he was in poverty, and in such a condition from drink that he had been ordered away to some place in Skye for treatment. His wife then said to him, "What shall I do?" and he answered, "My mother will do something for you, but you had better return to your old ways." I think that a man who conducts himself in that way cannot be heard when he says, "I am an injured husband." I am very clearly of opinion that he is not entitled to appeal to a

Court of justice for a remedy. I agree with your Lordship in thinking that the evidence of adultery is of the narrowest. There is absolutely no respectable evidence in the case, and, such as it is, it is only the evidence of detectives set upon her by the husband's relations. I am distinctly of opinion that such an action ought not to be sustained, and that it is not for the cause of morality that it should be.

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I do not like tying this man to this woman, but it is most important that men who marry prostitutes, as this man did, should not do so under the idea that they will obtain divorce as a matter of course on a proof of adultery on their part, or upon proof that in the ordinary case would suffice to obtain a divorce. I think it wholesomer that it shall be announced that they shall not easily get divorce, and I think especially when advice such as we have here is given that the plea of *lenocinium*, though perhaps that is not a very good word, should constitute a bar to decree being granted.

LORD CRAIGHTILL.—I am quite of the same opinion. If the adultery was in any way conduced to by the husband he is not entitled to get his divorce; but I think that if adultery is proved against a wife, and if it is not proved that the husband is directly or indirectly answerable for it, then, whether the wife was a prostitute or not, he is not to be deprived of that remedy which others enjoy. The wife is answerable for her own wrong, and if her husband has not conduced to her guilt, though she was a prostitute before her marriage, she has no right to relapse from virtue, and bring forth the facts of her early life as an answer to an action of divorce.

The first question here is whether this woman did commit adultery. Now, the character of this woman before her marriage has a material effect on the evidence brought forward to convict her of adultery, for that which would be conclusive proof against a person of hitherto unimpeachable character may not be conclusive against such a woman as this. It is notorious that whenever a woman not a professional prostitute goes to a brothel it is ascribed to one purpose only, and in such a case adultery would be held to be established. But here this woman was left by her husband, with no friends in the town but those in the walk of life in which she had been before her marriage. When she went to see them there was not the same presumption against her. There is a great deal in this view certainly, but the question is whether the evidence is all that is required. There is certainly not a strong case on the evidence, but I do not say that I feel warranted in differing from the conclusion arrived at by the Lord Ordinary, who saw and heard the witnesses give their testimony. I am far from thinking there is a clear case of adultery made out, but I think there is sufficient to warrant the verdict that has been given. That introduces the next question, are the circumstances such as to disentitle the husband from obtaining redress? It is not necessary for me, in answering this, to state an exact definition of the plea of *lenocinium*, but this I may safely say, that if a husband can be held to have been in any way contributory to what ensued the law will not interfere to give him a remedy. The circumstances here are certainly very peculiar. Take one case: In the course of a conversation between the husband and wife, in the presence of a man who had been intimate with the wife before her marriage, he advised her to go back to her former way of life. If it could be shewn that this was not meant or taken seriously of course all that could be said would be that it was a brutal and

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dangerous joke, but the pair came to Edinburgh, and again, in the presence of the same man, similar advice is given, and before the effect of the recommendation had passed away the husband left his wife without protection or means of subsistence. Might the wife not have had this advice in her mind when she returned to her former course of life? If what he said can in any way be held to have been contributory in bringing about such a result, then all that is required to enable me to come to the same conclusion as your Lordships has been proved. I think that that is so, and, therefore, I agree in thinking that this divorce should not be granted.

THE COURT recalled the Lord Ordinary's interlocutor, and assolizied the defender.

GEORGE DUNLOP, W.S.—JAMES ANDREWS, L.A.—Agents.

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DUNCAN MACPHERSON, Pursuer.—*Trayner—Jameson—Kennedy.*
KENNETH MACKENZIE, Defender.—*Gloag—Millie.*

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Royal Burgh—Harbour Dues—Prescription.—Held that a charter of royal burgh is a *habile* title on which to prescribe a right to exact harbour and shore dues, and that the usage of exaction for more than the prescriptive period will fix the limits of the right.

2d DIVISION.
Lord Adam.
M.

IN September 1879 Duncan Macpherson, tacksman of harbour dues of the royal burgh of Fortrose, raised an action against Kenneth Mackenzie, steamboat owner, for payment of £30, 9s. 4½d., being the amount of shore dues, and that the usage of exaction for more than the prescriptive period will fix the limits of the right.

In October 1879 a second action was raised by Macpherson against the same defender concluding for payment of a further sum of £29, 1s. 9d., being the amount of further dues, part of which was incurred before the raising of the first action, but payment of which, the pursuer stated, he then believed was not to be refused. These actions were conjoined.

From the documents lodged in the process it appeared that prior to the year 1455 Fortrose, then known by the name of Chanonry, was the cathedral seat of the diocese of Ross. Adjacent and coterminous lay the burgh of Rosemarkie, which had been erected into a burgh by a charter of Alexander.—This charter is no longer extant.

By charter, dated 18th June 1455, James II. erected the villa of Fortrose into a free burgh, to be held and possessed by the Bishop of Ross, with all and singular privileges, liberties, and customs, as the burgh of Rosemarkie, and annexed and united Fortrose to the said burgh of Rosemarkie, and granted to the inhabitants of Fortrose all exemptions, liberties, and privileges conferred on the burgh of Rosemarkie, under the ancient charters and writs of Alexander and other kings of Scotland, or enjoyed or possessed by the said burgh past their own limits.

The charter next in date was granted by James VI. on 6th August 1590. By that charter, on the narrative of the above-mentioned charter of James II., and of the general revocation and annexation to the crown patrimony of ecclesiastical lands and villas, the king made, erected, and incorporated the villa lands, bounds, and possessions of Fortrose into an entire and free royal burgh, to be called the burgh of Fortrose. After providing for the government of the said burgh the charter granted to the magistrates and their successors the power "*emendi et vendendi omnes et quascunque mercantias res et bona sicuti aliqui alii nostri burgi infra regnum nostrum*

gaudent et possident, devorias et custumas ejusdem in talibus usitat. et consuetas ac observatas levandi et precipiendi, ac etiam locos forales infra dictum nostrum burgum et libertatem ejusdem ad effectum prædictum omnibus temporibus futuris quotiescumque eis videbitur expediens assignandi et faciendi." The charter proceeded,—“Ac etiam Damus, concedimus et nominamus præfato nostro burgo de Forterose præposito ballivis consulibus decanis et cummunitati ejusdem præsentibus et futuris duos dies mercatoriales i.e. marcat dayes, unum vero earundem hybdomadatam die lune et alterum die sabbati Ac etiam duas liberas nundinas vulgo i.e. feair dayes annuatim pro emptione et venditione omnium bonorum et rerum infra nostrum burgum et libertatem eiusdem prout eis videbitur expediens tenendus unus dies nundinarum prædictarum vulgo Saint Boniface day et alter vero vulgariter nuncupat. pardonne day omnibus temporibus futuris cum omnibus custumis devoriis et privilegiis in talibus usitat. et consuetis.”

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Further, by charter dated 4th November 1592, James VI. ratified and confirmed the charter of 1455 (which is engrossed therein), and ordained that Rosemarkie, with Fortrose annexed to it, and with the name to all time coming of the burgh of Rosemarkie, should be held a free burgh, and “gave, granted, and disposed all and singular the prerogatives, privileges, and immunities which it ever had or could have, or which in any way belong to it, or to any burgh whatever within our kingdom, of which they, and any, our free burghs, have had the use or enjoyment.” There being no reddendo inserted in the above charter, a new charter was granted by James VI., of date 18th December 1612, in which this defect was supplied, and the reddendo fixed at £3 Scots.

This latter charter of 1612 contained the following,—“Vnacum omnibus Tholoniis custumis et libertatibus ad hujusmodi pertinentibus vel quæ de jure ad quemlibet alium burgum infra dictum nostrum regnum cognosci possunt pertinere . . . Et generaliter cum tantis immunitatibus privilegiis libertatibus et prerogationibus pertinentibus vel que iure cognosci possunt ad quemlibet alium burgum infra regnum nostrum pertinere ut supra Preterea pro causis antedictis pro nobis et successoribus nostris De novo annexavimus univimus et incorporavimus dictum villam de Forterose dicto nostro burgo de Roismarkye sic quod unus sit burgus omni tempore affuturo Burgum nostrum de Roismarkye nuncupandum Et quod inhabitantes dicte ville de Forterose utantur et gubernantur per prefectum ballivos et consules dicti burgi de Roismarkye veluti burgenses et inhabitantes ejusdem burgi nostri de Roismarkye in omnibus que ad ipsum pertinent Tenendum . . . Adeo libere et quiete in omnibus et per omnia sicuti aliqui alii burgi infra regnum nostrum sine revocatione contradictione impedimento aut obstaculo quocunque.”

In 1641 this charter, with all those preceding, was ratified and confirmed by Act of Parliament.

Finally, in 1661, Parliament, on the narrative of the charter of 6th August 1590, and the instrument of sasine following thereon, and also of the charter of 18th December 1612, and considering the decay of the burgh of Rosemarkie, and the growing prosperity of Fortrose, and the unlawfulness of markets on the Lord's day, ratified and approved, and perpetually confirmed, the various charters granted by Alexander, James II., and James VI., and the possession thereon, in the hail heids, articles, clauses, and conditions conceived in favour of the said royal burgh of Fortrose, and whereby their privileges and liberties are anyways concerned and enlarged. This Act of ratification further ordained that the said towns of Fortrose and Rosemarkie should be in all time coming called the burgh of Fortrose, and have provost, bailies, council, and other

No. 135. members requisite for administration of justice. The Act further altered the market days, and made provisions of new regarding the annual fairs. The burghs of Rosemarkie and Fortrose accordingly continue to this day incorporated into one burgh, under the name of Fortrose, with all the rights and privileges conferred by, or exercised under, the foresaid charters and Acts of ratification.

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The pursuer in his first action averred,—“The magistrates and town-council have constantly, by themselves or their tacksmen, exercised the right of levying and exacting customs or dues on all goods and merchandise loaded or unloaded within the jurisdiction of the burgh, and on all vessels anchoring within the limits of its anchorage-grounds. Such customs are known as harbour and shore dues, and have been exacted from time immemorial, or at least for upwards of forty years past, upon all such articles and vessels. The district within which the magistrates possess the right of levying these dues is specially described in the minutes of let from 1834 onwards as embracing the whole shore and sea-board of the burgh, the harbour and bays of Fortrose and Rosemarkie, and the Point, and as extending from the burn of Rosemarkie on the one side to the Craigwood Burn on the other. The present harbour was erected in 1814-16, at an expense exceeding £3482, and the whole revenue available for its maintenance and repair is derived from the letting of the harbour and shore dues. Since the completion of the harbour the greater part of the traffic and lading and unlading of goods has been conducted there. But the said dues have always been let, exacted, and paid, not merely within the limits of the harbour, but at all points along the shore between Rosemarkie Burn and Craigwood Burn. There may have been instances of individual escapes or evasions, and individual tacksmen may have waived their rights in isolated cases, but the constant course for upwards of forty years has been as averred.”

He alleged further,—The defender “himself was tacksman of the said harbour and shore dues from 1856 to 1862, and duly exacted them. He also sat in the town-council for some years, and approved the annual minutes of let and other proceedings relative to the said dues. Up till the present year he has paid the dues demanded without demur, and, as already stated, applied to be exempted from anchorage dues, and succeeded in his application. On these facts he is barred by his own conduct from denying the title of the magistrates.”

The defender in his answers denied that the pursuer had any right to exact the dues sued for, and averred that the pursuer relied “entirely on the burgh charters, which contain no grant of harbour, and an alleged immemorial usage of levying and exacting dues at the rate sued for.” This usage the defender denied, and averred that in law “a charter of erection of a burgh without a grant of harbour is not a competent title on which to prescribe a right to levy dues.”

He further averred,—“The harbour of Fortrose was made in the years 1814-17 by the Commissioners of Highland Roads and Bridges appointed under 43 Geo. III. c. 80, at a cost of about £4000. One-half of the expense of erection was borne by the said commissioners out of funds intrusted to them under 46 Geo. III., c. 155, which was an Act for applying certain balances arising from forfeited estates towards making canals, harbours, &c. Of the other half, the Convention of Royal Burghs supplied about £630, and the remainder was raised by subscription among the proprietors adjacent to Fortrose, and the inhabitants thereof. No part of the expense was borne by the burgh of Fortrose as a corporation, nor had the burgh any grant of foreshore or right of property in the harbour. No fund was provided for the maintenance and repair of said harbour, or of

about twenty others erected in a similar manner by said commissioners, until 1823, when an Act, 4 Geo. IV., c. 56, was passed empowering an imposition of dues at moderate rates.

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"By section 35 of the said Act power was given to the commissioners, for the purpose of keeping in repair such ferry piers and shipping quays as they had erected, to exact payment of a sum of 2d. per ton on any ferry or other boat arriving at any of the said piers or quays, and a sum not exceeding 2d. per ton on any goods embarked on or landed from any vessel or boat (not being a ferryboat plying for hire nor a vessel whose tonnage is registered), and in cases of vessels whose tonnage is registered a sum not exceeding 2d. per ton on every ton of the registered tonnage arriving at or departing from such pier or quay."

The defender further alleged that he was charged higher rates than those allowed by the Act, and, further, that anchorage dues for which he was charged were not charges authorised by the said Act, the only place in respect of the use of which any charge fell to be made being the harbour made by the commissioners.

The defender pleaded;—2. The pursuer has no title to sue, in respect (1) the magistrates and council have no legal right to levy dues under their charters, or by prescription; (2) they have no legal right to levy dues at the rates sued for, and could not convey such right to the pursuer. 3. *Separatim*, The defender is entitled to absolvitor, with expenses, in respect (1) any dues which have been claimed have been always charged against senders and consignees of goods, and not against the owners of the vessels; (2) said rates were never posted up or brought to defender's knowledge; (3) the rates charged in the account sued for are illegal, and the pursuer's material statements unfounded in fact. 4. Otherwise said account is subject to deduction, in respect of charges for goods shipped and landed beyond the limits of the harbour.

Proof was led in the conjoined actions.

Such of the evidence as was necessary to the decision of the case is set forth in the opinions of the Judges.

The Lord Ordinary, on 7th February 1881, assolizied the defender.*

* "NOTE.—These actions are brought by the tacksman of the harbour and shore dues of the burgh of Fortrose for payment of £59, 11s. 1½d., being the amount of shore and harbour dues alleged to have been incurred by the defender between the months of October 1878 and April 1879 inclusive.

"The table of dues, with reference to which the present account is charged, was framed and published by the magistrates in 1863.

"The question is, Whether the magistrates of the burgh have right to exact harbour and shore dues at the harbour and beach of Fortrose?

"The magistrates maintain that the charters erecting Fortrose into a royal burgh, followed by immemorial use of levying shore and harbour dues, are sufficient to establish a grant of free port to the burgh, and to give them a title to exact shore and harbour dues not only at the pier or harbour at Fortrose, but also all along the beach, from the burn of Rosemarkie on the one side to Craigwood Burn on the other, a distance of about two miles, which they say are the boundaries of the burgh.

"It appears from the minute of admissions by the parties that of the accounts sued for £33, 1s. 3½d. is charged as the dues on goods landed at the pier or harbour, and £17, 17s. 8d. is charged for anchorage dues, which are charged when the vessel comes into the harbour, and for a coble going between the vessel and the pier when she remains without the harbour. The balance of £8, 10s. is charged as dues payable for articles landed on the beach within the boundaries of the burgh.

"It appears to the Lord Ordinary that the right of the magistrates to charge

No. 135. The pursuer reclaimed, and argued ;—The dues levied by the magistrates were levied, not under the statute of Geo. IV., but following on

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shore and harbour dues, and anchorage dues, in respect of the use of the pier or harbour, depends on different considerations from their right to charge dues on goods landed on the beach, and that it is necessary, in the first instance, to ascertain the circumstances in which the harbour or pier was constructed.

"By the 46 Geo. III., cap. 155, it was enacted that the balances arising from the forfeited estates in Scotland should be vested in the Commissioners for Highland Roads and Bridges appointed under 43 Geo. III., cap. 80, and should be applied by them, *inter alia*, in constructing or improving harbours, piers, or quays, under the same powers, rules, and regulations as were directed by the said Act with reference to the making of roads and bridges. By this last mentioned Act the commissioners were empowered, when one half of the estimated expense of any road or bridge should be engaged for, to advance the other half as therein mentioned.

"In 1813 the Magistrates of Fortrose and others presented a memorial to the commissioners, stating their desire to have a pier erected at Fortrose, that they were willing to contribute one-half of the expense of the undertaking, and craving the aid of the commissioners. The commissioners agreed to the proposal, and directed their engineer to make a plan and estimate of the pier or harbour. The harbour or pier was erected under a contract between the commissioners and certain persons on behalf of the magistrates of the burgh, and was completed in December 1817. The joint estimated expenditure appears to have been £4015, 6s. 6d., of which the commissioners paid £2007, 13s. 3d. Of the other half, £631, 5s. 9d. was obtained by the magistrates as a grant from the Convention of Royal Burghs, and the balance was raised by subscriptions obtained from parties in the neighbourhood interested in the undertaking. The burgh of Fortrose contributed nothing in its corporate capacity.

"No authority was originally given to charge dues for the use of the piers and quays constructed, as this one was, under the foreshaid Acts of Parliament, until the year 1823, when the 4 Geo. IV., cap. 56, was passed. By the 35th section of that Act, on the narrative that it was expedient to provide funds for maintaining the same in repair, it was enacted that it might be lawful for the commissioners to direct that no person should be permitted to embark from or to land on such pier or quay by means of any ferry boat plying for hire, or any other boat, unless and until a sum not exceeding 2d. per boat (at the discretion of the commissioners) should be paid for every such ferry boat, or other boat arriving at or departing from any such pier or quay, nor should any goods be embarked from or landed at any such pier or quay from any vessel or boat (not being a ferry boat) plying for hire, nor a vessel whose tonnage is registered, unless 2d. a ton be paid for every ton weight for such goods so embarked or landed (and proportionally for fractional parts of a ton), and in case of a vessel whose tonnage is registered, 2d. a ton for every ton of registered tonnage.

"No other or additional power of imposing rates or dues for the use of such piers or quays has ever been granted by the Legislature, and the Lord Ordinary is of opinion that these are the only rates that can be legally exacted for the use of such piers and quays. He is further of opinion that no rates or dues could be legally exacted until the commissioners so directed. There is no evidence in process to shew that the commissioners ever directed that rates should be levied at Fortrose, or to shew that they ever authorised the magistrates to levy them.

"It further appears from the 19th section of the Highland Roads and Bridges Act, 1862, which deals with the transfer of such piers and quays, that the harbour of Fortrose is classed in schedule B as one of the harbours which have, by local Acts or otherwise, been transferred to, and are now vested in, other bodies and persons than the commissioners. No evidence has been produced in process to shew by what local Act, or how otherwise, the harbour of Fortrose was transferred to, or vested in, the Magistrates of Fortrose.

the charters. The words in the charter of 1590, "*custumis devoriis et privilegiis in talibus usitat.*" gave a right to levy harbour dues.¹ "Tholonia,"

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"With respect to the alleged immemorial use and wont of the burgh to levy shore dues, it appears from the earliest records of the burgh which have been produced, and which extend from 1710 to 1717, that the magistrates were at that time making efforts to raise funds for the erection of a harbour, which they considered to be absolutely necessary for the good of the community and privileges of the burgh.

"In the year 1718 the 'customs' of the burgh are let without reference to any other dues.

"In 1722 the customs of the burgh, 'as they are now restricted to the customs of the two markets of *aqua vitae* and the anchorage of boats,' are let to a tacksman. In 1723 they are again let in the same terms. In 1726 the 'hail customs of the burgh, both great and small,' are set to Alexander Gun.

"On 17th October 1743 a committee of council have a meeting with Thomas Davidson, their treasurer, for the purpose of auditing his accounts. They then pass his accounts, 'reserving the consideration of his accounts of the harbour-money till a full meeting of the council.'

"At a meeting of the council held on 12th May 1744 it was resolved that the quarterly stent and certain other sums should be applied 'to the building of the harbour aye and until the £10 sterling borrowed from the harbour-money for payment of the town's stent be completely satisfied and paid.'

"In October 1744 the magistrates, in settling accounts with their treasurer, find that he has only discharged himself of £55, 16s. 10d. of harbour-money.

"No minutes of council meetings are produced between the above date and 1803. In that year the 'customs of the burgh,' with 'the duty paid on malt, spirituous liquors, and other customable goods brought to the town or shore for sale,' were exposed to roup, and were let to John M'Allan for £7, 8s. sterling.

"This continued to be the form in which the subjects were roup'd down to 1817, when the 'shore dues' were, for the first time, so far as appears, let separately, the customs being let to John M'Allan for £3, 4s., and the shore dues to John Dempster for £4, 13s.

"In 1823, by which time the pier or harbour had been erected, the 'shore or harbour dues' are let, and they continue to be let in this form until 1830. In that year the customs, with the duties paid on malt, spirituous liquors, and all other commodities customable brought to the burgh and harbour, with the shore dues from the 'Burn of the Craigwood to the Burn of Rosemarkie,' are let. This is the first time that any territorial limits appear to be assigned to the alleged right of port or harbour.

"At a meeting of the magistrates and council held on 8th June 1837, on the narrative that the principal table of shore dues had fallen aside, and only a printed copy of the same remained in the collector's hands, they authorised and authenticated 'the presently existing' table of shore dues for this burgh, and declare the same to be as in the table, a copy of which has been produced. When this table was originally framed and published there is no evidence to shew.

"The magistrates and council seem to have entertained the idea that they could alter the dues charged as they thought proper, and in 1845 they revised the table of dues of 1837, increasing some and diminishing other charges, and appointed the new table to be the rate of charges in time coming.

"In 1846 the magistrates and council seem to have come to entertain some doubt of their power to levy harbour or shore dues. In the roup of the dues for that year a condition is inserted that the tacksman of the shore dues or petty customs should not, as such, commence any process at law for the recovery

¹ Tomlin's Law Dict., art. "Devoirs;" Hale, De portibus maris, Hargreaves' Law Tracts, i., 131; Greig v. Magistrates of Kirkcaldy, May 21, 1851, 13 D. 975, 23 Scot. Jur. 442.

No. 135. which also occurred in that charter, was equivalent to "portoria" or port dues,¹ and was only used with reference to harbours. In legal documents
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of dues or customs without first consulting with, and obtaining the consent of, the magistrates.

"In the next year there is an additional condition inserted, to the effect that although the expositors considered they had right to levy dues within the bounds of the shore of the royalty, yet it was expressly understood that they do not guarantee power to the tacksman of the shore dues to exact such dues, except so far as they are exigible at the harbour or quay of Fortrose.

"The dues were let under these conditions and restrictions down to the raising of this action.

"It appears at a meeting of the magistrates and town-council, held on 24th August 1853, instructions from the Commissioners of Roads and Bridges were laid before them directing that a table of dues in strict conformity with the Act should be published and enforced at Fortrose, where more than the legal dues had been levied, and that they must furnish annual statements of receipts and expenditure on account of the dues levied, on pain of having the power to levy them withdrawn. These instructions were not attended to.

"In 1855 the magistrates and council approved of a new table of dues. It was not at all in conformity with the Act, but was merely an alteration, in some respects, of the former table.

"In 1863 they again revised the table of dues, and approved and enacted the one now alleged to be in force, and with reference to which the charges sought to be enforced in this action are imposed.

"From what has now been stated it appears that there is no evidence that the Magistrates of Fortrose were in use to levy harbour or shore dues prior to the erection of the pier or harbour in 1817. They were in use apparently to levy certain duties on 'customable goods brought to the town or shore for sale.' What these goods were, or what duties they paid, there is no evidence to shew; whatever the duties were they appear to the Lord Ordinary to have been of the nature of custom duties, and not of shore dues.

"Subsequent to the erection of the pier or harbour there is no doubt that the magistrates have been in use to levy shore and harbour dues at the pier or harbour. Before 1837 there is no evidence to shew either the amount of dues charged or the articles on which they were charged. Subsequent to that date and down to the raising of this action—that is, for a period of more than forty years, the magistrates have charged dues according to the table of dues issued in that and subsequent years.

"It is said that they have thus acquired by prescription a right to levy these dues. It appears to the Lord Ordinary that the right to levy dues at all depends upon the terms of the Act of Parliament under which the harbour or pier was erected. It is clear that the Commissioners of Highland Roads and Bridges themselves could not have acquired by prescription a right to levy dues higher or different from those specified in the Act of Parliament, which was their only title to levy any. It is equally clear that the Magistrates of Fortrose can have no higher right than the commissioners. The tables of dues of 1837 and 1863 are in no respect in conformity with the rates specified in the statute. They are therefore illegal, and the magistrates have no right to enforce them, in so far as regards the harbour and pier at Fortrose.

"This, however, does not dispose of the charge of £8, 10s., as the dues on goods not landed at the pier, but on the beach.

"The magistrates would appear not to be very sanguine as to their right to exact shore dues, as they neither guarantee them to their tacksman, nor allow him to sue for them without consent.

"The Lord Ordinary has already said that, prior to the erection of the pier or harbour, there is no evidence that the magistrates were in use to levy shore dues. It was not to be expected that after the harbour was erected, and

¹ Ducange, Feudal Glossary.

it was a vox signata, signifying marine dues. (2) The magistrates had a No. 135. burgh charter, and so had a good title on which to prescribe a right to levy dues.¹ A barony title with a grant of parts and pertinents will, if followed by possession for the prescriptive period, give a right of ferry,² and a barony title is an inferior title to a royal burgh title. There was no express boundary beyond that marked out by usage.

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Argued for the defender;—The pursuer had no title to levy dues at all. Rights of harbour have hitherto been of two classes only, (1) a right over a large extent of shore beyond the mere port; (2) a right over a port alone. As to the first of these there must be a special grant, and the boundaries must be clearly defined.³ This was the right claimed by the pursuer. None of the things *inter regalia* has ever been prescribed by a burgh without a special grant, though a barony title is habile to do so. Thomson, in his Acts of Parliament, contrasted “tollonia” with “custuma portium” (pp. 667-671.)

LORD JUSTICE-CLERK.—This is a very important case relative to the burgh of Fortrose. There are two actions raised at the instance of Duncan Macpherson, tacksman of the harbour and shore dues of the burgh of Fortrose, against Kenneth Mackenzie, steamboat owner, residing at Rosemarkie, for the recovery of shore and harbour dues.

The defence to the two actions is that the pursuer has no right to levy pier and harbour dues, and it is said further that even if he had, the charges made in the account are on goods, some of which, at all events, were landed beyond the limits within which the magistrates or their tacksman can be supposed to have jurisdiction or power to levy rates, and that the rates charged are in excess of any rates which can be called legal. It is also pleaded that the magistrates had lost any right that they ever had, by reason of the pier having been allowed to fall into disrepair.

We have had a very able argument on the first question, namely, whether the

facilities thereby afforded for the landing of goods, the beach should be much used for that purpose. It appears to the Lord Ordinary that the pursuer has entirely failed to prove that the magistrates have for time immemorial levied dues on goods landed on the beach. He is therefore of opinion that the defender is entitled to be assolized from the conclusions of the action.

“The charters founded on by the pursuer, which are set forth in articles 2 and 3 of the condescendence, contain no express grant of a right of port or harbour, and no definition of any boundaries of a port or harbour. The question was argued at considerable length to the Lord Ordinary whether an express grant was necessary to confer a right of port or harbour, or whether the terms of the charters were sufficient when followed by immemorial use of levying shore or harbour dues, to establish such a right. As the Lord Ordinary thinks that the pursuer has entirely failed to prove immemorial use he has not thought it necessary to decide that question.”

¹ Stair, ii., i. 5; Craig, i. 15, 15.

² Duke of Montrose v. Macintyre, March 10, 1848, 10 D. 896, 20 Scot. Jur. 317; Farquharson v. Earl of Aboyne, Dec. 2, 1679, M. 10,879; Heritors of Don v. Town of Aberdeen, Jan. 26, 1665, M. 10,840.

³ Magistrates of Edinburgh v. Scott, June 10, 1836, 14 S. 922; Magistrates of Campbelltown v. Galbreath, Dec. 14, 1844, 7 D. 220, 482, 17 Scot. Jur. 107; Stair, ii. 3, 61; Ersk. Inst. ii. 6, 17, and 18; *Ibid.* ii. 1, 5; *Ibid.* iii., 7, 14; Bell's Prin., secs. 654 and 755; Earl of Stair v. Austin, Dec. 2, 1880, *supra*, p. 183; Colquhoun v. Paton, Dec. 15, 1853, 16 D. 206, 26 Scot. Jur. 104, 17th June 1859, 21 D. 996; Magistrates of Renfrew v. Hoby, Jan. 18, 1854, 16 D. 348, 26 Scot. Jur. 165.

No. 135. magistrates have any right to levy dues under their charters or by prescription, and it is to that question I am to address myself. In regard to the details of the account, and the other matters that are suggested, we thought it unnecessary to hear the parties.

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The question then is, whether the burgh of Fortrose or its tacksman has a right to levy these dues. That, as I have said, becomes a very important question. The Lord Ordinary has substantially found that the burgh has no such right; and that whether dues have been levied or not the magistrates had no title whatever under which they could levy them. The result of that judgment would be that the burgh of Fortrose for the future would be left without the means of maintaining the harbour.

I think that that is a more serious result than the Lord Ordinary had in view. For not only are they left without the means of maintaining the pier, but they will cease from the exercise of rights which have been exercised far beyond the prescriptive period.

We come to the consideration of the case with the admitted or all but admitted fact before us that for a period of sixty-three years these rates have been levied by the Magistrates of Fortrose without any interruption. The rates may not have been exactly the same all that time, because I think there is evidence of their having been raised, but practically they have been the same.

I must own that in a matter of custom and dues I consider that fact almost conclusive in itself. It will require very little title, in a municipal matter of that sort—not being a matter affecting private right, but seriously affecting the course and progress of trade—to validate a course of exactions which has subsisted for a period a half more than the prescriptive period.

But the answer of the defender is, in the first place, that the charter of the burgh gives no express grant of port and harbour, and that a right of port and harbour cannot be exercised unless the grant be expressed—that is to say, unless the words “port and harbour” appear in the grant. In the second place, it is said that the exaction of dues could only be valid on the supposition that they were exacted in respect of an authority or supposed authority conferred by the Commissioners for the making and keeping in repair of the Highland Roads and Bridges, Commissioners, who, we all know, were appointed with statutory powers to administer the forfeited estates in the last century. It is further contended that as the only right, apart from a crown-right, which the burgh could have acquired to levy rates, must have been from the Commissioners I have referred to (who, although appointed about the time already specified, continued to exercise their functions down to a much more recent date), and that right never was derived from the Commissioners, that therefore whatever dues were levied and paid, the exaction of them could not now be pleaded against the defender.

I am of opinion that all these contentions are not well founded. I think the burgh title was quite sufficient to prescribe, or rather to fix, by usage, the extent and limit of the powers of the burgh.

I am of opinion, separately, that the Commissioners of Highland Roads and Bridges, while they were entitled to make advances to the burgh for the benefit of the harbour, in the same way as they were entitled to make advances for the carrying on of any other public work in the north of Scotland, were in no respect either proprietors or administrators of the harbour in question, and that the burgh itself derived no title from them on any such footing. I should have

been inclined to think also, even had it been different, that that would have been no answer whatever to the demand which is made here. No. 135.

I shall endeavour very shortly to express my opinion upon these somewhat important matters without trying to deal with the questions exhaustively, which, in present circumstances, I am not in a fit position to do. May 21, 1881.
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And, first, in regard to the charter of the burgh :

It has been laid down by Stair, and it has been ruled in various cases by high authority, that a right of port and harbour—that is to say, a right to exact dues in respect of accommodation afforded in the harbour—may be acquired by prescription. Quite true, the defender says that Mr Erskine (ii., vi., 17 and 18 ; ii., i., 5) lays it down that it can only be acquired by express grant. Both writers I have mentioned are of the very highest authority as institutional writers ; but I venture to say that Mr Erskine must there have been speaking of an express title, and not of a title to prescribe. Stair's opinion in both the passages that were quoted is quite precise, and upon such a matter no authority is higher, or even so high, as his. I do not refer again to the opinion of Lord Cowan in *Colquhoun's* case, who lays down the law as a matter beyond all dispute precisely as Stair puts it. And therefore upon that question I am with the pursuer, thinking that the general title may be ascertained and defined by usage.

But there must of course be a title on which such a right can be prescribed. I do not think it necessary to deal with the question whether an ordinary infeftment in lands bordering on the sea-shore, coupled with the use to exact dues, would be sufficient to give the right. I am not by any means sure that it may not. But we are dealing here with a community having a charter of erection and *nomen universitatis* ; and we are dealing, besides—which is very important—with a matter cognate and incident to the municipal character. It is quite true that the charters have no words of port and harbour ; but it will be remembered, in the first place, that this is a sea-bounded burgh, and, in the second place, that it is a harbour—a natural harbour—but still a harbour. I may refer to an Act of Parliament passed in 1861 to facilitate the construction and improvement of harbours by authorising loans to harbour authorities. The interpretation clause of that statute (24 and 25 Vict. cap. 46) bears that “ the word ‘ harbour ’ shall include harbours properly so called, whether natural or artificial estuaries, navigable,” &c. Thus nature has made a harbour here, and the Crown had set down a municipal authority, within whose limits at all events the harbour was necessarily fixed ; and therefore this was a natural incident of the burgh community. In the passage quoted from Craig—which carries great weight—I think it was explained that the most appropriate recipient of a grant of this kind of port and harbour was a municipal corporation, because such a grant was not usually made to individuals, it being thought that the means and revenues of an individual would be insufficient for the proper maintenance of harbour works. That is very distinctly laid down in the passage quoted from book i. tit. xv., sec. 15, where he says—“ *Portus autem publici juris sunt, et inter regalia numerantur: tamen et privatorum, saltem universitatum proprii aliquando fiunt, ita tamen cuilibet appellere, onerare naves et exonerare in eis liceat, dummodo portoria solvat.*”

A burgh is a *nomen universitatis*, and it has been argued—although we were not referred to much authority in regard to that matter—whether or not in that respect it is on the same footing as a barony in regard to prescription.

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Now, without resolving that question absolutely, I should say that in a matter of this kind, Fortrose having a clear municipal charter, and necessarily the incidents of a seaport burgh, it has especially a title to prescribe such rights as the present; and, independently of that, this is not a mere erection into a burgh. It is an erection with a considerable amount of specification, and the specification is so wide that I cannot conceive that, interpreted by usage, it will not extend to and include the right of levying these harbour dues.

There are two charters; the second of them is the widest—the charter of Rosemarkie, dated 18th September 1612—and that erects the burgh “*unacum omnibus Tholoniis custumis et libertatibus ad hujusmondi pertinentibus vel quæ de jure ad quemlibet alium burgum intra dictum nostrum regnum dignosci possunt pertinere. Necnon cum potestate ipsis preposito ballivis et consulibus dicti nostri burgi communitatem eidem pertinentem tam de Roismarkye quam de Fortrose eidem unitam cum suis pertinentiis in particatas burgales hereditarie ipsis burgensibus aliisque inhabitantibus pro edificatione et reparatione dicti nostri burgi disponere. Et generaliter cum tantis immunitatibus privilegiis libertatibus et prerogationibus pertinentibus vel que jure cognosci possunt ad quemlibet alium burgum intra regnum nostrum pertinere.*”

The words in the first part of this clause are capable of more than one meaning. They are generic words; and “*Tholoniis*” is stated by Ducange to be appropriate to customs in relation to matters maritime:—“*Tholoniis—that is, customs levied on persons coming by sea.*” If the words, therefore, be general, they may be construed by usage, if they are capable of such a meaning.

Therefore on that first question I am of opinion that this burgh charter is a title on which a right of port and harbour may be prescribed.

The next question is, whether a right of port and harbour has been prescribed? On that matter, if nothing had been introduced about the Commissioners for making and repairing Highland Roads and Bridges, no doubt exists, because since the erection of the pier in 1817 these dues have been levied without exception down to the present time. But the matter does not rest there. I quite grant that the proof of usage is scanty enough between 1717 and 1814, but I think there is quite enough there, joined with the subsequent usage, to infer constant and continuous exercise of this right of harbour. I need not, I think, go over the evidence in detail. From 1717 the burgh authorities levied anchorage dues. The proof of it occurs only from time to time, but that proof necessarily implies some continuous use, because the harbour dues were let along with the burgh customs. It is, in my view, in vain to say that anchorage dues are simply dues on goods brought in. That is not the meaning of the term at all. It is dues for the use of the harbour, and not for the goods brought in from time to time. I need hardly say that I refer to the expressions which occur in the minutes of the town-council.

It must also be remembered that the burgh people from time to time improved their harbour for the purposes of a harbour—necessarily implying that they were asserting their right to improve the harbour of which they were in the possession and use.

Therefore I am of opinion that the title is quite sufficient, and the possession proved is beyond all manner of doubt.

But then comes this idea, that the Highland Roads and Bridges Commissioners in some way or other were the proprietors of this harbour—that it was

not the magistrates of the burgh who levied the dues but the Commissioners of the Highland Roads and Bridges, or, at all events, that the magistrates in levying the dues were levying them upon the title of these commissioners. On the contrary, I am of opinion that the view on this head maintained from the bar from first to last proceeds upon a total misapprehension of the fact. The Lord Ordinary goes so far as to say that the pier, which was begun in 1814 and finished in 1817, was built under an Act of Parliament—"It appears to the Lord Ordinary that the right to levy dues at all depends on the terms of the Act of Parliament under which the harbour or pier was erected." This, however, is a mistake. It was no more built under an Act of Parliament than it was built by the Convention of Royal Burghs or by the Commissioners of Supply. Down to 1823 there was no Act of Parliament authorising such a thing. The Act of Parliament having reference to this matter authorised the Commissioners of Highland Roads and Bridges to make advances of money to those persons who were about to build a pier. In this instance they did make advances—they made advances to the Magistrates of Fortrose; and the Magistrates of Fortrose made as strong an assertion of their rights of port and harbour as I can conceive. It was only a subvention that the Commissioners of Highland Roads and Bridges were authorised to make or made. That subvention was not the only means by which the works were brought to completion. It was supplemented by landowners in the neighbourhood, by persons in the burgh, and by the Convention of Royal Burghs, but the Magistrates of Fortrose, who had the right to it, within whose jurisdiction it was, remained administrators of the funds. It is not of the slightest moment whence the funds came, the fact being that the burgh, out of funds they acquired, built the pier.

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Six or seven years after that an Act of Parliament was passed which gave these Highland Roads and Bridges Commissioners the power in certain circumstances to authorise or direct the levying of rates for the support of the piers for which they had previously made advances. What would it signify that the Commissioners had authorised the Magistrates of Fortrose to do this? Would that have been a different state of matters in regard to the authority and proceedings of the magistrates? On the contrary, it would still have been competent to shew that the dues which were levied after 1823 had been levied before 1823.

But, unfortunately for the defender here, he pleads on his record that the Magistrates of Fortrose have not acquired any such right at all from the Commissioners, and I am of opinion that that plea, which the Lord Ordinary has sustained, is as matter of fact perfectly well founded. It is perfectly true that the Commissioners of Highland Roads and Bridges did make over this harbour to the Magistrates of Fortrose—a fact which, I think, has a tendency all the other way. But there is neither grant nor direction by them that the dues which they were authorised to collect were to be levied by the Magistrates of Fortrose. And I rather imagine that such was not the fact. The Magistrates of Fortrose had continued to levy dues from 1814 down to 1823 under their own authority. And they continued to do exactly the same thing after that date. Even if they had had a right given them by the Commissioners, their continued exercise of the right of levying harbour dues from 1814 to 1817, and down to the present time—a right which so far as we see they never ceased to exercise—did not originate with the Commissioners. Nor

No. 135. is it disputed that the dues that were levied are just the dues which the Act of Parliament authorised. That seems to me to be conclusive, and to put the matter beyond all doubt; the Magistrates took over the power of the Highland Roads and Bridges Commissioners, and extinguished any connection they ever had with the pier.

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In conclusion, let me say that I think there is an entire mistake as to the position of the Commissioners. Those Commissioners were simply appointed to make advances out of the funds derived from the sale of the forfeited estates, and they were to make these advances, and did make them to great public advantage, for harbours and roads in the Highlands. There was no obligation upon them to administer—they had a certain limited power to administer in cases where they thought fit—a power which they did not exercise, and in so far as they did not exercise any power of that sort, they were simply in the position of trustees handing over funds provided by the state for the purposes I have referred to, such as for harbours and bridges, in this case for the benefit of the harbour of Fortrose.

On the whole matter, I have come, without any difficulty, to the conclusion that the magistrates are entitled to continue the exercise of the right which they have now apparently exercised for so long a period.

LORD YOUNG.—I am entirely of the same opinion, and have really nothing to add. In the observations of a general character on the general law as applicable to the particular case before us, in its material features I quite agree with all that your Lordship has said. The general question before us—I mean as applicable to the burgh of Fortrose—is of public interest undoubtedly, but I think the public interest is with the pursuer of the action, and not with the defender. In point of fact, there is a harbour at Fortrose, whatever the real character of it may be,—that is to say, there is a place suitable for landing and embarking, and conveniently situated with reference to the requirements of the district. There is a district conveniently served by it, and accordingly resort is had thither for landing and embarking. That is a harbour. Is it a private harbour? There are plenty of private harbours in the country belonging to private individuals, and used for their own purposes—their own estates and their own people—and to which the public have no right to resort without special permission. And such harbours may belong to societies. Is this a harbour of that sort, or is it what is in legal language called a “free port,” which means, not that people may resort there without payment, but that it is free to all upon paying such dues as the accommodation afforded requires, or usage or law otherwise has established at the particular place? This harbour, then, is open to all the subjects of the Queen, and indeed to all nations and people who are at peace with the Queen. I take it there is no doubt of that. Nobody can prevent them going there. Well, then, it is a “free port,”—free to all. Not just as an open part of the shore where without trespass people may land or embark, but as a recognised harbour, a spot selected and improved, more or less, to which, beyond the memory of man, people have resorted for landing and embarking. And I suppose, referring to one's general understanding, we may conclude that to the existence of this port here the town of Fortrose owes its existence. It was not made a port on account of the village standing there, but the village was built there, which has enlarged itself, in point of dignity at least, into a royal burgh, because at that point there was a good harbour. It is erected into a

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burgh, the community built houses and established a village there, and that community is erected into a burgh; and the question is, what is this royal burgh? In order to ascertain the territorial limits of it, to begin with, in so far as these are not specified in the charter—and these are very rarely specified in the charter—you must have resort to usage. And there can be no doubt, as matter of right and law, that by proof of usage or possession you may well ascertain the territorial limits comprehended within a grant of royal burgh. It is not that anything may be acquired by the law of this country by possession or usage only,—it is that you explain the grant, the extent of the grant, in so far as it does not express itself by specifying and prescribing limits, by evidence of what was done under it. The usage is proof, not because usage *per se* affords a title to anything, but because it explains and interprets the grant which is the title. Now, upon the question, what is the burgh here? does it extend to the sea-shore, and include the sea-shore? The grant does not say, it does not mention the sea although the sea was there, in fact with the shore as a necessary accompaniment. Does the grant comprehend the sea-shore? To ascertain this, the question is put, How do the community act under the charter—did they possess the sea-shore? The answer upon the evidence here is, Yes, they did possess it; they made such use as alone could be made of it as a place of landing and embarking; they improved it for these purposes, and they made charges upon all those who resorted to it, for the purpose of defraying expense incurred. That was the only use that could be taken. They had certainly done that for sixty years at least, and there is evidence sufficient, having regard to the nature of the particular case, that that usage extended a long way back beyond the sixty years. It has been said more than once that the proof of usage is scanty. No doubt the whole affair is scanty; the harbour was scanty; the resort to it was scanty; everything about it was scanty; and the evidence must be scanty. But you have such evidence as might be expected, as a whole, with reference to usage in such a matter.

Then was the harbour included? What I have said shews that it was, for the harbour just consisted in the landing and embarking there. The burgh performed the duties—I daresay very scantily—of improving the natural features of the harbour, making it more commodious for the purpose, and exercised the right corresponding to these duties of exacting dues for the accommodation afforded. Well, join all these things together, with the free resort there without let or hindrance of all the world who are desirous of resorting there, and you have what is called a “free port” or harbour. Well, was that within the burgh or not? It is very commonly included in a burgh in a similar situation, so commonly that I am not aware of any instance of any royal burgh with a harbour, *i.e.*, with a harbour adjoining, in which the harbour was not part of the burgh. I put the question whether there was any such instance, and received the answer, that if there was it was not known. Well, there exists here a free port or harbour. The charter does not say whether it is within the burgh; but, as already said, the question what is the burgh, in so far as the charter does not specify, must be determined by usage. There are some things that do not need to be expressed, but would be implied,—jurisdiction, watching, and warding; the right and the duty of providing market accommodation. All these things are comprehended in the notion of a burgh, which is not merely a grant of land, but the erection of a community into a corporation for certain purposes advantageous to the whole, and the advantage is not limited to that community itself. It is a

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No. 135. *nomen universitatis*; it is not merely a grant of land; it comprehends many things besides the mere property of the land granted to the community, and port and harbour is one of those things which it frequently comprehends, and if it be not expressed I see no reason for not resorting to usage for the answer to the question, Does the particular burgh include it? The answer we have here quite distinctly, although no doubt beyond the sixty years the evidence is scanty, because scantiness is the nature of the whole matter before us. That being so, the magistrates, as the trustees of the community and the guardians of the community's interest, being impecunious, as they were likely to be in such a place, apply for aid to the Commissioners of Highland Roads and Bridges. They get that aid, and they build this pier, *i.e.*, they improve the accommodation of the harbour, and that is the beginning of the sixty years which the Lord Ordinary refers to. Having so improved it, they are able to give better accommodation, and their exaction of dues is more distinct. This continues down to the present, and what is there against it? Nothing at all. With the aid which they got from the Commissioners—and they might have got it from public subscription, indeed they appear to have got part of it from that—they might have got the whole from people interested, what does it matter?—they were enabled to set to work and to apply themselves to the improvement of the harbour, and they exacted dues from those of the public who resorted to it, all the public being entitled to resort. But the Act of Parliament to which the Lord Ordinary refers has no other concern with the matter at all. To be sure, if there had been no other way of raising money in order to maintain the harbour, by statute 4 George IV., cap. 56, the Commissioners themselves were entitled to impose dues. But that had nothing to do with the existence of the harbour, and the rights and duties connected with it, which belonged to and were performed by the grantees, *i.e.*, the community. In that I entirely agree with your Lordship.

That being so, the defender here, as one of the public, habitually resorts to this harbour with his steamer for his own profit, and thus takes the use of the accommodation provided there. Does not he maintain, and is not it in the interest of the community that he should maintain successfully—although he is suggesting the contrary here—that the magistrates are bound to improve the harbour, and keep it available for his accommodation, and for the accommodation of others? But, according to the Lord Ordinary's judgment, there is no obligation on the magistrates at all; it is not a free port and harbour; the magistrates have no duties and no rights at all. I cannot say that that is the view in which the community is interested. I think the community is interested that this shall be a free port and harbour, vested in this community, with the duty of maintaining it, and with the right of exacting dues necessary to enable them to perform that duty. But, according to that view, this action is well founded. The right to levy dues is corresponding to the duty of the community. If that be so, and these dues, reasonable in themselves, are generally in conformity with the usage of forty years, I hope, for the matter of a few pounds, probably only a few shillings, we shall not have this litigation prolonged. The dues are not fixed by Act of Parliament; the harbour is not of sufficient dignity and importance to require a statute to regulate it. As it is, the only measure is "reasonable dues," not transcending, generally speaking, the usage which is established here. I use the word "reasonable" with reference to the nature of the harbour, and the duty imposed upon the community in regard to it. The mere taxation of the account here sued for may be of interest in views which do not occur to

me at this moment, but I hope the parties will now enable us to dispose of the whole case. No. 135.

I agree with your Lordship that the Magistrates of Fortrose, as representing the community, have the right of port and harbour, with the duty of maintaining it, and the corresponding right of levying customary harbour dues necessary to enable them to perform that duty. May 21, 1881.
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LORD CRAIGHILL.—I concur with all that has been said by your Lordship and by Lord Young.

There is no doubt that this question is one of interest, not merely to the parties, but also to the community of which it may be said Fortrose is the central point. The magistrates, if the pursuer succeeds in this action, have power to levy such dues as are according to law, and upon them lies the obligation to maintain this harbour, so that it may be of use to all those who desire to resort there. And it is this last, certainly quite as much as anything else, that gives the right to levy dues.

The first question raised by the defender is whether there is any title in the magistrates to this port and harbour, to which the public have been in use to resort from time immemorial, giving them a right to demand harbour dues. What the defender says is that in the case of a burgh, if there is to be a right of port and harbour, it must be the subject of an express grant. I confess that I was startled by the proposition when I heard it, and I have heard nothing to satisfy me that it is according to law as recognised by the authorities. How it should come to pass that a royal burgh should be in a worse predicament than any other of those bodies by whom regalia may be possessed, I was at a loss to understand. The burgh charter—a *nomen universitatis*—is a title upon which to prescribe. Beyond all doubt in the case of a barony there is a title upon which possession can run into prescription. The authority of Stair goes much further than this, because in the first of those passages quoted to us he says that a right of port and harbour may be available which is possessed by the private right of an individual. According to Stair, custom itself, of course upon a title, will be enough to support a right of port and harbour. Now, I should think, with reference to the authorities, and to the considerations of expediency, the acquisition of a right of port and harbour, in place of being more difficult for a royal burgh than for others, may be easier. There is a great deal of presumption in favour of the burgh here. There is a shore suitable for port and harbour, and the idea that where there has been use, and a harbour called into existence, where the magistrates are the persons by whom the harbour has been maintained, and they have levied dues for the use of the harbour, it is not to be presumed that there is a title, if there is nothing more than a grant of royal burgh, without specifying port and harbour, is what I cannot understand. The mere *nomen universitatis* is regarded by Craig as of itself sufficient; he says that in every case, whether there is an express grant or not, port and harbour is to be looked upon as belonging to the burgh. And the same thing is meant by Bankton, b. i., t. 3, sec. 4,—“The privilege of port and harbour, and of exacting such dues for keeping it in repair, is for the most part granted to cities and burghs where they lie, and sometimes also to private parties for the public good and encouragement of navigation.” Wherever you have a burgh then with a port and harbour, surely the presumption is not against acquisition if there has been possession, but, on the contrary, is all in its favour. Therefore, it appears to me that a royal

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The only question remaining is, Has there been possession? The evidence is such as leads me to the conclusion that there has been possession. The possession for the last sixty years is plain enough. That there are tables of dues, recognised charges during that period, there is no controversy. That there had been something of the kind in the eighteenth century is pretty clear, though the evidence is not so abundant, but that is accounted for by the consideration that the period is so much further back. What we have, however, leads to the conclusion that there must have been harbour dues levied and dealt with by the burgh as part and parcel of their grant. You have anchorage dues for instance, in 1718; after that you have reference made to "the harbour fund," wherever it came from, whatever it was, a fund of such an amount as enabled the burgh to borrow from it for other purposes. And before 1823 we have harbour dues expressly specified as one of those rights which were exposed to public roup. That all shows, as I think, that prior to 1823, when the Act of George IV. passed, there was a harbour, and dues were levied by the magistrates. If that is so, coupled with the possession which has followed since, it appears to me that we are necessarily led to the conclusion that there is a title, and that upon this title it is to be held that these dues can be levied, and, consequently, that possession has explained what is comprehended in the charter forming the burgh title. }

But it is suggested that whatever was the case before 1823, matters were changed by the Act of George IV. I entirely agree on that subject with your Lordship and Lord Young. The Commissioners of Highland Roads and Bridges were never owners of any of those piers which were erected in part through the assistance given by them. Monies were placed in their hands, not that they might become proprietors, but that they might assist those interested in establishing certain piers. They at first could scarcely be regarded as creditors. It does not appear that there was any right conferred upon them of demanding repayment of the amount of their contribution. It appears that by the Act of 1823 they were empowered to give directions to levy a fee of 2d per boat for the use of piers erected through their subvention. But it is very remarkable that in this case there was never given any such direction. Was it of no interest to them that this pier should be kept up? The power required to be exercised only if there was not another way of maintaining the pier. Now, it appears to me that where the assistance was given to a royal burgh which had, or presumably had, a right to collect shore dues for the maintenance of the harbour this particular power given in 1823 was a power the exercise of which was not required; it was not necessary to collect this 2d., which was the whole amount the Commissioners could levy.

All the evidence goes to show that after 1823 this power, which was to be exercised when necessary, was in the case of *Fortrose* not required, because presumably there were other funds available for the purpose administered by the parties in right of the port and harbour, by means of which the harbour could be kept up. It is not necessary to say anything further in support of the view taken by your Lordship and Lord Young, in which I fully concur.

THE COURT recalled the Lord Ordinary's interlocutor, repelled the defences, and decerned against the defender for £44.

PRINGLE & DALLAS, W.S.—WATT & ANDERSON, S.S.C.—Agents.

JAMES CLARK, Pursuer.—*Trayner—Brand—McKechnie.*

No. 136.

MRS AGNES DENHOLM OR CLARK, Defender.—*J. Campbell Smith—Rhind.*May 25, 1881.
Clark v. Clark.

Husband and Wife—Conjugal Rights Act, 1861 (24 and 25 Vict. c. 86), sec. 16—Reasonable provision to wife—Whether husband had obtained complete and lawful possession of the property.—A wife having received from her father a sum of money, was allowed by her husband to deposit it in bank in her own name, which she did for two years. She then, with her husband's knowledge and consent, uplifted it and invested £450 in heritable property, taking the title in favour of herself and her heirs and assignees. The rental of the property was about £30 per annum. The husband some years afterwards brought an action to set aside the conveyance in his wife's favour as a donation *stante matrimonio* and revocable. *Held* that the purchase having been made with funds of the wife, of which, though they undoubtedly fell under his *jus mariti*, the husband had never "obtained complete and lawful possession" in the sense of the 16th section of the Conjugal Rights Act, 1861, he was bound in terms of that enactment before claiming the property to make a reasonable provision therefrom for his wife, and that in the circumstances the conveyance in question, which did not exclude his *jus mariti* from the rents during his life, but only secured the property to his wife after the dissolution of the marriage, was no more than a reasonable and moderate provision, and could not be revoked.

Observed (per Lord President) that "complete and lawful possession," in the sense of the Conjugal Rights Act, 1861, sec. 16, means something more than a good title to possess, and implies not control merely but actual possession.

IN 1865 Mrs Agnes Denholm or Clark received from her father, David Denholm, who was then still alive, a sum of money, of which she placed on deposit-receipt in her own name with the Commercial Bank of Scotland at Dunbar, on 5th July 1865, £440. This sum was increased by the addition of a farther small sum, to which Mrs Clark succeeded from an aunt, to £495, and was redeposited on 10th November 1865. It was again increased to £500 on 25th May 1866, and reduced to £460 on 22d March 1867, the deposit-receipts being always taken in Mrs Clark's name. The fund fell under the *jus mariti* of James Clark, Mrs Clark's husband, but he did not intromit with it or interfere with her dealing with it as her own, and accordingly, on 26th November 1867, the last mentioned deposit-receipt was uplifted and the proceeds employed to pay for a small heritable property in Dunbar, which had been bought by Mrs Clark with her husband's knowledge and consent. The disposition to this property, which was dated 28th November 1867, was taken in these terms:—"I George Denholm, of Ninewar, heritable proprietor of the subjects herein-after disposed, in consideration of the sum of £450 sterling, instantly paid to me by Mrs Agnes Denholm or Clark, wife of James Clark, tenant of Springfield, as the price thereof, do hereby sell and dispone to the said Agnes Denholm or Clark, and her heirs and assignees whomsoever, heritably and irredeemably, All and Hail," &c.

1st Division.
Lord Adam.
B.

The rental of the subjects was about £30. Mrs Clark had besides a lifeferent right to the *pro indiviso* half of certain other lands which had been left her by her father, and which yielded her about £40 a-year. There was no exclusion of Mr Clark's *jus mariti* from the rents of the property purchased in Mrs Clark's name, or from her life interest in her father's estate. Mr Clark was tenant of a large farm. He had received through his wife certain other sums, the amount of which was disputed, but which was certainly not less than the amount invested in heritable property in Mrs Clark's name.

Mr and Mrs Clark having separated in or about 1874, Mr Clark, on 19th May 1880, raised this action against his wife, to have it declared

No. 136. that the conveyance of the Dunbar property in her favour "was a donation by the pursuer to the defender, *stante matrimonio*, and that the same is revocable by the pursuer, and that he is entitled to revoke the same." May 25, 1881.
Clark v. Clark.

In defence Mrs Clark pleaded;—(3) The defender having obtained, by donation or bequest, the fund out of which she paid the price of the heritable subjects in question, the same did not fall under the pursuer's *jus mariti* or right of administration, in respect that he did not claim or obtain possession of it, as set forth in the "Conjugal Rights (Scotland) Amendment Act, 1861."* (5) The subjects in question being no more than a reasonable provision for the defender's support and maintenance, the present action is, in respect of the provisions of the statute cited, untenable in law. (6) *Esto* that there was a donation, it is irrevocable, in respect that it was a provision made for the defender, and was and is not more than reasonable.

The Lord Ordinary, after a proof, pronounced this interlocutor:—"Finds that the disposition of date 28th November 1867, taken by the pursuer in favour of the defender, his wife, was, in the circumstances, a reasonable and onerous provision made by him for her as his wife, and is not revocable by the pursuer: Therefore sustains the sixth plea in law for the defender, and assoilzies her from the conclusions of the action," &c.†

* By the 16th section of "The Conjugal Rights (Scotland) Amendment Act, 1861," it is enacted as follows,—“When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband, or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti*, or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and, in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session, according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*; provided always that no claim for such provision shall be competent to the wife if, before it be made by her, the husband, or his assignee or donee, shall have obtained complete and lawful possession of the property.”

† “NOTE.—At the conclusion of the proof the Lord Ordinary stated the grounds on which he was of opinion that the money paid for the subjects contained in the disposition above mentioned was in law the property of the pursuer, and that therefore no question arose under the 16th section of the Conjugal Rights Act. But he took time to consider the question raised by the defender's sixth plea in law, whether the disposition was to be regarded as a pure donation by the pursuer to his wife, or whether it ought not to be regarded as a reasonable provision by him to her, and therefore not revocable. There was no marriage-contract between the parties. The pursuer is under a natural obligation to provide for his wife, if not otherwise sufficiently provided for. She appears to be only provided in a sum of £40 per annum, being one-half of the rents of a small property called Howburn, the liferent of which was left to her by her father, the pursuer during his life being entitled to the rents. The pursuer is also entitled to the rents of the subjects now in question during his life. The information furnished as to his means is not very satisfactory, but he is the tenant of a considerable farm, and appears to be in comfortable circumstances. A few years ago he came into possession of a sum of £500 left to the defender by her uncle; and, besides household furniture of some value, he succeeded, in right of his wife, to a sum of about £100. In these circumstances, a provision of £450, which was the price paid for the subjects in question, does not appear to be more than a reasonable provision for his wife.—*Rust v. Smith*, January 14, 1865, 3 Macph. 378; *Galloway v. Craig*, 4 Macq. 267; *Kinnear v. Ferguson*, November 7, 1871, 10 Macph. 54.”

The pursuer reclaimed.

No. 136.

LORD PRESIDENT.—In this case the pursuer seeks to set aside a disposition taken in name of his wife in 1867 of certain subjects at Dunbar. The disposition bears to be granted “in consideration of the sum of £450 sterling, instantly paid to me by Mrs Agnes Denholm or Clark, wife of James Clark, tenant of Springfield, as the price thereof.” The pursuer’s allegation is that the money which was paid for the property really belonged to and was paid by him, and that therefore the conveyance of the subjects to the defender was a pure donation to her *stante matrimonio*, and revocable. On the other hand, the defender avers that the subjects were purchased with money to which she had succeeded from her father, or which her father had given her, and which had been kept in bank in her own name till the purchase of the property.

May 25, 1881.
Clark v. Clark.

Now, the defender’s averment is well founded in point of fact. She did receive from her father, and deposit in bank on 5th July 1865, £440. This sum was increased in November 1865 to £495, by the addition of a small sum which the defender had acquired from another source, and a fresh deposit-receipt was taken for that sum in her own name on the 10th of that month. The deposited sum was increased in 1866 to £500, but was reduced on 22d March 1867 to £460, and that sum remained on deposit-receipt with the Commercial Bank of Scotland at Dunbar till 26th November 1867 when it was uplifted. The conveyance in question is dated 28th November 1867, and there is no doubt that the money paid to the seller was the same money as was lodged in Mrs Clark’s name on deposit with the Commercial Bank.

In these circumstances the Lord Ordinary is of opinion that no question arises in this case under the 16th section of the Conjugal Rights Act, 1861, because “the money paid for the subjects contained in the disposition above mentioned was in law the property of the pursuer.” I am unable to agree with his Lordship in that view. It seems to me that if the 16th section of the Conjugal Rights Act did not apply to anything which was in law the property of the husband the provision would be quite futile. I think, on the contrary, that the enactment was intended to apply to property which is in law the property of the husband by virtue of his *jus mariti*, and that what it provides is that nevertheless he and his creditors shall not be entitled to claim it, “except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife.” But the section proceeds,—“Provided always that no claim for such provision shall be competent to the wife if before it be made by her the husband, or his assignee or disponee, shall have obtained complete and lawful possession of the property.” The first question therefore in this case appears to me to be, Was there on the part of the husband complete and lawful possession of what his wife kept deposited in bank in her own name and afterwards invested in heritable property with, apparently, her husband’s knowledge and consent at the time?

Now, it is quite clear that to have obtained complete and lawful possession means something more than to have a good title to possess. It implies not control merely, but actual possession. Where, then, was the actual possession in this case? Was it not in the wife, to the exclusion of the husband? It stood in her name on deposit-receipt. It was converted into land in her name. “Complete and lawful possession” on the part of the husband is therefore excluded by the facts.

No. 136. The only question that remains is, Is this provision as it stands such a provision as the wife is entitled to insist on having made for her before the husband and his creditors can claim the property? It is in land or other heritable property, and therefore very suitably secured. And it is certainly not a large provision, the gross rental being apparently only about £30 a-year. On the ground of amount therefore I think no objection can be taken.

May 25, 1881.
Clark v. Clark.

But it was farther objected that the defender was not entitled to a provision to take effect during the marriage. It is unnecessary to consider whether that is a sound objection or not. For from the nature of this provision the free rents *stante matrimonio* fall under the *jus mariti* of the husband, and the actual beneficial interest in the property only opens to the wife after the husband's death. I think therefore that the effect of allowing this deed of conveyance to be taken in the wife's name was to make no more than a reasonable and moderate provision for her, which the husband might have been compelled to make under the statute. Having made it voluntarily, he is not, I think, entitled to revoke it by setting aside the conveyance.

I therefore come to the same conclusion as the Lord Ordinary, but on different grounds.

LORD DEAS and LORD MURE concurred.

LORD SHAND was absent.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for James Clark against Lord Adam's interlocutor of 8th February 1881, recall the interlocutor; sustain the third and fifth pleas in law for the defender: *Assoilzie* the defender, and decern: Find the defender entitled to expenses," &c.

R. AINSLIE BROWN, S.S.C.—WM. OFFICER, S.S.C.—Agents.

No. 137.

ELIZABETH B. WINCHCOMBE, Pursuer (Appellant).—*Rhind—Millie.*

HENRY HOPKINS WINCHCOMBE, Defender (Respondent).—*Salvesen.*

May 26, 1881.
Winchcombe
v. Winch-
combe.

Husband and Wife—Divorce—Desertion—Pursuer unwilling to adhere.—In an action by a wife against her husband, concluding for divorce on the ground of desertion, the pursuer deposed that her husband had deserted her in May 1870, and had failed to contribute to her support since that date; that prior to the desertion he had treated her with great cruelty, and that if he had asked her to go back in July 1870 she would have been afraid to go back, and that she was not now willing to adhere. The Lord Ordinary (Adam) found that as the pursuer had, on account of her husband's cruelty, been, during the whole period of desertion, unwilling to resume cohabitation, she was not entitled to the remedy of divorce for desertion.

Held (rev. judgment of Lord Adam) that as the defender had deserted the pursuer for upwards of four years, and as there was no proof of his having made such an offer of adherence as she was bound to accept, she was entitled to decree of divorce.

2d DIVISION.
Lord Adam.
M.

ELIZABETH BARR WINCHCOMBE, Greenock, raised an action of divorce against her husband, Henry Hopkins Winchcombe, residing in France, on the ground of wilful and malicious desertion.

The pursuer averred;—The pursuer and defender were married in December 1868, and thereafter lived together in Greenock as man and wife till about the month of September 1870, when the defender wilfully and maliciously deserted her.

The defender denied the desertion, and stated that in 1873 and 1874

he had written repeatedly asking the pursuer to come to him. Copies of No. 137. these letters were put into process, but were not printed for the purposes of the debate in the Inner-House.

A proof was allowed.

The defender was not examined as a witness, and did not lead any evidence.

From the proof it appeared that shortly after the marriage the defender began to ill-use the pursuer, striking her when far advanced in pregnancy, turning her out of doors into the street at night, and threatening her life if she returned. The pursuer further deponed that on one occasion he drew an open razor across the back of her neck; that he left her in Greenock in 1870, without giving her his future address, after selling all the furniture in the house; and that from that time she had lived with her own relations, supporting herself and a child born of the marriage by her own exertions. Several witnesses deponed that he had, previous to the alleged desertion, announced to them his intention of leaving his wife. Being interrogated as to whether she had received letters from the defender since he deserted her, the pursuer deponed,—“I don't remember when I first heard about him after September 1870. I think it is about a year ago, or between one and two years ago. It was just about the time I caused a previous action to be raised against him. I had made inquiries to find out where he was. I found he was living at St Valerie-sur-Somme, in France, and carrying on a rope business there. From September 1870 until I heard about him being at St Valerie, I had got no letter or communication from him. He had never contributed anything to my support during that time, nor has he done so yet. A summons was raised against him on the ground of adultery, but was afterwards withdrawn. I cannot explain how that came to be. I know that my agents wrote to their French correspondents on the subject, and made inquiries about him. I put the matter into their hands. Since that action was raised I have received some letters from him, which I have handed to my agents, and since then I have raised the present action. I am quite sure I had no communication from him until the first action was raised.” Under cross-examination she further deponed,—“I am not now willing to adhere to him if he is willing to take me back. (Q.) Were you willing in July 1870 to go back to him if he had asked you? (A.) I was afraid to go back. (Q.) And you were not willing? (A.) In that case I was not willing, because I was afraid.”

On 14th March the Lord Ordinary pronounced the following interlocutor:—“Having heard counsel for the parties and considered the proof and whole process, assoilzies the defender from the conclusions of the action, and decerns: Finds the pursuer entitled to expenses: Allows an account to be lodged, and remits the same to the Auditor to tax and report.”*

* “NOTE.—The Lord Ordinary does not doubt that the defender deserted the pursuer in May 1870, and has remained away from her ever since, without contributing to her support, or to that of their son. *Prima facie* that state of matters would appear to entitle her to divorce, but it also appears that she is not, and never has been, willing that the cohabitation between them should be resumed, the reason being that while they lived together he had behaved to her with great cruelty. In other words, she acquiesced in the separation. It may seem to be a hard state of the law that she would have been entitled to divorce had he not behaved cruelly to her, but having behaved so cruelly to her that she is glad to get rid of him she is not entitled to divorce.

“The law, however, afforded her another remedy, that of separation.

“It appears to the Lord Ordinary, that prior to the change of procedure intro-

May 26, 1881.
Winchcombe
v. Winchcombe.

No. 137. The pursuer reclaimed.

May 26, 1881.
Winchcombe
v. Winch-
combe.

LORD YOUNG.—This action is brought on the ground of wilful and malicious desertion. If that is proved, and if it was maliciously and wilfully persisted in, for a period of four years, then the pursuer is entitled to her remedy. The desertion must have been malicious and wilful to begin with, and maliciously and wilfully persisted in by the offending spouse. If the facts enable us to affirm that, then I say that the pursuer is entitled to her remedy, and I think that they do. I think that the defender did so desert his wife more than ten years ago. He used her ill, turned her out of doors, and threatened her with violence if she came back again. All this he did deliberately, for he told his friends that his purpose was to be separated from his wife. He then broke up his establishment, ceased to have a home, and went away, leaving his wife to provide for herself, and that without any cause, so far as we can judge. He never invited her to return, at least for ten years, when, owing to the erroneous interpretation of a letter from France, his wife raised an action of divorce against him. The reading of the letter turned out to be erroneous, and the action was abandoned. After that the husband invited his wife to return. I am not going to express any absolute opinion on the legal question, whether it is too late for repentance when ten years of desertion has passed; it is, in my opinion, sufficient to say that there is no proof here of the defender's repentance and willingness to take his wife back. He cannot rely on these copies of letters alleged to have been sent by him; they are not properly before us, not being printed. I have, however, looked at them, and there is nothing in them which can be received as of any value after ten years' misconduct, unless they are strengthened by the evidence of the writer. I think, therefore, that it is proved that wilful and malicious desertion continued for ten years, and it is nothing to the purpose to say that when the pursuer was examined as a witness for herself she said, in answer to the question, "Would you be willing to return to your husband now?"—"I am not now willing to adhere to him if he is willing to take me back." I do not like the question, "Were you willing in July 1870 to go back to him if he had asked you? Would you have been willing to return if something happened which never did happen?" I do not like such questions being put, and I am not sure I should have allowed such a question myself. If I had allowed it I think the discreet answer would have been,—“If I had been asked, I should have taken time to consider my answer.” On the grounds I have stated I am not prepared to assent to the views of the Lord Ordinary, except in so far as

duced by the 11th section of the Conjugal Rights Act, the pursuer could not have been in a position to institute an action of divorce.

“She was not willing to adhere, and in her frame of mind could not have taken active steps by raising an action of adherence against her husband, and adopting the other procedure required by the Act to compel him to adhere, which were necessary preliminaries to an action of divorce, and without which the deserting spouse was not in a state of wilful and malicious non-adherence. It is clear that there was required not only desertion on the part of one of the spouses, but also a willingness to adhere, or rather a desire for adherence, on the part of the other.

“The Lord Ordinary thinks that the first of these elements is present in this case, but not the latter. He does not think that any change of the law, in this respect, was intended to be made, or has been made by the Conjugal Rights Act.—*Bowman v. Bowman*, Feb. 7, 1866, 4 Macph. 384; *Muir v. Muir*, July 19, 1879, 6 Rettie, 1353.

he says that he does not doubt that the defender deserted his wife in 1870, and has remained away from her ever since. I am therefore of opinion that in the circumstances this interlocutor ought to be recalled and the divorce granted.

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LORD CRAIGHILL concurred.

LORD JUSTICE-CLERK.—I entirely concur, and only wish to add that I quite retain the opinion I expressed in the case of *Muir*, cited by the Lord Ordinary, and think that the more the question is sifted the more clearly will it appear as an inevitable result that it would never do for a man at the end of twenty years of wilful and malicious desertion simply to make an offer to adhere, when his wife raises an action of divorce against him, with the result of making the wife's action fall.

THE COURT recalled the interlocutor of the Lord Ordinary, and granted decree of divorce.

M'CASKIE & BROWN, S.S.C.—R. W. RENTON, S.S.C.—Agents.

JOHN RISK, Pursuer.—*J. P. B. Robertson—Baxter.*
AULD & GUILD, Defenders.—*D.-F. Kinnear—Guthrie.*

No. 138.

May 27, 1881.
Risk v. Auld
& Guild.

Agent and Principal—Stockbroker—Sale of stock and closing of customer's account—Misrepresentation by customer as to means and credit.—Held that where a stockbroker has incurred personal responsibility by purchasing stock for a client on the faith of representations made by him as to his means, which proved not to be correct, and the client has refused to give satisfactory explanations or references, the stockbroker is entitled to realise the stock held for his client, and close the account.

Agreements and contracts—Stock Exchange—Gaming transaction—Betting as to the rise and fall of stock.—Observations (per Lord Justice-Clerk and Lord Young) on the question whether contracts for the purchase and sale of shares when neither party intends to deliver or accept the shares, but merely to pay the differences according to the rise or fall of the market, is a gambling transaction, so as to deprive the parties of the aid of the Court in questions arising out of them.

IN December 1880, John Risk, Glasgow, raised an action in the Sheriff ^{2d Division} Court of Lanarkshire at Glasgow, against Messrs Auld & Guild, stockbrokers and accountants there, for payment of £416, 15s, as loss and damage sustained by him from the defenders having sold certain stocks belonging to him contrary to his instructions.

The pursuer averred;—(Cond. 1) "In the month of June 1880, the pursuer employed the defenders to act for him and Peter Craig, Canniesburn Toll, near Glasgow, in the purchase and sale of shares on the Glasgow Stock Exchange. On the pursuer's instructions the defenders purchased fifty shares in the Steel Company of Scotland for the pursuer, and fifty for Mr Craig." (Cond. 2) "Before the arrival of the settling day for these purchases (29th June 1880), Mr Craig, who had previously been in quest of a bond for a sum of money he had lying in bank, received notice from his agents that a bond for £4000 over heritable property could be given to him. Mr Craig and the pursuer inspected the property, and being satisfied that it was a safe investment for the sum mentioned, accepted the security. Craig thereupon expressed a desire to be clear of the Steel shares, and, with a view to relieving him, the pursuer wrote to the defenders inquiring if they would be willing to put into his name the fifty

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shares standing in Craig's name, and he at the same time offered to lodge money in their hands as security for any loss that might arise. The defenders agreed to put the shares into the pursuer's name, but nothing was said by them about the pursuer's offer of security." (Cond. 4) "The defenders expressed no dissatisfaction with the pursuer or the orders he gave them until 15th July 1880, when he received a letter from them, stating that 'in consequence of information we have to-day received we must ask you to give us a reference as to your position and means, else we must close your account.' After the offer of security which the pursuer had made to the defenders at the commencement of his dealings with them, and which they did not think necessary to accept, the pursuer was very much surprised and annoyed at the position they had taken up, and on 16th July 1880* wrote them to this effect, and also intimated that he did not intend to give them any more orders for purchases on his behalf when the transactions then in hands were closed. He, at the same time, instructed them that 'if the market is good to-day for Huntingtons and Steels you may close them. I will give you instructions further on regarding the Caledonians and Atlantics.' To the instructions contained in this letter the defenders paid no attention; but, contrary to express instructions, at once closed the whole of the pursuer's accounts, notwithstanding that the market was not good for either 'Huntingtons' or 'Steels' on the day in question, and sent him a statement of account shewing a balance of £52, 15s. 4d. in his favour, which sum he declined to accept." (Cond. 5) "On the said 16th July 1880, when the accounts were closed as aforesaid, there stood in the pursuer's name 220 shares of the Steel Company of Scotland, 200 shares of the Huntington Copper Company, 20,000 dollars second Atlantic Bonds.

"The defenders allege that they sold the Steel Company shares on the Glasgow Stock Exchange as follows:—10 shares at £11, 5s., 10 at £11, 2s. 6d., 130 at £11, and 70 at £10, 17s. 6d. Had the defenders attended to the pursuer's instructions, he could have realised £12, 10s. per share for these; and he thus lost, through their breach of duty, the sum of

"The Huntington Copper Company shares, * * *	30	0	0
"5000 dollars Atlantic Bonds, * * *	72	10	0

"At the same date the defenders, as acting for the pursuer, had, on what is known as a "bear" account, sold twenty shares of the Caledonian Railway Company, and to close this account the defenders, contrary to instructions,

Carry forward,

£437 10 0

* The letter referred to was as follows:—"Gent.,—I have just got your note, and am rather surprised at it. I rather think you have got bad information, but where a doubt has got hold, instead of giving references or making explanations, as all this has a tendency to unsmooth business between us a little, it will perhaps be better to close, at least for a time, until you may get better information. However, I should not like you to close all at once, as I think this would be imprudent, but we will try to finish up with this account. I expected you would have sold my Huntingtons yesterday; and if they and Steels are good to-day close both. Caledonians and Atlantics I think would be better to go on with until near the close of the account.

"I may say that, except lodging a little money as what I offered you, I never was asked for more before; and had this been proposed at first by you I would have taken it kindlier, as I consider this would not have been out of place, nor do I consider, on the whole, you are far wrong yet, although quite misinformed.—Yours truly, JOHN RISK. Messrs Auld & Guild, sharebrokers."

Brought forward,	£437	10	0	No. 138.
purchased ten shares at £111, 2s. 6d., and ten at £111, 5s., instead of doing, as they could have done had they not failed in their duty to pursuer, purchasing them at £111. On this head the pursuer sustained losses to the extent of				May 27, 1881. Risk v. Auld & Guild.
		3	15	0
Making a gross loss of	£441	5	0	
“ But from this sum there falls to be deducted, in name of brokerage, contangoes, &c., a sum of		25	0	0
	£416	5	0	

Shewing a total loss of £416, 5s. 0d. which the pursuer has sustained by the defenders' breach of duty.”

The pursuer pleaded;—The defenders having undertaken to act as brokers for the pursuer on the Glasgow Stock Exchange, and having failed to avail themselves of his offer of security made at the commencement of his transactions with them, and they having been guilty of breach of their duty toward the pursuer as his brokers by selling and buying stocks contrary to his instructions, the pursuer is entitled to decree as craved, with expenses.

The following were the principal statements by the defenders, with the pursuer's answers:—(Stat. 1) “The defenders were instructed by the pursuer, on or about 16th June last, to purchase on his behalf 100 shares of the Steel Company of Scotland. Fifty of the said shares were to be carried over, and the remainder taken up and paid for. The said shares were duly purchased, and notices of the purchases were sent to the pursuer.” (Ans. 1) “Admitted, under the explanation that the 50 shares which were to be taken up as here mentioned were for Mr Craig, and this was known to the defenders.” (Stat. 2) “On 22d June the defenders received a letter* from the pursuer stating,” &c. “The defenders, in the belief that the said statements were true, and that the pursuer was a person of means, agreed to his request, and did not ask a deposit. The said statements were really untrue, and were made with the object of deceiving the defenders, and of representing that the pursuer was worth £4000, or, at all events, that he had invested or intended to invest that sum on heritable security.” (Ans. 2) “Denied. The defenders are called upon to produce the letter here mentioned, which is referred to for its terms.” (Stat. 4) “Under the 58th rule of the Glasgow Stock Exchange, the defenders were personally responsible to the brokers from whom they had bought and to whom they had sold the said shares or stock on the pursuer's account for the due implement of the said purchases and sales.” (Stat. 5) “Under the 87th rule of the said Exchange it is provided as follows:—‘When (first) members continue to carry over the stock, shares, or other securities for their constituents, the differences, if any, thereon against said constituents shall be paid by them to said members not later than twelve o'clock on the settling day; and failing due payment accord-

* “21 Madeira Court, Glasgow, 22d June 1880. Messrs Auld & Guild, stockbrokers. Gent.,—Sometime ago I gave orders for a bond of £3500 to be looked out for me. Yesterday I got notice that I could get £4000, a first bond, on good property, but this will take away the cash I intended for the 50 Steel shares. Would it inconvenience you or upset anything already done to put all the 100 shares on the spec. list, and I could lodge with you say £50 against loss until closed. If any expense beyond the 1s. per share on the 50, charge it.—Yours truly, JOHN RISK.”

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ingly by said constituents, said members may thereupon close all their transactions then outstanding for said constituents; and when (second) members have entered into transactions for constituents, and while the said transactions are still outstanding, said constituents become bankrupt or insolvent, or by their own admission, intimation, or otherwise, are unable to implement said transactions, said members may thereupon close all said outstanding transactions and they may so close said transactions in both cases foresaid, either (a) by assuming or taking over said transactions to their own account, or to the account of other constituents, at the average market prices of the day, as said prices shall be fixed by the committee; or (b) by selling out or buying in, as the case may be, either at their own hand or through the secretary officially; and said transactions shall be entered to the credit or debit, as the case may be, of said constituents, and thus fix the balance due on their accounts.' (Ans. 4 and 5) "The rules of the Stock Exchange are referred to for their terms, beyond which no admission is made." (The extracts from the rules were afterwards admitted.) (Stat. 6) "As the pursuer had requested the defenders to 'carry over' the purchases which should have been settled upon the 29th June and 14th July, and as the sum for which the defenders were personally liable was large, they caused inquiries to be made as to the pursuer's financial position. The result of these inquiries was not satisfactory." (Ans. 6) "Not known that the defenders made inquiries as to the pursuer's position; but if they did, the information they profess to have received was incorrect, and not such as to have entitled them to act with regard to the said shares in the manner in which they have done. The defenders are called upon to state at whom they made the said inquiries, and what the nature of the information was." (Stat. 7) "On the 15th day of July, the defenders wrote to the pursuer as follows:—'Dear Sir,—In consequence of information we have to-day received, we must ask you to give us a reference as to your position and means, else we must close your account. The information may not be correct, and a reference to your solicitor who offered you a bond for £4000 will doubtless satisfy us.'" (Ans. 7) "Admitted." (Stat. 8) "The pursuer failed on 16th July to furnish the references desired; and with a view to avoid any loss in their transactions with him, as the stocks and shares bought and sold by the defenders were subject to fluctuations in the market, and the Glasgow Stock Exchange was to be closed on the 17th and 19th July, they at once acted upon their intimation of the previous day, and sold the stocks or shares they had purchased, and bought in such stocks or shares as they required to implement sales made by them on his behalf, and closed the account." (Ans. 8) "Denied as stated, with the exception that the defenders closed the pursuer's account. Explained and averred that on said 16th July the pursuer wrote a letter to the defenders, which they are called upon to produce," quoted *supra*.

The defenders pleaded;—(1) The pursuer's statements are irrelevant. (2) The defenders, in accordance with the rules of the Stock Exchange, and at common law, were entitled to close the pursuer's accounts upon his failure to furnish them with satisfactory references as to his means and position to meet the obligations undertaken by them on his behalf. (3) The defenders having been induced by the pursuer's representation that he had obtained, or was about to obtain, a heritable bond for £4000, to continue their account with him, and to undertake heavy liabilities on his behalf, were entitled, upon his failure to furnish them with satisfactory references, to close the account.

On 22d January 1881 the Sheriff-substitute pronounced an interlocutor before answer, allowing parties a proof of their averments.

The defenders appealed to the Sheriff (Clark), who, on 16th February 1881, pronounced the following interlocutor:—"Finds that it appears on the record that the defenders were induced by misrepresentation on the part of the pursuer that he had the control of means to the extent of £4000, to undertake his employment and act for him: Finds that soon after they discovered that they had been misinformed in this respect, and that, in point of fact, as appears from his own letters in process, he was not possessed of the said means: Finds that, in these circumstances, they were warranted in refusing to proceed farther with his employment, or execute his orders; and therefore finds, in point of law, that he has disclosed on record no relevant case: Sustains, accordingly, the defenders' pleas in law to this effect: Recalls the interlocutor appealed against, and dismisses the action, and decerns," &c.*

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The pursuer appealed to the Second Division of the Court of Session.

Argued for the pursuer;—The pursuer had stated a relevant case, and ought to be allowed a proof. The rule of the Stock Exchange on which the defenders relied was not in point, as it applied only to cases where persons failed to pay on the settling day, or were admittedly unable to meet their liabilities. This was not the case with the pursuer, at least proof was required on the subject. The defenders, who were employed by the pursuer as his agents, had, by disobeying his orders, involved him in loss; they were therefore liable to him in the amount thereof.¹ Their duty was to have held on till the next settling day.

The defenders argued;—The pursuer's case was irrelevant. There was no contract averred that they should hold the stocks longer than they liked. The 87th rule of the Stock Exchange applied, as in his letters the pursuer had failed to give them satisfactory references as to his means. Further, they had been induced to continue their course of transactions with the pursuer solely by his false representations in the letter of 22d June.

LORD YOUNG.—I must say I have a very clear opinion of this case, and that

* "NOTE.—It is plain from the record that the defenders were induced to act for the pursuer as brokers on a gross misrepresentation, and that if they had continued to act for him they might have incurred responsibilities of a grave kind without any adequate security. The pursuer by his letter induced the defenders to believe that he had the control of £4000. Before executing his orders they, from inquiries made, ascertained that this statement was questionable, and accordingly, before proceeding farther, they grant him an opportunity of satisfying them on the matter. Instead of doing this he wrote them another letter, the plain meaning of which was that their connection had better terminate, seeing they entertained doubts as to the matter in question, and giving them no satisfactory explanation of the state of his means. By the rules of the Stock Exchange referred to, it would appear that the defenders were acting quite within their power when, in these circumstances, they brought their connection with the pursuer to an end—indeed, were it not for such rules, no broker would be in safety to deal with parties as to whose means he was not perfectly informed. I would also notice that the statements in the condescendence, as regards the alleged claim of damages, are very far from being of that clear and distinct kind, more especially in reference to dates, which an action of this kind would require. In short, I do not think that on his own shewing the pursuer has made a case of sufficient relevancy to be remitted to proof."

¹ Lacey v. Hill (Scrymgeour's claim), July 2, 1873, L. R. 8 Chan. App. 921; Lacey v. Hill (Crowley's claim), April 25, 1874, 18 L. R. Eq. 182; Foulds v. Thomson, June 10, 1857, 19 D. 803, 29 Scot. Jur. 372.

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without having any sympathy for either party. I am not going to make any observations on the matter of gambling in shares, which, in my opinion, the facts as stated here do not press on our consideration. There is no legal or moral objection to persons investing in railway or other shares in the expectation that they will rise in value and may therefore be sold at a profit. But there is gambling of a pernicious description which is very prevalent, and which can only be profitable to brokers, and occasionally to lucky gamblers at the expense of others. That gambling consists in selling stocks which have no existence, the operations being often carried on to an extent greatly exceeding the whole stock of the concern, and the proceeding being simply a betting by one party against the other that the stock will or will not rise in value in the course of a fortnight, and the transaction being settled by the losing party paying the bet to the winner. Sometimes this may be done under circumstances which leave no doubt as to its existence, and yet as there is no possibility of proving it a Court will feel itself bound to aid a party invoking its aid in what is really such a proceeding. But where a case of this most pestilential kind is really disclosed, I apprehend that a Court will refuse to aid the parties. The law is clear. It is stated in two sentences in Addison on Contracts, 7th ed. 209—"A colourable contract for the purchase and sale of railway shares or of goods, where neither party intends to deliver or accept the shares or the goods, but merely to pay the differences according to the rise or fall of the market, is gaming and wagering, and it is for a jury to determine whether the parties really meant to purchase and sell, or whether the transaction was a mere bet upon the future price of the commodity." I look to the record in this action, which is raised by the customer against the broker, and find that the action is for breach of contract, because it is said if the contract had been observed the customer would have made more than he did. The statement might have been so made as to conceal the real nature of the arrangement, and then we should not have been able to get at the gambling in the transaction. But we have a record admitted to be defective, and to require amendment. No Judge is more willing than I to allow an amendment in order to get at the matter really in dispute, but here, in a case where the pursuer, a speculator in Glasgow, is engaged in pure gambling for differences, and the only amendment that can be made is to set out more clearly the arrangement under which he contracted with the broker to assist him in gambling, and where the action is one against the broker for so conducting this gambling that the speculator had not made more than he did make, I am not for allowing any amendment. I am prepared on this ground to hold that there is no relevant case stated.

I agree also with the Sheriff in his other ground of judgment that it is proved on the evidence of the letter before us (which is not explained by an averment so as to let in proof) that the customer deceived the broker, and induced him to lend his credit by a false representation in writing containing a statement which was untrue and calculated to deceive. When a broker has taken up for a customer shares to be paid for on the settling day, he is bound, if the customer does not put him in funds, either to make payment or take the shares himself. When he is selling on what this pursuer frankly calls a "bear" account, he is liable, and pledges his own credit to the person to whom he sells, and therefore to induce him to give such assistance he requires from the customer an assurance of having means. This customer, for the purpose of giving such assurance, wrote to the broker on 22d June 1880—"Some time ago I gave orders for a bond of £3500 to be

looked out for me. Yesterday I got notice that I could get £4000, a first bond on good property," and so on. Are those statements true? Not a word of them. Were they intended to deceive? Yes, they were. With what object? To induce the broker to pledge his credit. The broker discovers the truth in July, and sends the letter mentioned—"In consequence of information we have to-day received, we must ask you to give us a reference as to your position and means, else we must close your account. The information may not be correct, and a reference to your solicitor, who offered you a bond for £4000, will doubtless satisfy us." What is his answer? The letter quoted so often, in which he says it is better to close accounts in consequence of the doubt about his position. For a person in that position to bring an action against the broker for not obeying instructions seems to me extravagant.

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I think therefore, first, that the action is not relevant; that there is no case for our aid in correcting the statements in record so as to bring out the true point; and that, indeed, there is every reason for refusing that aid. And, in the second place, I am of opinion that on the evidence, *prima facie* conclusive, under the pursuer's own hand, of the deceit practised by him in order to aid his credit, no explanation of which is given, the Sheriff is right in the finding in fact which he has made.

LORD CRAIGHILL—I am obliged to differ from the conclusion reached by Lord Young and by the Sheriff, for I think that as matters now stand the Sheriff was not warranted in the conclusion at which he has arrived. It might have been that on the pursuer's statements we might have rightly dismissed the action as irrelevant, because not disclosing grounds in law for the conclusion desired—that is, we might have turned the pursuer out of Court on his own statements. Or, again, a defender may be assoilzied without any proof, because of admissions made by the pursuer in answer to the defences which are sufficient to destroy his case. But the specialty of this case is that in order to find the action irrelevant we must go outside the statements and admissions made by the parties on record. Something must be done as if after a proof, though there has been no proof. The Sheriff has taken that course, and I think he is wrong. I am far from saying that the pursuer's case is as full and complete as could be desired, and it was plainly the pursuer's interest to have stated more than he has done. But I am not prepared to say his statements are irrelevant. His case is that he, wishing to buy and sell shares, employed the defenders to act as his brokers, and that they sold shares belonging to him without his authority and to his loss. It may be that on a proof we should find they were quite warranted in doing so, but in order to do so now we must go beyond the pursuer's statements and admissions. No doubt the defenders say they were entitled to sell, first, by the rules of the Stock Exchange, which rules and their application to the case both remain to be proved. They say also that the employment was taken by them in consequence of his misrepresentations. It was quite reasonable that the defenders should make inquiry into the financial position of the pursuer, and, it may be, demand an answer with regard to it. But we have not yet reached the stage of coming to a conclusion on the facts. The Sheriff has taken into consideration a certain letter, and has dealt with it as if there was nothing else in the case. I should like, for my part, to have known what was the information of the defenders, and how they came to be anxious as to the pursuer's position. We are not warranted, I think, in taking

No. 138. these letters as if they contained the whole case. To do so would, in my opinion, be to take something for granted where no proof is allowed—in short, to take the defenders' proof and not the pursuer's—and that is a course to the propriety or justice of which I cannot assent. As to the character of the transactions, I cannot adopt it as a ground of judgment that they are betting transactions, and that therefore no facilities ought to be given by the Court to enable one of the parties or the other to recover that which is due to him. It may be that their true character is what is described by Lord Young, but the pursuer certainly does not say so, and the defenders say the very reverse in statement 1, where they say—"Fifty shares were to be carried over, and the remainder taken up and paid for." With these statements before us I think it would be unjust to both parties if we withheld facilities for proof, or were influenced by considerations which are not properly before us and not determined by proof. I am therefore for reverting to the interlocutor of the Sheriff-substitute.

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LORD JUSTICE-CLERK.—This is a somewhat important case, and I am sorry that there should be a difference of opinion upon it. I quite understand the view of Lord Craighill with regard to deciding the case without farther proof. I have, however, come to be of opinion, and that very clearly, that it would be idle to continue the controversy, because there is no further question of facts to be established by proof, and the facts that have been established by the pursuer himself are quite sufficient to support the Sheriff's judgment. In that state of matters if we were to put the parties to the cost of further procedure it would be an unreasonable application of the forms of process, and I, for one, am not by any means inclined to allow it.

In the first place, then, let me say that I greatly sympathise with what Lord Young has said upon the nature of the transaction. No doubt such dealings as these have been for many years a canker in our mercantile community, and have had, and have now, a most pernicious influence. At the same time, I am not prepared to rest any part of my judgment in the case upon these views. The contract was not an illegal one, as far as I can judge from the statement of it, or from the argument directed against it at the bar; indeed it is not stated in the record that it is so. I have referred to the passage in Addison on Contracts, quoted by Lord Young, and find that it is so modified by the passage which immediately follows it that it is impossible to apply it here. In the case of *Hibblewhite v. M'Morine*, 5 M. and W. 466, there cited, Baron Parke says,—"I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognisant of the fact that the goods are not in the vendor's possession; and even if it were a wager it is not illegal, because it has no necessary tendency to injure third parties." In these circumstances I am not inclined to take that ground of judgment. The case here is really "false representation." The pursuer says that he employed the defenders as his brokers, and that they undertook to hold certain stocks over till the next settling day, and that at a time when the balance of the account was in his favour they chose to close the connection and to sell the stocks at a loss, and that on a day between the settling days. The statements are not very clearly made, but still enough is disclosed to shew that the brokers really undertook the defenders' business on a certain belief as to

the pursuer's position. The brokers admit the employment, and inferentially admit that they were not entitled to sell these stocks unless something had happened to justify such a course. But they say that they were so justified, on two grounds, first, by misrepresentations by the pursuer, and second, by the fact that instead of resisting the sale he acquiesced in it. Now, unquestionably, on both these grounds proof might have been led, but the Sheriff has found, and Lord Young has given strong reasons for thinking, that because as much as is necessary for judgment has been admitted, and no qualification of those admissions has been or can be stated at the bar, no proof is necessary. Lord Craighill says that it is hard that one party should be allowed proof and not the other, but that is hardly so; for what the Sheriff has found is that on the record no further proof is required. The pursuer wrote a letter to these brokers evidently for the purpose of raising his credit in their eyes. But he has admitted that the statements in that letter were false, that he really had not £4000 of his own, and the brokers discovered that that was so. After that do we require a proof? His statement on record is that another man had a bond for the money and not he. The defenders wrote to him requesting the name of the solicitor who, according to his letter, would grant him the bond. Now, the pursuer had not the courage to face this difficulty, but writes to say that if the defenders were not satisfied with his credit they had better close the connection. Now, looking to the rules of the Stock Exchange, as to which there is no dispute, this false statement, followed by a refusal to give any information, justified the defenders in what they did. There is nothing stated on record which could be sent to proof which could alter the effect of these facts. But, further, the pursuer did not object to the defenders' course of action. On the contrary, he acquiesced in it. On the whole matter I think we should be quite wrong if we allowed the case to proceed further.

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THE COURT pronounced the following interlocutor:—"Dismiss the appeal, affirm the judgment of the Sheriff appealed against, and decern: Find the respondents (defenders) entitled to expenses in this Court, and remit to the Auditor to tax the same, and the expenses found due to the respondents in the inferior Court, and to report."

MACONOCHE & HARE, W.S.—ANDREW FLEMING, S.S.C.—Agents.

THE SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY

(Pursuers), Appellants.—*Keir*.

DAVID HORNE (Defender), Respondent.—*Strachan*.

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May 31, 1881.
Scottish Property Investment Company
Building Society v. Horne.

Right in security—Ex facie absolute disposition—Debtor left in possession—Summary ejection.—A building society held a security for advances to one of its members over heritable property by way of *ex facie* absolute disposition duly recorded. Their debtor received no proper back-letter, but the rules of the society provided that he should remain in possession on certain conditions, and in the event of his falling in arrear with his instalments and interest, that it should be "in the power of the society, without any warning or legal process of any kind whatever, to enter into possession of the property," "and if such member shall be in the actual possession or occupancy of the premises, to remove him therefrom."

Held that a petition for summary ejection at the instance of the society against their debtor was incompetent.

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infert on a disposition *ex facie* absolute of certain property in Glasgow belonging to David Horne, builder, Glasgow, including a house, No. 7 Clarendon Street, in which Horne lived. Their disposition, though *ex facie* absolute, was really in security of a loan made to Horne under the rules of the society, of which he was a member. Horne held no back-bond or letter from the society, but the society's rules with regard to advances provided—(See rules Nos. 33, 34, and 35, quoted at length in the opinion of the Lord President).

The 61st rule further provided:—"When any member who has obtained an advance allows his instalments and interest, or any disbursements made on his account, to fall into arrear to an extent equal to three months' instalments, it shall be in the power of the society, without any warning or legal process of any kind whatever, to enter into possession of the property in respect of which the advance has been made, and to draw, uplift, and discharge the rents or feu-duties (as the case may be) payable therefrom, and if such member shall be in the actual possession or occupancy of the premises, to remove him therefrom, and let the property to others, or to constitute such member their tenant therein, and allow him to remain in the occupancy at such rent as the directors shall think reasonable and shall fix; which rent shall commence to run and be payable from such previous term as the directors shall determine, and the society shall have the same preference for such rent as landlords by law are entitled to, and shall be entitled to recover the same, by sequestration or other legal process, and, in general, the society shall have full power to act in every respect as absolute proprietors of the property. For these purposes it shall be sufficient to intimate the intention or resolution of the directors to such member by a letter under the hand of the secretary, addressed to him, according to his address as entered in the books of the society; and a certificate, under the hand of the secretary, that such letter was either delivered to such member, or put into the post-office bearing his address, as entered in the books of the society, shall be legal and conclusive evidence of such intimation. After deduction of all payments made and expenses incurred on account of their management of such property the directors shall place the balance to the credit or debit, as the case may be, of the member's account with the society. Upon payment of the whole arrears due in respect of such advance the society's possession shall cease, and the member to whom the advance was made shall be entitled to resume possession."

Horne having, as alleged by the society, fallen more than three months in arrear with his instalments and interest, they brought this petition to the Sheriff of Lanarkshire, "to grant warrant to summarily eject and remove" him from the house, No. 7 Clarendon Street, occupied by him.

The society founded on their 61st rule, as quoted above.

Horne denied that he was in arrear, but pleaded as a preliminary defence—(1) The pursuers have no right or title to prosecute the present action. (2) Any disposition held by the pursuers, although *ex facie* absolute, being only in security, they cannot exercise any right beyond that of an ordinary bondholder. (3) The pursuers are not entitled to use the present proceedings, being *ultra vires* of an ordinary bondholder.

The Sheriff-substitute (Spens) pronounced this interlocutor:—"Finds the present summary process of ejection incompetent: Sustains accordingly the first plea in law stated for the defender, and dismisses the action."

The Scottish Property Investment Company Building Society appealed to the Court of Session.¹

¹ Wylie v. Heritable Securities Investment Association, Dec. 22, 1871, 10 Macph. 253, 44 Scot. Jur. 150; Waterstone v. Mason, June 30, 1846, 8 D.

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LORD PRESIDENT.—The leading object of this building society, as specified in May 31, 1881. its rules, is, “by the subscriptions or payments of its members to form a fund” Scottish Property Investment Company out of which “members who are desirous of erecting or acquiring dwelling-houses or other heritable property may receive advances upon heritable security Building Society v. Horne. by way of mortgage to enable them to do so.” The defender is a member of the society, and there have been transactions of a somewhat complicated character between him and the society. He purchased heritable property of considerable extent, and on the security thereof obtained large advances from the society. The form of security was a disposition *ex facie* absolute, and there was no back-letter properly speaking. But it is quite clear on the face of the society's rules that the *ex facie* absolute title was in reality in security merely. I think it necessary that this should be clearly shewn as the basis of the judgment I am to propose. I beg therefore to refer to the 33d, 34th, and 35th of the society's rules :—“(33) Applications for advances shall be in the form No. 2 or No. 3 appended to these rules, accompanied by such specification of the security offered and other information as the directors may require ; and these applications shall be recorded by the manager according to the dates at which they are received by him in a register to be kept for that purpose, and they shall be preferred and disposed of by the directors in the order in which they are recorded. The manager shall have power, before receiving any application for an advance, to require the applicant to deposit with the society the amount of the surveyors' fees. (34) When the directors are satisfied that the property offered is a sufficient security, such property shall be conveyed to the society by absolute disposition, or by bond and disposition in security, or such other deed as the law-agents of the society may require ; and the same, and all other necessary title-deeds relating thereto, shall be deposited with the society ; and the directors shall then give the party who has sold the property, or is to grant the necessary deed, an order on the society's bankers for the amount agreed to be advanced by the directors. (35) No member who has obtained an advance shall be entitled, on any ground whatever, to change or alter the property over which the security of the society extends without the written consent of the directors ; nor shall he, without such consent, be entitled to take a grassum on letting any lease, or to grant any feu of such property, or any portion thereof, to sell or give up any right or pertinent to the property, nor to lease the property for a longer period than five years. Provided always that no lease granted by any member shall be held to be valid or to bind the society, in the event of their having to enter into possession of the property, unless the rent fixed under the same shall have been conditioned as the fair annual value of the property. Such members shall, however, from and after the execution and delivery to the society of the requisite conveyances and title-deeds, as before provided, and so long as these rules are complied with, have power to possess such property, to input and output tenants, and to draw the rents and pursue therefor, but always without prejudice to the preferable right of the society over the same.”

944, 18 Scot. Jur. 486 ; Gordon v. Baddon, June 22, 1848, 10 D. 1385, 20 Scot. Jur. 503 ; Williamson v. Johnstone, Dec. 23, 1848, 11 D. 332, 21 Scot. Jur. 77 ; Nisbet v. Aikman, Jan. 12, 1866, 4 Macph. 284, 38 Scot. Jur. 150 ; Hally v. Lang, June 26, 1867, 5 Macph. 951, 39 Scot. Jur. 530 ; Rankin v. Russell, Nov. 19, 1868, 7 Macph. 126, 41 Scot. Jur. 73 ; Scottish Heritable Security Company v. Allan, Campbell, & Co., Jan. 14, 1876, *ante*, vol. iii. 333.

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Now, it is quite clear that this 35th rule in all its parts applies equally to a security given in the form of an absolute disposition and to one in the form of a bond and disposition in security, and therefore, though under the rules as a member of the society he has granted an *ex facie* absolute disposition, he is, by force of the 35th rule, entitled to maintain that the conveyance is no more than a security, and not inconsistent with his continuing in possession so long as he fulfils the condition of paying interest and instalments on his loan. Accordingly the defender is just in the ordinary position of a person who has granted an absolute disposition qualified by a back-bond. The 35th rule affords him in this respect all the protection that a back-letter could.

The ground on which the society proceed is that the defender has failed to fulfil the condition by paying interest and instalments. And for the alleged violation of the special agreement as to these, they seek a remedy. What is that remedy? Summary ejection. Now, observe, the defender has a good right to possess unless he has incurred a forfeiture of possession. It is the 61st rule which provides for such forfeiture in the event of a member falling in arrear. But before the 61st rule can be put in operation the ground of forfeiture must be established as matter of fact, and until that is done the right to possess continues. Now, the question is, is this a case for summary ejection? To warrant that, the possession must either be vicious possession, that is, obtained by fraud or force, or precarious possession, i.e., without a title. In this case there is neither. There is no question of vicious possession. A precarious possession is a possession by tolerance merely. But this defender is here in virtue of ownership, and under the rules of the society. The law on this is very clearly settled, and I need only refer to the case of *Hally v. Lang*, the rubric of which is—"A petition for summary ejection which contained no allegation of vicious or precarious possession without title held incompetent." I need not quote more than the opinion of Lord Deas, who says,—“The first ground on which we must dismiss this petition is that there is not set forth here any such ground of action as, according to the forms of process in the Sheriff Court, will warrant an ejection. An ejection is only competent when a party is either a vicious possessor or a precarious possessor, in the sense of having no title at all, and the party asking ejection must set forth something sufficient *ex facie* to support his application.” I am therefore of opinion that this petition stands properly dismissed.

LORD DEAS.—I should have some difficulty in proceeding on my own opinion in the case of *Hally v. Lang*, in so far as that opinion seems to proceed a good deal on the action being incompetent in the Sheriff Court. Now, since that case was decided the jurisdiction of the Sheriff has been extended to questions of heritable right relating to subjects of not greater value than £1000. This question is about property of the value of £30 per annum, and therefore presumably of not greater value than £1000. I am therefore disposed to view this case in the same light as if it had been brought in this Court. It thus raises a much larger question than occurred in *Hally v. Lang*. I think this action is ruled to be incompetent by the case of *Wylie*—I mean incompetent on principle. A warrant of ejection is not a decree, but a diligence. The question therefore is, whether private parties can make rules for themselves applicable for diligence quite different from those of the ordinary law. If that were so they might make rules of diligence injurious to the interests of

the other creditors. Now, under its rules this society may, without any warning whatever, enter into the possession of this defender's property. That is quite inconsistent with the ordinary rules of law, as fully explained in the case of *Wyllis*. I therefore think the Sheriff was right in refusing this petition.

LORD MURRA.—The nature of this action is an ejection of the most summary kind known to law, just as in the case of *Hally*. I am of opinion, with your Lordship, that the forfeiture requires to be established. There are certain circumstances in which it is provided that the society may enter on the possession, and these circumstances must be shewn to have taken place. I concur with your Lordship in resting my opinion on the case of *Hally*.

LORD SHAND was absent.

THIS interlocutor was pronounced :—" Recall the Sheriff-substitute's interlocutor of 21st August 1880, and all the subsequent interlocutors in the inferior Court, including the interlocutor of 17th February 1881 : Dismiss the petition as incompetent, and decern : Find the defender and respondent entitled to expenses in both Courts, and remit to the Auditor to tax the account or accounts of said expenses, and to report."

AULD & MACDONALD, W.S.—PETER DOUGLAS, S.S.C.—Agents.

ADAM WILL AND OTHERS (LOWDEN'S TRUSTEES), First Parties.—
R. V. Campbell.

MRS MARGARET WYSELEY COUPAR OR LOWDEN, Second Party.—*Kennedy.*

PETER LOWDEN AND OTHERS, Third Parties.—*R. V. Campbell.*

CATHERINE KIDD LOWDEN AND ANOTHER, Fourth Parties.—*Guthrie Smith.*

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Provisions to husbands, wives, &c.—Antenuptial marriage-contract—Conveyance of universitas—Subsequent alterations in settlement.—A husband in an antenuptial marriage-contract conveyed his whole means and estate as at the date of his death to trustees, and therefrom provided £150 to his widow, "in full of all legal claims." He directed the residue of the estate to be divided equally among the children of a former marriage, and any children to be born of the present one. Two children were born of this marriage. The husband afterwards executed a trust-settlement, whereby he directed an additional payment of £300 to his widow, and also gave her the liferent of her children's shares of the residue, subject to the burden of alimenting them. Held that this was a fair and reasonable provision for the wife, and not a fraud upon the provisions of the antenuptial contract as regarded the children of the second marriage.

PETER LOWDEN, merchant, Dundee, on the occasion of his marriage with Miss Margaret Wyseley Coupar, his third wife, entered, on 9th March 1870, into an antenuptial contract of marriage, whereby he disposed and conveyed his whole means and estate to trustees for the following purposes :—(1) Payment of debts, funeral expenses, &c.; (2) "that my said trustees shall, as soon as convenient after my death, pay to the said Margaret Wyseley Coupar the sum of £150 in full of all legal claims which she may be entitled to, and of which sum she, by her signature hereto, hereby accepts in full of all her legal claims against me or my said estate as my widow or otherwise; (3) regarding the remainder of my said estate, I direct my trustees, in the event of there being any children of this marriage, to aliment and educate them out of the common fund until the youngest arrives at the age of twelve years, and on such age being attained by the youngest then I direct my said trustees to divide my

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whole estates equally, share and share alike, between my children got by marriage with Elizabeth Mudie, and any child or children who may be born by my present contemplated marriage, giving to my said trustees, as I hereby give, discretionary powers to them to mete out or invest the share which may fall to the child or children of this contemplated marriage for their best advantage, and until such time as they may think it prudent to hand over such share to the beforementioned children; (4) my said intended spouse shall be entitled, in the event of her surviving me, to get delivery from my trustees of all the property and articles which she may bring to me at the time of our marriage."

This deed concluded, "(lastly) and as this contract is also my settlement, I recall all other settlements or contracts I have made." The contract was signed by both Peter Lowden and Miss Coupar.

Mr Lowden had three children by his first marriage, none by his second, but two more were born of his marriage to Miss Coupar.

On 17th July 1874 Mr Lowden executed a trust-disposition and settlement, whereby he conveyed his whole means and estate to trustees, directing them (1) to pay debts, &c.; (2) as soon as convenient after his death to dispoise to his widow his dwelling-house in Dundee, to pay her the £150 provided in the contract of 1870, and to allow her to take all the property she had at the time of her marriage as therein also provided, and also allow her the free liferent use of his household furniture, &c.; (3) and (4) to pay to the three children of his first marriage each a fifth share of the free residue of his estate, and to hold and retain two fifth shares of the residue for the two children of his present marriage, but to pay the income thereof to his widow as an alimentary liferent, subject to an obligation on her to maintain and educate her children, and so to relieve his general trust-estate of the undertaking to aliment and educate in the antenuptial contract.

On 28th July 1877 and 12th December 1878 Mr Lowden added codicils to his trust-deed, whereby he bequeathed to his widow a sum of £300 in addition to the former sum of £150 and the liferent use of his house. Both trust-deed and codicils were signed by Mrs Lowden, as well as by the truster, in token of her approval of them.

Mr Lowden died on 17th October 1880, survived by his widow, and three children of his first and two of his third marriage. He left means to the extent of about £7000.

Some difficulty having arisen as to the effect of the above deeds, a special case was prepared and presented to the Court for opinion. To this case the first parties were Mr Lowden's trustees, the second party Mrs Lowden, the third parties Mr Lowden's children by his first marriage, and the fourth parties his children by his last marriage.

The questions of law were:—(1) Whether the first deed has been in its entirety revoked or superseded by the subsequent trust-settlement and codicils? (2) Whether the provisions of the first deed in favour of the third parties hereto have been validly revoked or altered in the manner and to the effect contained in the subsequent trust-settlement and codicils? (3) Whether the provisions of the first deed in favour of the fourth parties hereto have been validly revoked or altered in the manner and to the effect contained in the subsequent trust-settlement and codicils? (4) Whether the second party hereto is entitled to all or any of the additional provisions made in her favour by the trust-settlement and codicils; and whether all or any of the said provisions are to be charged upon the trust-estate in the manner and to the effect directed in the said trust-settlement or codicils; or are any, and which, of the said provisions to be charged exclusively on the shares of residue falling

to the third parties hereto? (5) In the event of the answer to the third question being in the negative, are the fourth parties hereto entitled, in addition to the provisions in their favour in the first deed, to take any benefit under the trust-settlement and codicils, and, if so, what? (6) Are the first parties hereto entitled to the sole and exclusive administration and management of the whole estate, heritable and moveable, left by the testator, and to hold and dispose of the said estate to and for behoof of the second, third, and fourth parties hereto, according to their respective rights and interests?"

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Argued for the first, second, and third parties;—The effect of the conveyance in the antenuptial contract of the *universitas* of his estate by Mr Lowden had not the result of divesting him of all power to alter or increase the provision to his wife.¹ The conveyance of a *universitas* still left the father in a position to make other provisions, provided they were not a fraud upon the contract under which the conveyance was made. This widow was in any view entitled to aliment out of the estate.

Argued for the fourth parties;—The marriage-contract being an irrevocable onerous deed, Mr Lowden could not alter any of the provisions therein made,² and these children were therefore entitled to get their shares free from the burden of their mother's liferent.

LORD JUSTICE-CLERK.—A number of questions have been presented for our consideration under the branch or head of law which we have been discussing, but I do not think in the circumstances before us they present any material difficulty.

The questions between the parties arise under (1st) an antenuptial contract or deed, dated 9th March 1870, between Peter Lowden, merchant in Dundee, and Margaret Wyseley Coupar, who became his third wife; and (2d) the trust-disposition and deed of settlement of Peter Lowden, dated 17th July 1874, which was also subscribed by his wife, and two codicils thereto, the one dated 28th July 1877, and the other the 12th December 1878. By the first deed Mr Lowden made a provision of £150 to his wife in the event of his death, which has still to be paid; while the result of the settlements as regards Mrs Lowden, if the settlements are also to receive effect, is, that there fall to be added to the £150 a dwelling-house believed to be of the value of £400, the liferent of the household furniture (to cease on her marrying again), a bequest of £300, and the liferent of her own two children's two-fifth shares of the estate.

Six questions are submitted to us, but the principal of these is the fourth—"Whether the second party hereto is entitled to all or any of the additional provisions made in her favour by the trust-settlement and codicils; and whether all or any of the said provisions are to be charged upon the trust-estate in the manner and to the effect directed in the said trust-settlement or codicils; or are any, and which, of the said provisions to be charged exclusively on the shares of residue falling to the third parties hereto?"

¹ Fraser, Feb. 13, 1677, M. 12,941; *Champion v. Duncan, &c.*, Nov. 9, 1867, 6 Macph. 17, 40 Scot. Jur. 17, Lord Curriehill's opinion; *Stair*, iii. 5, 52; *Fraser on Husband and Wife*, ii. p. 1413.

² *Bruce v. Glen*, Feb. 7, 1761, M. 13,036; *Advocate-General v. Trotter*, Nov. 17, 1847, 10 D. 56, Lord Fullerton's opinion; *Marshall's Executors v. Lord Advocate*, March 20, 1874, *ante*, vol. i. p. 847; *Moir's Trustees v. Lord Advocate*, Jan. 7, 1874, *ante*, vol. i. p. 345.

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In the first place, the rights of children to general provisions of conquest under a marriage-contract, although they are to a certain extent stateable as debts in certain circumstances, and give a certain amount of *jus crediti*, do not interfere with the reasonable administration by the husband of his own domestic affairs, and the position of his wife and children.

The real question is, What was the good faith of the obligation undertaken to the wife—for she was the other party—and in favour of the children, who have a right and interest under the deed as being an onerous deed in their favour? What was the real meaning of this deed?

I said in the course of the discussion, and it strikes me very strongly, that one peculiarity of this case is that there was a family by Mr Lowden's previous marriage, and the husband and wife were bargaining about that. And what they bargained was that all were to be put on the same footing at the husband's death—that is to say, that the amount of conquest was to be equally divided. I think it difficult indeed to maintain that that being the nature of the contract, and of the thing contracted for, any effect will be given to that contract which will entirely upset the other deeds, or that they are to upset that contract. The husband here faithfully carried out the contract, with one very trifling exception. His ultimate settlement gives his wife enlarged provisions, but his right to do so was a right that he unquestionably retained notwithstanding the clause in the contract which said that £150 should be paid to her at his death in full of all legal claims “which she may be entitled to, and which sum she, by her signature thereto, hereby accepts in full of all her legal claims against me or my said estate as my widow or otherwise.” The only other thing that can be said is that the children's share to which they will ultimately succeed on the death of their mother is to be liferented by her, she having got a subsequent provision to that effect from her husband, who had power to grant it. I do not think anything more was intended than I have indicated; and, on the whole matter, I am of opinion that the second deed does not go beyond a fair and reasonable construction of the intention of the parties in the marriage-contract, and consequently that the questions should be answered in favour of the widow.

LORD YOUNG.—I am of the same opinion. The questions before us are not framed in such a manner as to elicit exactly the answers which I should have supposed—agreeing, as I understand, with your Lordship—it would be desirable to return. For it is asked, first—“Whether the first deed has been in its entirety revoked or superseded by the subsequent trust-settlement and codicils?” And secondly—“Whether the provisions of the first deed in favour of the third parties hereto have been validly revoked or altered in the manner and to the effect contained in the subsequent trust-settlement and codicils?” The third question is, “Whether the provisions of the first deed in favour of the fourth parties hereto have been validly revoked or altered in the manner and to the effect contained in the subsequent trust-settlement and codicils?”

So that all these refer to revocation; and I do not think we have here any question about revocation. The question is as to the extent of liberty which the marriage-contract left the father, and whether he has abused it. I am of opinion that the marriage-contract has left him at liberty to make a reasonable provision for his widow. At the time when he entered into the marriage-contract in question Mr Lowden had been twice married. By his first marriage he had

three children alive ; by his second he had none, alive or dead. Apart from No. 140. the provision he made for his wife, he provides that his children by his first marriage, and any children he may have by the marriage he is then entering into, shall share in his fortune equally. That is the whole provision of the con-
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tract—that whatever he shall leave at his death, whether it be large or small, or anything at all, he shall leave at his death to his children by whatever marriage he has entered into, and divide it equally among them. That, I say, is the whole provision, apart from the provision to his wife. And the provision to the wife is certainly about the most wonderful I ever saw. It is neither more nor less than a direction to pay her £150, and that then she might go about her business. She is to have a sum of £150 in full of all legal claims which she may be entitled to, and of which sum she, “by her signature hereto, accepts in full of all her legal claims against me or my estate, as my widow or otherwise.”

Now, I say I have rarely seen such a provision made in favour of a widow by an antenuptial contract of marriage. Suppose there had been none at all, I do not think the contract otherwise would have prevented the husband from making rational provision in favour of the unprovided-for widow. Indeed, that is too clear to be matter of argument. He might, notwithstanding the terms of the contract, have made a provision in favour of his widow, assuming that she was not provided for. But here we have a provision in favour of the widow, and it amounts to the sum of £150. I think that is not a rational provision. I do not understand how it has got into the deed. One almost is led to suppose it must have been £150 a-year that was meant. It might, however, have been 150s. for that matter. Does the contract preclude him from increasing, or tie him up so that he shall not increase, this ridiculously inadequate provision to a reasonable one? I think not. Upon the same principle that he could have made a provision in her favour in the absence of any provision whatever, I think he is at liberty to increase up to a rational amount this provision of £150. And that was what he proceeded to do, with the concurrence of the wife herself, three or four years after the contract was entered into. And he certainly made a provision in her favour moderate enough. The provision was, that whatever shares of his estate her own children should be entitled to upon the footing of the equality which had been bargained for between him and her in the marriage-contract, she should have the liferent of, under an obligation to maintain those children. That I think a fair and rational provision, and not *contra fidem tabularum nuptiarum*, and quite within the power of the husband, and that without any revocation of the former deed, but in the exercise of the liberty which he possessed notwithstanding the former deed. I am not prepared to give proper expression to it at this moment, but I should have wished that the question had been put somewhat in this form—Whether the deed of 1874 is contrary to the husband's right, or an excess of the liberty that was left to him after the execution of the deed of 1870? I should be prepared to answer that question by saying that he was not by the deed of 1870—that is, by the marriage-contract—precluded from making the deed of 1874, which accordingly, in my opinion, ought to receive effect.

LORD CRAIGHILL.—I have arrived at the same opinion. I am glad that I have been able to do so, because, apart altogether from any legal consideration, the deed granted by the late Mr Lowden as a testamentary deed was reasonable in itself, and satisfied in a reasonable way the claims of all who came under it.

No. 140. The deed is one as regards the terms and meaning of which there is no controversy between the parties.

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It appears that the testator had entered into three marriages. In regard to the third, he had entered into an antenuptial marriage-contract, by which he made provisions, in the first place, for his wife, and, in the next place, for the children of the marriage, and at the same time for the issue of his previous marriage with Miss Mudie.

The question that has arisen here is, whether or not the hands of the testator were tied up when he made the trust-deed, so that he was prevented from doing anything which, as regards the widow and as regards the children of their marriage, was inconsistent with the provisions to be found in the antenuptial marriage-contract. I think that, so far as regards the wife and children of the marriage, that was a contract and not a testament. It is also clear that that which was left to the trustees or conveyed to the trustees for the purposes set forth in the marriage-contract was the *universitas* of Mr Lowden's succession. And it is established that where *universitas* is in such circumstances as the *universitas* here, then the estate is subject to the reasonable acts and deeds of the person whose it is.

That being so, I am of opinion that the testator was entitled to increase the provision that was given by the marriage-contract in favour of his wife. It was the best thing that could have happened for all concerned, because, as has been suggested by my brother Lord Young, the provision for his wife in that deed is no provision at all. So far as appears, the wife had no fortune of her own, and £150 could not by any possibility maintain her until the end of her days, and when once it was spent, then, if there was no other provision for her, she must have turned on the estate left by her husband, and claimed as matter of law what he has wisely left her as matter of provision under the deed of 1874. Of course if it had turned out that the provision was unreasonable, that, so to speak, it had robbed others to enrich the wife, the law would not confirm such an exercise of the power which the husband possessed. But these provisions given in the end are not more than reasonable provisions, and ought to be sustained.

The difficulty I had was with regard to the imposition of that portion of the provision which was created in favour of the wife upon the two-fifths of the estate left to the children of the marriage. But, everything taken into account, and looking at the powers which the husband unquestionably has over all parts of the succession, I quite agree with your Lordships in thinking that as regards the effect the thing cannot be interfered with as being contrary to the faith of the contract.

THE COURT pronounced this interlocutor:—"Find that the party thereto of the second part is entitled to the additional provisions made in her favour by the trust-disposition and settlement of Peter Lowden, dated 17th July 1874, and the two codicils thereto, the one dated 28th July 1877 and the other dated 12th December 1878, and that the said provisions are to be charged upon his trust-estate in the manner and to the effect thereby directed; and that the parties of the first part are entitled to the sole and exclusive administration and management of the whole estate, heritable and moveable, left by the said Peter Lowden, and to hold and dispose of the same to and for behoof of the parties of the second, third,

and fourth parts according to their respective rights and interests: No. 140.
Find it unnecessary farther to answer the questions put in the
special case, and decern," &c.

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DUNCAN, ARCHIBALD, & CUNINGHAM, W.S.—W. B. GLEN, S.S.C.—Agents.

GEORGE M. RITCHIE, Pursuer.—*Nevay*.
ALEXANDER M'INTOSH, Defender.—*Shaw*.

No. 141.

June 2, 1881.
Ritchie v.
M'Intosh.

Process—Caution for expenses—Bankrupt—Trust for creditors—Bankrupt suing trustee to account.—A bankrupt who had granted a voluntary trust-deed for behoof of creditors sued his trustee to account for a balance of funds which he alleged was in the trustee's hands. *Held* that he was entitled to sue the action without finding caution for expenses.

Observations (per Lord Young) on the grounds on which the Court will order caution for expenses to be found.

GEORGE M. RITCHIE, on 6th April 1878, granted a trust-deed for be-^{2D DIVISION.}
hoof of creditors. Alexander M'Intosh was the trustee nominated in the deed, and he accepted the trust, and proceeded to administer the estate. ^{Sheriff of Midlothian.}
I.

On 11th January 1881 Ritchie raised an action in the Sheriff Court of Midlothian calling on M'Intosh to account for his intromissions with the estate, and alleging that he had £800 of funds as a balance in his hands. The condescendence contained various averments of malversation, &c., against the trustee, and it was also therein stated by Ritchie that his creditors had been paid in full, and that the above balance remained.

M'Intosh defended the action, and, besides denying Ritchie's statement, pleaded;—(2) The pursuer being insolvent, and having denuded himself of his whole estate, is bound to find caution before proceeding further with the present action.

The Sheriff-substitute (Hallard), on 4th March 1881, appointed Ritchie to find caution for expenses, and afterwards, on his failure to do so, on 25th March assoilzied the defender.

On 4th April 1881 the Sheriff (Davidson), on appeal, recalled this last interlocutor, and of new appointed Ritchie to find caution for expenses. On 6th May the Sheriff-substitute again, in respect of Ritchie's failure to implement the Sheriff's interlocutor of 4th April, assoilzied the defender.

Ritchie appealed to the Court of Session, and argued;—The trustee here was the creature of the cedent, and was bound to account to him when called on.

Argued for M'Intosh;—The pursuer was practically a bankrupt. The general rule was, that a person who was divested must find caution for expenses.¹

LORD JUSTICE-CLERK.—On the question as it is presented here I have no difficulty of any kind, because a trustee in such a position is nothing but the creature of his author. The creditors may have a *jus quæsitum* under such a deed, but no such point is under consideration. The trustee cannot object to account when he has received the estate upon condition of accounting. It is not for him to say that by receiving the estate he has divested his author, and that therefore that author cannot sue him for an accounting without finding

¹ Harvey v. Farquhar, July 12, 1870, 8 Macph. 971, 42 Scot. Jur. 564; Horn v. Sanderson & Muirhead, Jan. 9, 1872, 10 Macph. 295, 44 Scot. Jur. 176.

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caution. The Court can, at any stage, if it sees fit, order caution to be found, but I see no reason for making such an order here, at all events *hoc statu*. I think we should therefore recall the interlocutors appealed against.

LORD YOUNG.—I concur. I must confess I am amazed at the judgments of the Sheriffs, who have manifestly misapprehended the law on this subject. No doubt it is the practice both in this Court and in the Sheriff Court not to allow a party divested of his property to sue an action except upon the condition—but not always on the condition—of finding caution for expenses. The reason is, that in such a case the party so divested is usually seeking to recover for himself something which is included in his conveyance to another. For example, a bankrupt who is legally divested of his estate has sometimes brought an action, saying the trustee is no doubt the proper person to sue this action, because the right is vested in him, but he improperly refuses to make this claim, and I ask leave to make it myself. This observation applies equally to the case of a person who is divested by a voluntary trust-deed. The person truly vested in the claim refuses to make it, and so *prima facie* it cannot be considered a good claim. The Court, in that case, may allow the divested person to make the claim, but only on finding caution for expenses. Here, however, the person suing is divested, but he is suing his own trustee and calling on him to pay over an alleged balance, which he says is in the trustee's hands. Can it be said that his right to call upon his trustee to account for a balance said to be in his hands was so conveyed to the trustee as to make him the proper person to sue for it? If the action is rightly founded, the pursuer here, and no one else, has the true interest. The right is in him, and he is only seeking to make good a right of which he never was divested. To say the contrary is to make a proposition outwith the rules of good sense and authority.

There is always a power in the Court to order a party to find caution for expenses, but absolute impecuniosity is never the sole reason for such an order. The conduct of the cause may be such, or other matters may transpire, which make such an order necessary, but absolute impecuniosity will never be taken as the sole ground for making a party find caution for expenses. That is a rule which I remember hearing the first Lord Mackenzie lay down very much in the same terms as I have now used.

LORD CRAIGHILL.—I concur in the conclusion to which your Lordships have come, and in all the observations made in explanation of the grounds of judgment.

THE COURT pronounced this interlocutor:—"Recall the judgments of the Sheriffs appealed against, and decern: Find the appellant (pursuer) entitled to expenses in this Court, and also in the inferior Court, from 4th March 1881, the date of the interlocutor closing the record."

R. BROATCH, L.A.—D. FORSYTH, S.S.C.—Agents.

JAMES SMITH AND OTHERS (SIR JOHN SINCLAIR'S TRUSTEES), First Parties. No. 142.
—*Sol.-Gen. Balfour—Gloag.*

MRS MARGARET CRICHTON ALSTON OR SINCLAIR, Second Party.—
Mackintosh.

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SIR JOHN ROSE GEORGE SINCLAIR, Bart., Third Party.—*Mackintosh.*
MARGARET SINCLAIR and NORMAN SINCLAIR, and their *Curator Bonis* and
Factor *Loco Tutoris*, Fourth Parties.—*J. C. Lorimer.*

Entail—Agreement between heir in possession and apparent heir—Heir and Executor.—An heir of entail in possession expended certain sums in improvements, and entered into an agreement with his son, the apparent heir, whereby the latter bound himself, "his heirs and successors, succeeding to" the estate, to repay the same. The son died without succeeding to the estate, but his eldest son succeeded his grandfather as heir of entail. *Held* that neither the grandson who succeeded to the estate, nor the personal representatives of the son, were bound by the agreement to repay the sum expended.

Entail—Succession—Collation—Heir alioquin successurus.—The heir of entail in possession of an estate by his settlement bequeathed a third of the residue of his free means to his son (who was then heir-apparent to the entailed estate), "partly in consideration of the burdens he will be subjected to on his succeeding me" in the entailed estate, "and to his heirs, executors, and successors." The son predeceased, leaving three children, the eldest of whom succeeded to the entailed estate on the death of his grandfather. In a question between him and the other two children as to whether he could take a share of the grandfather's bequest without collating his life interest in the entailed estate, *held (diss. Lord Young)* that there was here no room for the doctrine of collation, as the heir of entail was entitled to a share of the residue in consequence of the expressed will of the testator.

Observations (per Lord Justice-Clerk and Lord Young) on the case of *Blair v. Blair*, Nov. 16, 1849, 12 D. 97, 21 Scot. Jur. 612.

ON 6th March 1851, by interlocutor of Court on a petition presented 2^d DIVISION.
under the Rutherford Act, the late Sir John Sinclair of Dunbeath, Bart.,
with consent of his three sons then alive, viz., John Sinclair, Alexander
Young Sinclair, and George Sinclair, disentailed the estate of Barrock, in
the county of Caithness. Thereafter, and in terms of the agreement
entered into between Sir John Sinclair and his sons, Sir John, after
borrowing on the security of the said estate £6000, on 14th July 1851
re-entailed the estate in favour of himself, "whom failing, of John Sin-
clair, lieutenant in the 39th Regiment of Madras Native Infantry, my
eldest son, and the heirs-male of his body; whom failing, to Alexander
Young Sinclair, lieutenant and adjutant of the 26th Regiment of Bombay
Native Infantry, my second son, and the heirs-male of his body; whom
failing, to George Sinclair, lieutenant in the 63d Regiment of Bengal
Native Infantry, my third son, and the heirs-male of his body; whom
failing," as therein mentioned. And he thereby, in terms of the agree-
ment, renounced all right to "burden the said lands and estate with any
sum or sums of money for improvements, or for any purpose whatever
other than the amounts which have been or may be borrowed under the
Drainage Acts passed or that may be passed," and for such provisions as
he had made, or might, by virtue of any law or any Act of Parliament, be
entitled to make in favour of his widow and younger children. Sir John
was duly infeft under this entail.

On 3d March 1856, an agreement was entered into between Sir John
and his eldest son, John Sinclair, whereby, on the narrative that it was
advisable to have a corn and meal mill erected at How on the estate, which
it was estimated would cost £700, it was agreed that Sir John should
borrow this sum, and his son John should grant him a promissory-note

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for £700, and on his succeeding to the estate should pay off the loan without having any claim against Sir John or his personal representatives. A similar agreement was entered into between Sir John and his second son, Alexander Young Sinclair, dated 15th November and 25th December 1856, Alexander Young Sinclair, granting his father a promissory-note for £700, and becoming bound, in the event of his succeeding to the estate, to pay off the £700 without claim against Sir John or his personal representatives.

On 1st February 1861—the eldest son, John Sinclair, having in the meantime died—Sir John and his two surviving sons, Alexander Young and George, entered into another agreement. This document proceeded on the narrative of the former agreements, and also contained a statement that Sir John had expended £1400 in erecting a farm-steading at Quintfall on the estate. The sons then bound themselves as follows:—“*Primo*, I, the said Alexander Young Sinclair, the nearest heir in succession to the said entailed estate, and I, the said George Sinclair, as at present next in succession to him, do hereby corroborate and confirm the said agreement between the said Sir John Sinclair and Alexander Young Sinclair, which is dated the 15th day of November and 25th day of December 1856, in the whole heads, clauses, and contents thereof; and of new I, the said Alexander Young Sinclair, in the event of me or the heirs of my body succeeding to the said entailed estate, and I, the said George Sinclair, in the event of me or the heirs of my body succeeding to the said entailed estate, do hereby become bound to content and pay, as we do hereby in the events foresaid respectively bind and oblige ourselves, and our heirs and successors, to content and pay the said principal sum of £700 sterling to the executors of our said father, with the interest of the said principal sum from and after his death, aye and until payment: *Secundo*, And in consideration of the said advances made by the said Sir John Sinclair upon the improvement of the said estate in the parish of Wick, and in the erection of the steading on the farm of Quintfall, do hereby respectively as aforesaid become bound, as we do hereby bind and oblige ourselves, and our heirs and successors succeeding to the said entailed estate as aforesaid, to content and pay the further principal sum of £1000 sterling to the executors of our said father, with the interest of the said principal sum from the time of his death aye and until payment.”

Sir John Sinclair died on 21st April 1873. He was survived by his widow, Lady Sinclair, and by the widow and three children of his son Alexander Young Sinclair. He left a trust-deed, dated 22d March 1867, whereby, in the fourth place, he provided:—“With regard to the residue and remainder of my said estate and effects, heritable and moveable, above conveyed, including therein, when free, the capital sum or sums lent out or invested to meet the said liferents in favour of the said Dame Margaret Learmonth or Sinclair, and such capital sum or sums which may have been invested to meet the foresaid annuities or any of them, in the event of my trustees considering it expedient to provide for all or any of the said annuities in that way, I direct and appoint my trustees to pay, assign, and dispose one third part thereof to the said Major Alexander Young Sinclair” (afterwards Lieutenant-Colonel Alexander Young Sinclair), “my son, partly in consideration of the burdens he will be subjected to on his succeeding me in the said entailed estates of Barrock, and to his heirs, executors, and successors; and the remaining two-third parts thereof to the said Captain George Sinclair, my second son, and his heirs, executors, and successors.”

Lady Sinclair—Sir John's widow—who was also one of his trustees, on 23d December 1875, in order to avoid any question between Sir John's

trustees and the widow of Alexander Young Sinclair, paid the £700 No. 142.
 above referred to out of her own funds, and granted to the trustees an
 obligation to free and relieve them of all responsibility in connection with June 7, 1881.
 the other sum of £1000, should they be made responsible for not enforcing Sinclair's
 payment thereof. Trustees v.
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After Lady Sinclair's death, Sir John's trustees began to arrange for dividing the residue, and difficulties having arisen as to who was to pay the £1000, and to whom the shares of residue under his settlement were to be paid, a special case was prepared and presented to the Court. The parties to the case were (1) Sir John Sinclair's trustees; (2) the widow of Alexander Young Sinclair; (3) Sir John Rose George Sinclair, Bart., the eldest son of Alexander Young Sinclair; and (4) Margaret and Norman Sinclair, Alexander Young Sinclair's younger children, and their *curator bonis* and *factor loco tutoris*.

The questions of law in the case related to two different matters:—(1) As to the liability for the £1000 above mentioned. This was dealt with under questions 1 and 2, which were as follows:—"1. Whether the party of the second part, as representing the personal representatives of the said Alexander Young Sinclair, is liable in payment of the said sum of £1000 above mentioned, with the interest thereof from the date of Sir John Sinclair's death? 2. Whether the party of the third part, as heir of the body of the said Alexander Young Sinclair, who has succeeded to the said entailed estate of Barrock, is liable in payment of the said sum of £1000 and interest?" (2) As to the succession to residue under Sir John's settlement. The remaining questions related to this, and were:—"3. Whether the third part or share of the residue of the estate of Sir John Sinclair, payable to the 'heirs, executors, and successors' of Colonel Alexander Young Sinclair, is divisible equally among his children, the parties of the third and fourth parts, without collation by the party of the third part? or 4. Whether the party of the third part is bound, as a condition of receiving an equal share, to collate the value of his life interest in the entailed estate to which he succeeded on the death of the testator?"

On these points the trustees (first parties) maintained, with respect to the £1000, alternatively, that the general representatives of Alexander Young Sinclair, represented by his widow (second party), were bound to pay the £1000 with the interest; or (2) otherwise that Sir John Rose Sinclair (third party) the eldest son of Alexander Young Sinclair, as heir of entail who had succeeded to and was in possession of the estate of Barrock, was bound to pay the £1000 and interest.

Mrs Sinclair and Sir John Rose Sinclair (second and third parties) maintained, on the other hand, that the obligation by Alexander Young Sinclair, with respect to the £1000, was not enforceable either against Alexander Young Sinclair's personal representative or the heir of entail. Mrs Sinclair did not admit that the amount of the estate of Colonel Alexander Young Sinclair was sufficient to meet the claim for £1000 and interest, in the event of its being held liable therefor; but it was agreed that all questions as to the amount of the estate should be reserved.

With regard to the division of the one-third of the residue of Sir John's estate bequeathed to Alexander Young Sinclair and his heirs, executors, and successors, Sir John Rose Sinclair, Alexander Young Sinclair's eldest son, maintained that he was entitled to an equal share of residue along with his brother and sister.

The brother and sister (fourth parties) maintained that their elder brother was only entitled to an equal share of residue on his collating the value of his life interest in the entailed estate to which he had succeeded on the death of Sir John Sinclair, their grandfather.

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Argued for the first parties on the question as to the £1000;—The charge clearly fell on the general representatives of Alexander Young Sinclair, because where an heir of entail in possession professes to bind himself and the heirs of entail, he only in reality binds himself and his general representatives.¹

Argued for the second party;—The liability failed entirely, as any obligation undertaken was only to come into force in the event of Alexander Young Sinclair succeeding to the estate, which he never did.

Argued for the third party on the question of collation;—Collation did not apply here. It only came in in questions of intestacy. Further, Sir John Rose Sinclair took here directly, as one of his father's heirs *in mobili-bus*, under a bequest from his grandfather. He might have been bound to bring into "hotchpot" everything that he took as heir-at-law of his father, but he took nothing in that capacity. All the heritage he took he took from his grandfather.²

Argued for the fourth parties on the question of collation;—The case of *Blair*³ extended the obligation to collate to cases where the moveable estate had been left by will, and the case of *Little-Gilmour*² had already extended it to cases of entailed estates where the heir was *aliouquin successurus*. Sir John Rose Sinclair was therefore bound to collate his life interest in the entailed estate before he could share in the moveable bequest from the grandfather.

At advising,—

LORD JUSTICE-CLERK.—In this special case there are four parties—first, the trustees of the late Sir John Sinclair of Dunbeath, who was heir of entail in possession of the estate; the second is the widow of Colonel Alexander Young Sinclair, who was the second son—ultimately the eldest son by the death of his brother—of Sir John Sinclair, the heir of entail; the third is the heir at present in possession, Sir John Rose Sinclair, who is the eldest son of Colonel Sinclair; and the fourth are the younger children of Colonel Sinclair for their interest in this matter.

There are substantially two questions that arise, one of them, which I shall afterwards speak to, of considerable interest.

The first two questions relate to a special agreement made between Sir John, the heir in possession of the entailed estate, and his then eldest son, and also his second and third sons, in regard to certain burdens upon the entailed estate. I need not go in detail into the transactions between the father and the sons; but the substance of it is this, that the entailed estate of Barrock, under the authority of the Rutherford Act, with the consent of the eldest and second sons, was burdened with £6000, and Sir John undertook, in the transaction by which the disentail was effected, to lay no additional burden on the Barrock estate for improvements or otherwise; but finding that there were certain matters that were urgently required for the benefit of the estate, he entered into an agreement in the year 1856 with his eldest son in regard to the building of a mill at How,

¹ Todd v. Moncrieff, Jan. 14, 1823, 2 Sh. 113 (N. E. 104), aff. May 27, 1825, 1 W. & S., 217.

² Little-Gilmour v. Little-Gilmour, Dec. 13, 1809, F. C. 1 Ball's App. 102; Anstruther v. Anstruther, Jan. 20, 1836, 14 Sh. 272, aff. Aug. 16, 1836, 2 Sh. and M'L. 396; Blair v. Blair, Nov. 16, 1849, 12 D. 97, 21 Scot. Jur. 612; Ersk. 3, ix. 3.

The building of the mill was valued at £700. The result was that his eldest son, then John Sinclair, undertook, in the event of his succeeding to the estate, to become liable for this sum. Afterwards the second son undertook a similar obligation conditionally upon his eventually succeeding to the estate. Then after the death of John Sinclair the final agreement was come to in February 1861 which is the subject of the first two questions that arise here.

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I must really say that I have endeavoured to arrive at the meaning of that instrument with very little success, and at this moment I am totally unable to say, at least with any amount of confidence, what it was that the conveyancer intended to express by the very enigmatical words which are used in that deed.

However, we must take it as we find it. By this minute of agreement between Sir John Sinclair and his two surviving sons, Alexander and George, after narrating the former agreements, and setting forth that it is reasonable that they, the two sons Alexander and George, should grant these presents, "do hereby corroborate and confirm the said agreement between the said Sir John Sinclair and Alexander Young Sinclair, dated the 15th day of November and 25th day December 1856, in the whole heads, clauses, and contents thereof; and of new, I, the said Alexander Young Sinclair, in the event of me or the heirs of my body succeeding to the said entailed estate, and I, the said George Sinclair, in the event of me, or the heirs of my body, succeeding to the said entailed estate, do hereby become bound to content and pay, as we do hereby in the events foresaid respectively bind and oblige ourselves, and our heirs and successors, to content and pay the said principal sum of £700 sterling." To say that that was done of new is an entire blunder, for no such thing had been undertaken by the prior agreements in any sense. The prior agreements were entirely dependent on the heir himself, the party bound, succeeding to the estate, and no such condition or event as the heirs of his body succeeding to the entailed estate was in contemplation at all. That was entirely a new thing. I do not know what meaning is to be attached to "in the event of me or the heirs of my body succeeding." I do not know, I say, what that means, because Alexander Sinclair and George Sinclair might have predeceased the heir in possession by many years, and the idea that the winding-up of their personal succession was to remain over until it was seen whether any of their sons succeeded to the entailed estate, is to my mind a notion that never could have been entertained by a man of business. Therefore I am inclined to read that part of the agreement *pro non scripto*. I do not think it has any meaning, and I do not see how it could by any possibility occur to any practical conveyancer.

The widow paid the £700, and there is no question about it now. But then we come to a question of somewhat more moment. The only importance of the particular clause to which I have adverted is to be found in its bearing upon the next, which was intended, as I think it must have been, to operate precisely the same kind of obligation. It runs thus:—"And in consideration of the said advances made by the said Sir John Sinclair upon the improvement of the said estate in the parish of Wick, and in the erection of the steading on the farm of Quintfall, do hereby respectively as aforesaid become bound, as we do hereby bind and oblige ourselves, and our heirs and successors succeeding to the said entailed estate as aforesaid, to content and pay the further principal sum of £1000 sterling."

It is impossible to exaggerate the want of intelligibility in this clause. It

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would seem to imply that the heirs and successors had been bound in the prior clause. But there is not a word to bind them in the former clause, and yet here they, "as aforesaid," become bound and bind themselves; their heirs, and successors succeeding to the estate. It is perfectly plain that nothing of that kind could have been intended, because, if Alexander Sinclair had the power to bind the heirs of entail, much more had the heir in possession. It must have been perfectly well known that there was no power whatever to do that; and I am quite persuaded that there is nothing here but the most slipshod and inaccurate language.

The conclusion I come to is, that the only intention of either of these two obligations was to bind the two heirs, the obligants, in the event of their individually succeeding to the entailed estate; and as Colonel Sinclair did not succeed to the entailed estate I am of opinion that his personal representatives were not responsible for either of these obligations.

I am of opinion, therefore, that we must answer the first and second questions to the effect that neither the heir nor the personal representatives of Alexander Young Sinclair are responsible for this sum of £1000.

I have come to that conclusion with some amount of difficulty, because I felt I was dealing with a clause the precise words of which have little meaning. I cannot find the heirs of entail liable when the executors are not. Nor do I see how I can say that in the event of one of the heirs of the body succeeding to the entailed estate at an indefinite period that is to be made a condition of the liability.

But then we come to a question of a different kind, and one involving much more important interests so far as the law is concerned, and that is the third question—"Whether the third part or share of the residue of the estate of Sir John Sinclair, payable to the heirs, executors, and successors of Colonel Alexander Young Sinclair, is divisible equally among his children, the parties of the third and fourth parts, without collation by the party of the third part?"

It will be observed that the question relates solely to the interests of the younger children of Alexander Sinclair. It arises in reference to the personal succession of the late Sir John Sinclair, but it is not stated or maintained on behalf of the next of kin of Sir John; but the younger children of his son Alexander, who have no right in this money but that of legatees, now make this claim against their brother.

The subject-matter of this question is a legacy left by Sir John Sinclair in a will executed by him in the year 1867, after the date of the agreements we have referred to. He left a trust-deed, the trustees under which are parties here; and after leaving to his wife the liferent of the whole of his property, he proceeds as to the residue:—"I direct and appoint my trustees to pay, assign, and dispose one-third part thereof to the said Major Alexander Young Sinclair" (afterwards Lieutenant-Colonel Alexander Young Sinclair), "my son, partly in consideration of the burdens he will be subjected to on his succeeding me in the said entailed estate of Barrock, and to his heirs, executors, and successors; and the remaining two-third parts thereof to the said Captain George Sinclair, my second son, and his heirs, executors, and successors."

There is no ambiguity in this bequest. The parties interested in testing its validity were the next of kin of Sir John Sinclair, but apparently no question has been raised upon that matter. At least the trustees, who are parties in this case, have said nothing about it. The legacy, they therefore seem

to think, must be paid according to its terms. Its terms seem to admit of No. 142.
 no doubt. Failing Alexander Sinclair, who predeceased his father, his heirs, executors, and successors are conditionally instituted in the right of the legacy ;
 and this leaves the only question to be, who Alexander Sinclair's heirs, executors, and successors are. June 7, 1881.
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Now, as Alexander Sinclair left no heritage, his heirs, executors, and successors *in mobilibus* are his children, or next of kin, including the eldest son. This is apparently not disputed by the younger children *in terminis*, and, as I think, it seems to conclude the controversy between them.

But it is contended for Alexander Sinclair's younger children that although their father left no heritage, and although they are in no sense next of kin of Sir John Sinclair, whose succession is in question, they are entitled in the division of this legacy, when paid over, to exclude their elder brother, unless he throw in the entailed estate, which he did not derive from their father, and in which they cannot and never could have had the slightest interest through him.

It is too plain, I think, to require illustration, that if there could be room for this plea of collation as regards this legacy, it is one competent only to the next of kin of Sir John Sinclair. Had there been place for the plea at all, they, the next of kin of Sir John, might have insisted that the third party here was bound, as a condition of drawing his share of the legacy, to collate with them the value of the life interest in the entailed estate which he took as heir of his grandfather, or as *alioquin successurus* to him ; but this plea, if it had been effectual, would not have enlarged the shares of Colonel Sinclair's younger children, but would have increased the residue of Sir John Sinclair's estate.

But even if the demand had been so stated—and it may be that these younger children, as well as the eldest son, may by the failure of the rest of Sir John Sinclair's family be in a position so to state it—there would have been no ground on which it could have been maintained. It must have failed, first, because the third party here claims nothing as next of kin of his grandfather, and it is only to such claims that collation between heir and executor applies ; and secondly, because the conditions under which this legacy was left were dependent entirely on the testator's intention, and the settlement indicates no intention on his part so to limit the bequest, but, as I think, exactly the reverse. As regards the first of these points, it is necessary to recur for a moment to the principle, elementary as it is, on which this rule or law of collation between heir and executor depends. It is a matter entirely peculiar to the technical rules of the Scotch law of real property and personal succession. But its operation and limits have been very clearly fixed by authority. Collation—the right to collate heritage—is the privilege of the heir who has succeeded to the heritable property of a defunct. The right is a limitation of the general rule that the heir is excluded from sharing with the other next of kin in the *pars legitima* of a parent's moveable succession. The rules of our common law carry heritable estate to the heir to the exclusion of the other children, and the moveable estate to the other children to the exclusion of the heir. But, in a question with the other children or next of kin, the rule is the same, that the heir in heritage is excluded from sharing in the legitim, and, if the dead's part is not tested on, the right of the next of kin will exclude the heir there also. But, as the heir is in blood one of the next of kin, he is allowed the privilege of collating what he takes as heir, and betaking him-

No. 142. self to his character of next of kin on condition of throwing the heritage or its value into the general succession.

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But this right is entirely in the option of the heir, and the next of kin cannot compel him to exercise it. One sentence from Lord Stair sufficiently explains the foundation of our law on this subject. He says—"Heirs are excluded from the bairn's part though in the family, because of their provision by the heritage, except in two cases—first, if the heir renounce the heritage in favour of the remanent bairns, for then the heir is not put in a worse position than they, but they come in *pari passu* both in heritable and moveable rights, which is a kind of *collatio bonorum*." The second case he refers to is when the heir is an only child, and combines both characters. Excepting in those two instances the heir is excluded from sharing in the personal estate. The same kind of doctrine is given at greater length by Erskine, b. iii, t. 9, s. 3, and by Bell in his Commentaries, vol. i., 5th ed., p. 101.

But, as the heir's privilege to collate is only available or necessary to enable him to assert his right as one of the next of kin, it cannot extend to rights from which the next of kin are excluded, and therefore cannot possibly have any place in testate succession. The best test of this is to take the case of a legacy left to the heir *nominatim*. The heir is not excluded, and has no privilege to assert and no claim to purchase. The next of kin have no claim to it, and have consequently no consideration to give. The legacy must be paid *secundum formam doni*, and the intention of the donor or testator is the only rule. In the passage I have already referred to Mr Bell states this as settled law. He says—"The privilege of collation may be excluded by the will of the deceased where he has the uncontrolled power of disposing of his moveables. Thus, if the will bequeath legacies, and leave the residue to an executor or residuary legatee, or clearly bequeath the succession to the next of kin as specifically under the will, the heir will have no right to demand collation." This passage touches the question very closely, for it exhibits so strongly the rule that collation cannot apply in testate succession that, if Sir John Sinclair had left his moveables by will to his next of kin as a class, Colonel Sinclair would not have been entitled to any share even by collating his interest in the entailed estate.

But here the case is wholly different. The legatees in this special legacy are not the next of kin of the testator, but certain children of another, who are described as the heirs, executors, and successors of their father. This is a mere designation, which, when its meaning is determined, is equivalent to nomination. But its meaning admits of no doubt, because, as Colonel Sinclair left no heritable property, his eldest son had from the first all the rights of one of the next of kin.

On this first head, therefore, I am of opinion that there is no room for the doctrine of collation here, because this special legacy is testate succession, taking effect solely by the expressed will of the testator.

But, secondly, it appears to me very clear that the intention of the testator was that the succession of the legatee to the entailed estate should not affect his right to the legacy. On the contrary, in the case of the institute the will bears that the legacy was given in the prospect of his succession to the entailed estate. I could have understood the younger children maintaining that the words "heirs, executors, and successors," as they related to moveable succession, were primarily to be understood of the younger children and not of the heir—in which case, as the heir was not included in the bequest, he could have no interest in a legacy which was not left to him. But that has not been maintained here, because the

intention to the contrary very clearly appears. Here the legacy was expressly given in aid of burdens connected with the title to the land. The conditional institutes were simply to take in all respects as the institute would have taken, and I cannot read into this bequest a condition which seems equally opposed to the legal construction of the instrument and the manifest intention of the author of it. In a word, the fallacy of the argument for the younger children seems to me to consist in confounding two things which are entirely distinct—the designation of the legatees with the rights conferred only by the will. The legatees take no right of inheritance through their nearness of kin to their father; their right of succession comes to them solely by virtue of the bequest. Yet are they quite accurately designed, in the words of the will, the “heirs, executors, and successors” of their father, and would be so however barren the character might be. The identity of the persons favoured being ascertained, their patrimonial interest flows entirely from the intention of the testator.

I must not conclude, however, without saying a word on the case of *Blair*, without which, indeed, the argument for the younger children could scarcely have been plausibly maintained.

The substance of that decision, as far as it relates to the present question, is this—a lady left a mixed succession to the heirs and successors of a relative. The eldest son claimed the whole on the faith of certain informal writings, which was not allowed. He was preferred, however, to a certain leasehold property to which he was entitled under the words of the will. He then proposed to collate this heritage and participate in the general succession. This was allowed, on grounds which I am entirely unable to follow. The decision is most imperfectly reported—Lord Cockburn strongly remonstrating against it; and the grounds stated by the Lord Justice-Clerk Hope are such that I can hardly believe he is accurately reported. He is reported as saying, in direct opposition to the law as laid down by all the institutional writers, and every case, as far as I am aware, decided on the subject, that “collation is not confined to intestate succession, for an heir of entail must collate.” I greatly doubt if he so expressed himself; for so far as the remark bears on the case it was inaccurate, and so far as it was accurate it has no application to it. The rule that an heir of entail must collate, coupled with the qualification required to make it accurate, proves, what indeed was not in question, that the heir's obligation to collate is in principle limited to intestate succession, seeing that the liability to collate entailed estate only applies when the heir of entail was *aliocuin successurus* to the last heir, and so in a sense taking up his succession. If he is not heir of line or *aliocuin successurus*, it has long been settled that he is not bound to collate. But, as I have said, the remark was wholly beside the only question in controversy. The eldest son was not *aliocuin successurus* to Miss Blair. The question was, whether by collating heritage acquired by a singular title he could obtain right to a share of a special legacy left to the next of kin? On this head the illustration used by the learned Judge has no application whatever, and the result, as I have said, is at variance with the nature of the right and an unbroken current of authority.

The learned Judge is also reported to have said that the eldest son succeeded to the heritage as the heir of his father. But the phrase is quite inaccurate. Strictly he succeeded to nothing as the heir of his father. He succeeded wholly and exclusively as a donee under Miss Blair's settlement, and he had no other right to the succession. But he was found to be the donee under Miss Blair's

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settlement, because he was the person who, if his father left heritage, would have succeeded to him *ab intestato*—a matter entirely turning on the meaning of the words of the settlement.

I do not trust the words of this report, which are evidently abbreviated. The Court, I imagine, must have gone on the footing that they could read in Miss Blair's settlement indications of an intention that if the heritage were renounced the right of the heir as one of the next of kin should take effect. If this were not the ground of it, I can only say I think it an erroneous decision, and am not prepared to follow it, with, I need not say, profound respect for the eminent Judges by whom it was pronounced, and from whom I should greatly hesitate to differ.

LORD YOUNG.—On the first question I am of opinion, with your Lordship, that it must be answered in the negative—the party of the second part is not liable in the payment of this sum of £1000. I am of that opinion, because I think it clear that by the agreement relied on the liability is not put upon the second party. The agreement is very inaccurately expressed whatever you take to be the meaning of it. That there is inaccuracy of expression is clear; but construing it with reference to the subject-matter, and with reference to the intention of the parties, as I collect it from the instrument itself and other deeds which are narrated there, I think it plain that there was no intention to put the obligation upon the executor of Alexander Young Sinclair, and that the deed does not admit a construction which would put it upon the executor of Alexander Young Sinclair. Why the party should have thought for one moment of putting the obligation upon the executor of Alexander Young Sinclair, who never succeeded to the estate, I do not know.

With reference to another sum which is not now here in question—the sum of £700—I think it was exactly in the same position as the sum of £1000, with no other difference than that the smaller sum was expended upon the erection of a mill, while the larger sum—slightly larger—was expended upon the construction of a farm-steading upon the entailed estate. With respect to the smaller sum, the parties expressed themselves clearly in an antecedent deed that it is the heir succeeding to the estate who is to relieve the grandfather of the immediate expenditure—that is to say, the son, the party to the agreement, is to relieve him if he succeeds—that the immediate proprietor, namely, the father, shall lay out the money and pay interest while he lives, but that on his death his son succeeding him in the entailed estate shall pay off the loan which was incurred for the purpose of making the expenditure. That, I think, was plainly the meaning and intention of the parties, according to the good sense of the thing, with reference to the sum dealt with by the second deed also. From that deed, and from what may be legitimately referred to, I, without any doubt or hesitation in my own mind, think that there was no intention of putting this obligation upon the second party, namely, the executor of Alexander Young Sinclair.

With regard to the heir whose liability is the subject of the second question, the parties were agreed, and as they were agreed I do not know why the question should have been put. They are not at variance about it at all. They think the heir is not liable.

Upon the third question, whether the third part or share of the residue of Sir John Sinclair is divisible equally among his children, the parties of the third

and fourth parts, without collation by the third party, I have more to say. No. 142. But before addressing myself more particularly to that question, I should like to point out that the younger children—indeed the whole children—of Alexander Young Sinclair are of the next of kin and heirs *in mobilibus* of Sir John. His children all predeceased him, and therefore his next of kin were necessarily his grandchildren. A husband, after his own children, can have no nearer of kin than their issue, and they are the only grandchildren of whom we have any account in this case, although George, another deceased child of Sir John, may have left children, and if so, they would be of the next of kin of the grandfather also. Now, whatever the importance of it may be, the grandchildren were of the next of kin to the grandfather as well as of their father.

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One other observation I make upon this head, and it is this—that Sir John Sinclair, the eldest son of Alexander Sinclair, was his father's, and is at this moment his grandfather's, heir of entail or heir of heritage. Of that there is no doubt whatever. He is the eldest son of his deceased eldest son. Therefore he is his heir of heritage, and he has taken the heritage accordingly. And he has taken it none the less that his grandfather, Sir John, was, by reason of the entail, powerless to prevent it coming to him—coming to him as the family estate—coming to the family heir; that is undoubtedly the state of the fact. Now, Sir John Sinclair left a will as well as a deed of entail—a will to govern the succession to his personalty, as the deed of entail which he was not free to make or to refuse to make—for I take for granted it was an onerous deed—governed the succession to the only heritage which so far as we know he had. By the entail the heritage descended to his heir-at-law, the heir of the body of his eldest son, who predeceased him, and by the will his personal estate is given—it is only a third part of it with which we have to deal—to the heirs *in mobilibus* of his son, who were also his next-of-kin. Now, that is the whole family succession, heritage and moveables. There is an entail governing the succession to the one but carrying it to the heir in heritage; there is a will governing the succession to the other but carrying it to the heirs *in mobilibus*. The heir of heritage so taking and keeping the family estate seeks at the same time to share the personal estate as one of the heirs *in mobilibus*.

Now, I have considered whether the law compels us to take this view—I confess with some prejudice against it; all the more on account of that prejudice I have considered the law on the subject as I can collect it from the authorities and from the principles which govern the law in the case. I should point out that although in the grandfather's deed the first destination of his personalty—of the one-third in question—is to his son Alexander Young, if he desired to take it, he would, no doubt, have taken it without the least necessity for collating the entailed estate—for it never was doubted, so far as I know, that where a legacy or bequest of residue is given to an heir *nominatim*, he is free to take it along with the entailed estate, or along with an estate however coming to him, *ab intestato* or otherwise. Indeed, any father, or more remote ancestor—it does not signify—may give his worldly goods, if he is free to dispose of them, to his eldest son and cut off the others, except in so far as they are protected by legitim. Legitim preserves a certain amount of their father's estate to them, but any father is nevertheless entitled, if he wills, to give all his worldly goods and gear, heritable and moveable, to his eldest son, or to cut off his eldest son from both the heritage and the moveable estate, except in so far as he would have the legal right of legitim. There is no question about that.

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But here, failing Alexander Sinclair—and he did fail—the construction which the law compels us to put upon the will *quoad ultra* is that the bequest is to Alexander's heirs *in mobilibus* as a class. It is to those, leaving the law to designate them, upon whom the law impresses the character of Alexander's heirs *in mobilibus*. That, I think, is the only way we can read this bequest. It becomes immaterial therefore that by this will the father—I mean Sir John, the grandfather with reference to the present parties, but the father of Alexander—signified a clear intention to give him one-third of the residue of his personalty in addition to the entailed estate, and that the will would have had that effect. He was entitled so to will, and clearly expressing that will it would have received effect. But it is quite immaterial, for Alexander died, and his will, as expressed with reference to the circumstances as applied to those upon whom the law of succession—I mean the general law of succession—impresses the character of Alexander's heirs *in mobilibus*, says that one-third of the residue shall be due. If any effect were to be given, or any importance to be thought to attach, to the circumstance that he meant Alexander, if he survived, to take it in addition to the entailed estate, it would be that the conditional institution was of Alexander's heir in heritage—the heir of his body taking the entailed estate; and in that view the heir is to take the whole, just as the father would have done if he had lived. But that was not contended, and that circumstance, in my view of the law, is of no materiality at all.

Now, I stated to your Lordships that having a very strong feeling that the policy and equity of the law led to the result that the heir of the family—that is, the eldest son taking the family estate as such—shall be excluded from the class of those upon whom the law impresses the character of heirs *in mobilibus*, unless he chooses to purchase his admission into that class by collating what he has taken as heir of the family with what has fallen to the heirs *in mobilibus*—feeling, I say, very strongly that this was according to the equity and policy of the law—even although both heritage and moveables descended from the grandfather—the father having died young—I addressed myself on that account the more anxiously to the consideration of the law, and the result of my consideration, so far as I have not indicated it already, and perhaps with some degree of repetition, I shall now state.

The late Sir John Sinclair by his will directs his testamentary trustees to pay one-third of the residue of his estate to his son Alexander, “and to his heirs, executors, and successors.” Alexander predeceased the testator, leaving three children, who are parties to this case, and their father's undoubted “heirs, executors, and successors.” The question is, Whether the eldest, Sir John Sinclair, is entitled to a share of the bequest in his grandfather's (the late Sir John's) will without collating his life interest in the lands and estate of Barrock, to which he succeeded as heir of entail on his grandfather's death?

The entail of Barrock was made by the late Sir John in 1851, in pursuance of an arrangement by which it had immediately before been disentailed, and the destination under which the present Sir John succeeded on his grandfather's death in 1873 is in these terms—“whom failing, to Alexander Young Sinclair, . . . my second son, and the heirs-male of his body”—that is the destination under which the third party here, the heir of entail in possession, succeeds. It is under a destination to the heir-male of his father's body. He thus took the estate under a conveyance to the heirs-male of his father's body, and this conveyance was made, as it happens—though I think the circumstance immaterial

—by his grandfather, to whom he immediately succeeded by reason of his father's predecease. And it is not doubtful that he thus had an advantage by primogeniture over his father's younger children, none the less that it was secured to him by deed of entail. The residue of the grandfather's estate immediately in question being personalty, it is clear, and was admitted, that the conditional institution of the "heirs, executors, and successors" of Alexander, who predeceased the testator, operates in favour of Alexander's personal representatives or heirs *in mobilibus*, just as certainly as the destination which I have quoted from the entail of Barrock operated in favour of his heir in heritage—the heir-male of his body.

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Now, although a man's children are all equally near of kin to him, and so *prima facie* are all entitled to share in his moveable succession as his heirs *in mobilibus*, or to take such a bequest by anyone, even a stranger, to their father's heirs *in mobilibus*, yet the law of primogeniture and our system of entails is modified by the familiar rule that the eldest son, if he has taken or succeeded to heritage by reason of his primogeniture, is excluded from the class of heirs *in mobilibus*, unless he shall choose to purchase his inclusion by collating the heritage with the younger children. Now, this again is a qualification upon his exclusion which I have represented as a modification of the law of primogeniture. He is excluded from the class to which he otherwise belongs as a modification on the law of primogeniture. But there is a qualification upon this exclusion, which is, that he may bring in the heritage and share it with the others who are equally near of kin with him, and then he shall share the moveables with them. Your Lordship has observed that it never was supposed that he could be compelled to collate. Certainly not; if he could be compelled to collate, there would practically be an end to the law of primogeniture or the advantages of it, because wherever he took more by the law of primogeniture than the share of the whole family property, heritage and personal together, he would be always called upon to collate. There would then be an equal division in almost every case, whether he had the lion's share or not. But he cannot be compelled to collate. And it is there that the law of primogeniture still operates—at least as a great many people think—of course we do not here express any opinion upon such questions—with injustice and hardship, and if the heritage is a great deal more than the share effeiring to one of the children of the family the heir takes it all the same, and the younger children may go with little, approaching to nothing. On the other hand, if there is very little heritage then the law enables the heir by giving it up—making it "hotchpot" with the moveables—to return into the position of one of the next of kin or one of the younger members of the family.

The question we have to decide is, whether or not this rule is applicable in the circumstances of this case? And before examining the arguments *hinc inde* on the question, I cannot avoid remarking that the case, in my view of it, is clearly within the policy and equity of the rule.

The first proposition on which the eldest son, the third party, relies is, that he took Barrock, not as heir to his father but as heir to his grandfather, which is true in this, more or less, material sense, that he served heir to his grandfather in conformity to the rule of our feudal law which requires that the service shall be to the proprietor last infeft, and he must have done so equally although his father had survived and possessed the estate for years, if he died uninfeft—a case of frequent occurrence. But his right was as heir-male of his father's body, *i.e.*,

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as his father's eldest son, or by reason of his primogeniture among his father's children, and in this capacity he was served heir to his grandfather and took the estate.

But in applying the doctrine of collation, it is the substance of the thing, and not the technicality of feudal title, that is regarded, and this is illustrated in various circumstances, but quite uniformly, by all the cases. Thus, it has long been settled that the heritage need not have been inherited, but that heritage taken by immediate voluntary conveyance (favouring the primogeniture) excludes the eldest son from the class of heirs *in mobilibus* unless he shall choose to collate. Now, I do not regard this as unimportant, and this, I think, is what Lord Justice-Clerk Hope meant in the case of *Blair*—that it is not necessary to collation that there shall have been intestacy; for it was decided long before the case of *Blair*, and was known as familiar law, that the heritage need not have been inherited, but may have come by voluntary deed, if it came to the heir.

LORD JUSTICE-CLERK.—If he was heir of line.

LORD YOUNG.—Yes, surely. But it need not have been intestate. Intestacy was not required.

Again, it has been decided that the same result follows the taking of heritage under an entail made by a remote ancestor or a stranger—similarly favouring the primogeniture—although in that case the estate was taken neither by the law of succession, which the entail superseded, nor the will of the immediate predecessor, who was powerless in the matter, and except for merely technical purposes only a liferenter. Lastly, it has been held immaterial that the heritage taken by the heir or eldest son of a family never belonged to his father or other ancestor—was not his heirship at all—but was taken directly and immediately from a stranger who made a deed similarly favouring the primogeniture. It was so decided in the case of *Blair*. Agreeing with that case as according to the principle, policy, and equity of the rule under consideration, I must regard it as an authority, and I should not feel at liberty to depart from it, even if I had doubts about it. But if it is an extension of anything that had been decided before, it is an extension in conformity with the principle, and in conformity with the reason and the policy, of the rule which I have referred to—and the rule is not by any means unique. It is founded upon a principle which has received application under a variety of circumstances. It is well illustrated in English law as well as in ours, where they speak about equity requiring something to be brought into hotchpot if anything is claimed.

It was so decided, I say, in the case of *Blair*. In that case a stranger, by her deed, as the Court construed it, gave her heritage to the heir in heritage of Mr Blair, and her personalty to his heirs *in mobilibus*, and it was held that the heir, although undoubtedly one of his father's heirs *in mobilibus*, and taking nothing from his father at all, could not be included in the class with respect to the stranger's personalty except on condition of collating the heritage coming to him from the same stranger. I am unable to distinguish the present case from that of *Blair*, in a sense favourable to the heir's argument, by reason of the circumstance that both the heritage and the personalty came in that case from a stranger, and here from a grandfather. Nor, having regard to the case of *Little-Gilmour*, can I make a distinction on the ground that here the heritage is taken by deed of entail executed by the grandfather in pursuance of an onerous, as I

assume, disentail arrangement, while there it was taken under a voluntary deed. No. 142. The substantial fact, material to the doctrine of collation—regarded as a reasonable and equitable doctrine—is the same in both cases, viz., that heritage is given to and taken by the eldest son and heir of a certain person as such, i.e., in that character, or by reason of his being so, and certain personalty to the heirs *in mobilibus* of the same person. The policy, equity, and reason of the doctrine require, in my opinion, that the heir shall, with respect to the personalty, be excluded from the class of heirs *in mobilibus*, unless on the equitable condition of collating. I am unable to think that the decision in *Blair's* case would have been different on the question of collation had the testator there made an entail of her heritage in favour of the heir-male of Mr Blair's body, and by separate deed given her personalty to Mr Blair's heirs *in mobilibus*. It would have made the conclusion simpler on another branch of the case, but would not have affected the question of collation. But how then would that case have differed from this? The gist of the decision undoubtedly is, that it is immaterial to the question of collation that both heritage and personalty have come from a stranger—provided the first is given to the heir in heritage, and the latter to the heirs *in mobilibus*—and that it is also immaterial that the ancestor to whom they are heirs has left nothing to be taken by either.

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Upon these grounds I am unable to arrive at the same conclusion as your Lordships on this third question. And I confess I think the result to which in law I am disposed to come is in accordance also with the equity of the matter as well as the policy of our law. The father of a family of three dies in their infancy, during the lifetime of his own father, the grandfather of his infant children. Upon his death the family heritage and the personalty come to them. In such circumstances I shrink from the notion that the heir who takes the estate is to share the moveable fund with the younger children without collation. The personal estate to be divided amounts to about £12,000, and the heritable estate to about £2000 or £3000 a-year. It is easy to see what the result will be. The genius of our law on this matter is that the heir taking the heritage shall not share the £12,000 with the younger children.

LORD CRAIGHILL.—There are set forth in the special case four questions on which the opinion and judgment of the Court are asked, but in reality there are only two upon which we have to come to a judicial determination. For the counsel for the parties of the first part admitted at the debate that the party of the third part—the heir of entail now in possession, the eldest son of Alexander Young Sinclair—was not bound to make payment of the £1000 in question. That question, therefore, upon this admission, may be answered in the affirmative.

The third and fourth questions again are alternative, and the answer to the one involves also the answer to the other. There are thus practically only two questions upon which parties have joined issue, and these I shall now proceed to consider.

1. The first is, whether the party of the second part, as representing the personal representatives of the late Alexander Young Sinclair, is liable for the sum of £1000 which is in controversy. This depends on the obligation undertaken by Alexander Young Sinclair in a deed called the minute of arrangement and agreement set forth in the special case. The import of this deed, however, cannot, as I think, be truly gathered from its provisions alone. It refers to previous deeds, and the character and comprehension of these must be taken into account in

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The first of the earlier agreements was concluded in March 1856, and was between Sir John Sinclair, of Dunbeath, the heir of entail then in possession of the estate of Barrock, and John Sinclair junior, his eldest son and next heir of entail. What we there find is that Sir John had built a meal mill at How, on the entailed estate, at a cost of £700; that he and his eldest son had agreed that this sum should be borrowed; that the interest thereof during his life was to be paid by Sir John, "the said John Sinclair junior becoming bound to pay the principal sum, and interest falling due thereon, after the death of his said father;" and that upon those considerations it was agreed (art. 3) "that the said principal sum, with the interest falling due thereon, shall be paid by the said John Sinclair junior on his succeeding to the said estate." The succession to the property was thus a condition of John Sinclair junior's liability, though the opening clause of the agreement sets forth no such condition, but simply bears that John Sinclair junior had become bound to pay the principal sum, and interest to fall due, after his father's death. This is the result, and the only result, which in the circumstances could be considered either reasonable or natural, and yet we only reach it by qualifying what is said in one part of the minute by what is elsewhere disclosed.

The second of the agreements to which Sir John Sinclair and his sons were parties was concluded in December 1856, between him and Alexander Young Sinclair, his second son. This agreement sets forth in the preamble the arrangement with John Sinclair junior relative to the cost of the mill at How, and, strange to say, his obligation is there described as one "by which he became bound to pay the principal sum, with the interest thereon, after the death of his father"—the condition of succession to the estate being left to be assumed—"and that it is proper that in the event of the said Alexander Young Sinclair succeeding to the property he should in a similar manner become bound to pay the principal sum, and interest falling due, after his succession." Parties agreed (art. 3) that in the event of Alexander Young Sinclair's succession the principal sum, and interest falling due after his succession, should be paid by him. This obligation, however, was limited by the condition (art. 4) that there should be no claim under this agreement if the debt should be paid by John Sinclair, the elder brother of Alexander. Thus, again, in the case of Alexander, as it had been in the case of John, we have succession to the entailed estate recognised as the condition upon the fulfilment of which the obligation undertaken was to come into operation.

The third of the deeds is a minute of arrangement and agreement concluded in 1861 between Sir John Sinclair on the one side, and his son Alexander, who by the death of his brother had become next heir of entail, and George Sinclair, his second surviving son, on the other side, being that the effect of which is submitted for our determination. The consideration set forth requires special attention, and it is, that "parties considering that an agreement was entered into during the lifetime of John Sinclair, the eldest son and nearest and lawful heir of entail of Sir John," whereby the said Alexander Young Sinclair became bound in the event of the death of his elder brother, and of Alexander succeeding to the estate of Barrock, to content and pay the £700, being the cost of the meal mill at How, with interest to become due after the death of his father; and further, considering that Sir John had also expended on another part of the en-

tailed estate an additional sum of £1400, for which, or any part thereof, Sir John had not taken, and did not intend to take, any steps to burden the entailed property, it is just and reasonable that Alexander, his nearest and lawful heir of entail, and George, as at present the next in succession to him, should do something—though what should be done is not expressed—therefore the two sons engaged and agreed as follows:—*Primo*, to corroborate and confirm the said agreement between Sir John and Alexander in the whole heads and contents thereof, and of new Alexander, in the event of him or the heirs of his body succeeding to the entailed estate, and the said George in the like event, bound themselves respectively, and their heirs and successors, to content and pay the said sum of £700 to the executors of their father, with interest from and after his death.

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Now, how are these two parts of this agreement to be reconciled—that in which the previous agreement with Alexander is corroborated, and that in which the foregoing obligation is expressed? The obligation corroborated bound Alexander only in the event of his succession to the property; the latter in words binds him, not only in that event, but in the event of the succession opening to heirs of his body. Was this last really intended? I think it was not, because the clause of obligation sets forth that the obligation is entered into of new. This it could only be if it was the same obligation as the one corroborated. In this contrariety of provision, and remembering that words of apparently general obligation had in the previous agreement to be restricted by words occurring elsewhere, my opinion is that an obligation for the £700 in the agreement in question was not intended to be operative unless upon condition that either Alexander in the one case, or George in the other, should succeed to the entailed succession.

Alexander and George, in the second place, by this deed of arrangement and agreement, in consideration of other improvements than the erection of the mill at How, "respectively, as aforesaid, became bound, and they obliged themselves and their heirs and successors succeeding to the entailed estate as aforesaid, for the further sum of £1000." This is the obligation we are asked to construe. The task is perhaps more difficult than the interpretation of the obligation as to the £700, because some of the elements which exist in the latter are absent upon this occasion, but, on the other hand, there is one at least now present which previously was absent. Here the heirs and successors of Alexander and George succeeding to the estate are to be bound according to the mere words of the obligation. But this was a thing which neither could accomplish. Neither Alexander nor George was in possession, and, if either had been, he could not have bound the heirs of entail directly; he could only have burdened the estate in the way prescribed by statute. This obligation, if it was thought about, was therefore one which must be taken to have been known to be ineffectual. Alexander and George, however, bound themselves respectively, but, as I think, only in the event of their succession. The words referable to the obligation for £1000 are as open to construction as those which have relation to the £700, and, thinking that the former as well as the latter are susceptible of interpretation, I come to the conclusion that, as Alexander did not succeed, there is not on any ground an operative obligation by which his executors are affected.

2. The next question is, whether the third part of the residue of Sir John Sinclair's estate, payable to the heirs, executors, and successors of his son Alexander under his trust-deed, is divisible equally among the children of the latter

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—the parties of the third and fourth parts—without collation—that is to say, collation of his life interest in the entailed estate by the party of the third part—the eldest son of Alexander—who after his father's death succeeded as heir of entail to Barrock on the death of his grandfather, Sir John Sinclair, the testator. This question must, I think, be answered affirmatively.

We are dealing here not with intestate but with testate succession, and the terms of Sir John's settlement, as exhibiting his intention, are the things, and the only things, by which our judgment must be governed.

Now, Sir John left the third of the residue of the succession carried by his settlement "partly in consideration of the burdens his son Alexander will be subjected to at his succeeding to the said entailed estate of Barrock," to Alexander, his heirs, executors, and successors. These last were thus conditional institutes, and it happened that they became the legatees through the predecease of their father. The question, who were the heirs, executors, and successors of Alexander who have succeeded, is answered, as I think, once we know that the residue, the third of which forms the legacy in question, is moveable succession. The children of Alexander, who are his next of kin, are the legatees, and in this case the eldest son of Alexander must be counted as one of the number. Had he separated himself from the rest by taking something as the heir of his father, one of two things must have happened—either he could not claim a share of the legacy, or, if he did, the heritage he took from his father must have been thrown into the fund for division; but there was no heritage, and all the children are consequently of the next of kin.

This, apart from the explanation as to the making of the bequest, would have been the result, but when we turn to what is stated by Sir John as to the motive by which in part he was influenced we find that the inheritance of the entailed estate was not and could not be a condition contemplated by the testator as one by which the succession to the legacy was to be affected. It is said, indeed, that the eldest son of Alexander was the heir of entail, who took Barrock on the death of his grandfather, and that consequently, as the legacy in question is a part of Sir John's succession, he must be separated from his brothers and sisters, who alone are to be regarded as their father's next of kin. But this view is fallacious, and the fallacy consists in the assumption that the eldest son of Alexander took Barrock as the heir of his father, and not merely as the heir-at-law of his grandfather. And what he takes as such cannot change the rights or the character he possesses as one of the children, or heirs, executors, and successors of his father. There is another consideration which seems to me to be conclusive against the idea upon which the opposite opinion is rested. The succession to the entailed estate is said to be the succession of Sir John, and the succession to the legacy in question is also the succession of Sir John, and upon the conjunction of these two circumstances the argument for collation is rested. But, if this argument is to prevail, the next of kin of Sir John, and not a certain number of the children or next of kin of his son Alexander, are the parties for whose benefit collation is to be introduced. Such a result is not contended for by any party, and the effect of it would be to diallocate entirely the testamentary provisions by which the testate succession of Sir John is to be regulated. The case of *Blair* (Nov. 16, 1849, 12 D. 97) is not an authority against the conclusion at which I have arrived. Whether after the settlement which in that case gave rise to the litigation had been construed, and it was found that the portion of the residue consisting of heritage belonged to the heir-at-law of Colonel Blair, and the moveable part to

the next of kin of the latter, the heir even on collation was entitled to claim a share of moveables, is a question as to which the Judges were not agreed, and upon it there is, as I think, room for difference of opinion. But, taking the decision as we find it, it here has no application. The heir of Colonel Blair did assert his character of heir-at-law to his father, and having done so he could not without collating what fell to him as such claim to participate in the moveable succession. But here the eldest son of Alexander Young Sinclair is never heard of as his father's heir-at-law, much less does he ask or get any share of the bequest in dispute in that character,—and, consequently, the doctrine of collation is outside the circumstances of the present case. There is, as I think, no authority for the opposite opinion. All authority, rightly understood, is, as I think, against it. We may, or may not, think it a right thing that the distribution should be in this way, inasmuch as the heir-at-law, or the man who should have been the heir-at-law, had there been anything for him to take in that character, is the heir of entail now in possession of the family property. It would seem more desirable, perhaps, in one way, that he should not be able to participate with brothers and sisters in the moveable succession; but this consideration cannot be allowed to affect the question, which must be answered according to the recognised rules of law.

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THE COURT pronounced this interlocutor:—"Find, in answer to the first and second questions, that neither the party of the second part, as representing the personal representatives of Alexander Young Sinclair, nor the party of the third part, as heir of the body of the said Alexander Young Sinclair who has succeeded to the entailed estate of Barrock, is liable in payment of the sum of £1000; and, in answer to the third and fourth questions, that the third part or share of the residue of the estate of Sir John Sinclair, payable to the 'heirs, executors, and successors' of the said Alexander Young Sinclair, is divisible equally among his children, the parties of the third and fourth parts, without collation by the party of the third part, and decern."

JAMES MASON, S.S.C.—H. & H. TOD, W.S.—Agents.

JAMES RONALDSON and OTHERS (Gray's Trustees) (Pursuers), Reclaimers. No. 143.
—*Trayner—Dickson.*

DRUMMOND & REID (Defenders), Respondents.—*Asher—Pearson—Guthrie.* June 7, 1881.
Ronaldson,
&c. v. Drum-
mond & Reid.
Agent and Client—Reparation.—Circumstances in which the Court held (*res.* judgment of Lord Lee) a law-agent bound to repay to a client a sum invested under the agent's advice on a heritable security.

THE REV. JAMES RONALDSON and others, the testamentary trustees of 2d Division.
George Gray, coalmaster, Leavenseat, by Whitburn, who died on 18th June Lord Lee.
1873, as authorised by the trust-settlement, appointed one of their own M.
number, Mr William Drummond, factor and law-agent for the trust, with right to the usual remuneration.

In June 1874 Mr Drummond became a partner in the firm of Drummond & Reid, and thereafter the business of the trust was transacted by this firm.

In 1876 Messrs Drummond & Reid were acting as law-agents for Mr Simpson, coalmaster, Benhar. At that date certain money belonging to

No. 143. the trust fell to be invested, and a sum of £6000 was lent to Mr Simpson at Martinmas in that year on a bond and disposition in security over two properties in Fifeshire.

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In May 1877 Messrs Drummond & Reid, acting on behalf of Mr Simpson, applied to the trustees for a further loan of the sum of £3500, offering as security the reversion of his lands and estate of Kinglassie, Fifeshire. This proposal was refused by the trustees, on the ground of the insufficiency of the security offered, there being prior securities over the said estate to the extent of £25,500. Subsequently another application for the same loan was submitted in the same manner to the trustees, offering, in addition to the security of Kinglassie, the security of the dwelling-house of Viewfield Villa, and offices and grounds, at Harthill, Lanarkshire, which was occupied by Mr Simpson himself. This application was agreed to by the trustees by minute of meeting, of date 10th May 1877, which was as follows:—"Recorded that the bond and disposition in security by Mr Turnbull to the trust for £3500 was to be paid at Whitsunday, as Mr Turnbull had sold the subjects, and resolve to lend the same on bond and disposition in security by Mr Simpson over lands at Kinglassie and dwelling-house at Harthill, there being a prior charge on the former, and the loan forming the only loan on the latter."

At Whitsunday 1877 the amount of the loan was paid over by Messrs Drummond & Reid to Mr Simpson, and, in return, a bond and disposition in security, dated the 4th, and recorded the 5th, of June 1877, over the said subjects was given. This bond and disposition in security bore "that the said George Simpson granted him on the 4th June to have instantly borrowed and received from the trustees the sum of £3500 which had been paid to him on the previous 15th May, and which sum he bound himself, and his heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the pursuers or their assignees whomsoever, with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum at the rate of £5 per centum * per annum from the date thereof." It further bore that, in security of the personal obligation written in the said bond and disposition in security, the said George Simpson, in addition to the said lands and estate of Kinglassie, assigned to the trustees, heritably but redeemably as thereafter mentioned, yet irredeemably in the event of a sale by virtue thereof—" (First) A lease or tack of All and Whole that lot or piece of ground, part of the lands and barony of Harthill, lying in the parish of Shotts and shire of Lanark, consisting of 2 roods and 27 poles imperial measure or thereby, bounded as therein set forth; and (second) a lease or tack of All and Whole that lot or piece of ground, part of the lands and barony of Harthill, lying in the parish of Shotts and shire of Lanark, consisting of 3 roods and 38 poles imperial measure or thereby, bounded as therein set forth; but excepting always from the subjects contained in the said leases a portion thereof extending to 3 roods and 38 poles or thereby particularly described in an assignation by the said George Simpson in favour of the said James Watt, which is dated the 21st day of February, and recorded in the said General Register of Sasines the 5th day of March, 1867."

* The defenders, in objecting to a statement by the pursuers of the amount due, stated:—" (2) Interest is charged at five per cent, while the agreement between Mr Simpson and Mr Gray's trustees when the loan was made was that, till otherwise arranged, interest should only be charged at four per cent. This agreement was never altered."

George Simpson having become insolvent in 1879, his estates were No. 143. sequestrated, and a trustee appointed thereon.

On 29th April 1879 Messrs Drummond & Reid ceased to be agents for Gray's trust, and on 5th June the trustees intimated to them that they held them liable for the sum of £3500 lent to Mr Simpson. June 7, 1881.
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Messrs Drummond & Reid having refused to pay the sum, the trustees raised an action in the Court of Session concluding for payment thereof, with interest thereon at five per cent from 15th May 1878.

The pursuers averred ;—(Cond. 5) "The pursuers, in agreeing to grant the foresaid loan of £3500, relied on the defenders seeing that the money so lent was secured over the absolute property, not only of Kinglassie, but of the said villa, offices, and grounds at Harthill. They further relied on the defenders seeing that the security given by Mr Simpson was sufficient and ample. They trusted to the defenders' professional skill and capacity to examine and ascertain that the titles of the said properties were valid and correct; and they relied upon them obtaining, in exchange for the said loan of £3500, a valid bond and disposition in security embracing the property of the said lands and estate and villa and offices and grounds. In place, however, of so fulfilling their duty to the pursuers, the pursuers have now ascertained that the said defenders violated their instructions, and (by themselves or their clerks, for whom they are responsible) acted with gross negligence and want of professional skill and capacity in the following, or one or more of the following, respects—(1) They failed to observe, or at least to inform the pursuers, that the said villa, offices, and ground at Harthill did not consist of heritable estate held in fee-simple by the said George Simpson, as was relied on by the pursuers, but were only leasehold property—the portion first above mentioned being held by Mr Simpson for ninety-nine years from 1859 under said first lease, and the portion second above described for ninety-nine years from 1864 under the lease second above mentioned—and the deed they took in exchange for the said loan of £3500, so far as it affected the said villa, offices, and grounds at all, conveyed only right to leases. (2) Although the *solum* of the ground on which the said villa, offices, and grounds at Harthill have been erected and laid out extends to nearly 4 imperial acres, the said bond and disposition in security only conveys to the pursuers about 2 roods and 27 poles. Nearly the half of the said villa and the whole of the offices, consisting of coach-house, stables, washing-house, and others, and large portions of the grounds, are entirely omitted from the security in favour of the pursuers. (3) They took as security from Mr Simpson what, excepting through gross negligence or want of skill, they could not but have known to be worthless or, at least, wholly inadequate for the protection and safety of the pursuers, and the trust-estate under their management."

The defenders' answer was :—"Believed to be true that the pursuers relied upon the defenders obtaining a valid security over the subjects contained in the said bond. *Quoad ultra* denied. The building lease in question had been recorded in the Register of Sasines in terms of the Registration of Long Leases (Scotland) Act, 1857, and formed as good a security as if the subjects had been held in feu. The defenders cannot say whether or not the nature of Mr Simpson's title was specially discussed with the pursuers, but there was no desire to conceal its nature, and indeed the same was, it is believed, known to all or most of the pursuers. In regard to the extent of the ground embraced in the title, it is the fact, as it now appears, that a small part of Mr Simpson's buildings had been erected on ground outside his boundary, of which ground he had verbally arranged for a long lease, but this fact was not known to the defenders. As soon as it was ascertained arrangements were made with-

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out difficulty for bringing within the title the whole subjects occupied by Mr Simpson, and for Mr Simpson's trustee granting to the pursuers a supplementary conveyance in security. This was at once communicated by the letter dated 18th June last to the pursuers' agent, which is referred to. The pursuers, however, in place of taking advantage of these arrangements, have raised the present action. On 16th October Mr Simpson's trustee, who has made up a title to the whole subjects, addressed the following letter to the defenders:—'Edinburgh, 16th October 1879.—Gentlemen,—As trustee on Mr Simpson's estate I beg to say that I am prepared to concur in a sale by Mr Gray's trustees of Mr Simpson's villa at Harthill, with its offices and grounds, including the ground at the back, a building lease of which has recently been obtained, and the ground acquired by Mr Simpson from Dr Clark, and also of the effects included in their process of poinding the ground, to the effect that the proceeds be applied in the first instance to the sum due to Mr Gray's trustees, and the reversion in manner agreed on between you and me.—Yours truly, AD. GILLIES SMITH.' The defenders on 17th October transmitted a copy of this letter to each of the pursuers, and to their agent, accompanied by a letter from themselves in the following terms:—'With reference to the demands made by Mr Gray's trustees, we beg to send you as one of these trustees a copy of a letter from Mr Gillies Smith, the trustee on Mr Simpson's estate, stating his willingness to concur in the sale by Mr Gray's trustees of the whole subjects at Harthill, which they say should be the subject of security for their loan, to the effect that the proceeds be applied *primo loco* in payment of Mr Gray's trustees. Mr Smith has made up a title to the ground at the back, and is ready to execute a supplementary conveyance in security to Mr Gray's trustees of the whole subjects referred to. The above is of course following up what has been already tendered to the trustees. If the trustees continue to reject the tender made, we will of course use that circumstance in any question with them. We may add that we are willing that the present suit be sisted, reserving all questions until the property be realised, and it be seen whether the trustees have the least practical interest in adopting the course they have done.—Yours, &c., DRUMMOND & REID.' The supplementary assignation and disposition in security referred to has been executed by Mr Simpson's trustee and Mr Simpson himself in favour of the pursuers, and is ready for delivery, and delivery thereof has been tendered, and is hereby tendered to the pursuers."

The defenders further averred that the estate of Kinglassie was really of the value of £34,500, and averred that it would have sold at that or nearly as good a price had it not been for the stagnation in trade and general depression at the time when it was put up for sale, but was not sold.

The pursuers pleaded;—(1) The defenders having been authorised by the pursuers to make payment of the said sum of £3500 of trust-funds to Mr Simpson only in exchange for a bond and disposition in security conveying to them (in security), first, the lands of Kinglassie, and second, the villa, grounds, and others at Harthill, and having made payment to Mr Simpson without getting such a deed, are bound to make repayment of the said sum to the pursuers with interest. (2) The defenders having as agents for the pursuers been instructed by them to procure for a loan of £3500 ordinary heritable security over the said lands, villa, and others, and having failed to do so through gross disregard of instructions and negligence or want of skill on the part of themselves or their clerks, they are bound to restore the pursuers to the position in which they would have been had there been no such disregard of instructions or neglect of duty or want of skill. (3) The defenders having, while acting as the

pursuers' agents, been guilty of gross negligence and want of skill in taking for the said loan of £3500 of trust-funds security which by the exercise of ordinary care they would have known to be worthless, or at least grossly inadequate, they are liable to the pursuers in the loss, injury, and damage thence arising to the latter. (4) The pursuers not having given the defenders authority, and, *separatim*, not having the power, to invest on the security of leases, are in the circumstances entitled to decree as concluded for.

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The defenders pleaded ;—(2) The averments of the pursuers being unfounded in fact, and, in particular, the defenders having been guilty of no negligence in the premises, the defenders are entitled to absolvitor. (3) *Separatim*, The defenders are entitled to absolvitor, in respect the pursuers have suffered no damage by or through any act or default of the defenders.

On 5th November 1879, on the suggestion of the Lord Ordinary (Young), the following joint minute for the parties was put into process:—"The parties agreed that, without prejudice to their rights and pleas *hinc inde*, the whole subjects at Harthill, and the furniture and other effects in Viewfield Villa and offices there, should be sold by the pursuers, the nett proceeds thereof being applied, firstly, towards the debt due to the pursuers. And the parties agree that if a loss arise the liability for the same or any part thereof shall be determined under the present action."

The subjects at Harthill realised £2110, and the furniture £1119, 7s. 5d.

After a proof, the import of which appears in the opinions of the Judges, the Lord Ordinary (Lee) pronounced this interlocutor:—"Edinburgh, 28th February 1881.—The Lord Ordinary having considered the cause, finds that on or about 10th May 1877 the defenders, as law-agents for the pursuers, as trustees under the trust-disposition and settlement No. 99 of process, were authorised and employed by the pursuers to lend the sum of £3500 belonging to said trust to Mr George Simpson, coalmaster, Benhar, on the security of his lands at Kinglassie, in the county of Fife, and dwelling-house at Harthill, in the county of Lanark, known as Viewfield Villa: Finds that in giving instructions for said loan the pursuers knew that the defenders were acting also as law-agents for Mr Simpson, were aware that there was a prior charge on the estate of Kinglassie, and were informed of the fact that the loan would form the only loan on the dwelling-house at Harthill, and that Mr Simpson had expended upwards of £10,000 on that property: Finds that the borrower, Mr Simpson, was a person known to several of the trustees, and then in good credit; that the subjects at Kinglassie consisted of an estate recently purchased by him for £34,500, yielding a nett agricultural rental of over £1000 per annum, without being over-rented, and which had been accepted as affording first-class heritable security to the amount of £25,500; and the subjects at Harthill consisted of a dwelling-house and offices, with garden, greenhouse, and vinery, erected at an expense of about £12,000, upon ground extending to between three and four acres, held partly under the registered lease, No. 14 of process, for the period of ninety-nine years from 1859, partly under the registered lease, No. 15 of process, for the period of ninety-nine years from 1864, partly upon an arrangement with the proprietor to grant another ninety-nine years' lease followed by possession, and to a small extent as a feu from the estate of Polkemmet, in terms of the disposition, No. 76 of process: Finds it not proved that the defenders represented to the pursuers that the subjects at Harthill were the property of Mr Simpson by virtue of a feudal title, or that they gave the pursuers any ground for believing that the title thereto was other than that which was actually possessed, and which has been made good to the pursuers by the supplementary disposition and assignation, No. 8

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of process : Finds that the defenders having obtained the completion of a title to the dwelling-house, &c. at Harthill, in the persons of the pursuers, as trustees foresaid, in terms of said supplementary disposition and assignation, and writs therein referred to, and having offered before the action was raised to obtain such a title, cannot be held to have failed to obtain security for said loan in terms of their instructions : Finds it not proved that the said security was insufficient, or that the pursuers, as trustees foresaid, have suffered loss and damage through negligence or want of skill on the part of the defenders in making the said loan or in taking security therefor : Therefore sustains the defences, assoilzies the defenders from the conclusions of the action, and decerns : Finds the pursuers James Ronaldson, James M'Kelvie, and David Waldie liable to the defenders in expenses of process, and remits to the Auditor to tax the account when lodged, and to report."*

* "NOTE.—The object of the present action is to make the defenders responsible for a loan of £3500 from the trust-funds of the deceased George Gray, coalmaster, Leavenseat, Whitburn. The transaction was entered into in May 1877. The defenders were at that time law-agents for the trust, and it is said that in taking authority from the trustees they failed to communicate to them the fact that one of the subjects of the security was held under a ninety-nine years' lease, and represented that the whole belonged in absolute property to the borrower. It is also said that after obtaining authority to carry through the transaction, the defenders, through gross negligence, failed to obtain a complete title, even of lease, to a part of the subjects on which the loan was to be secured, and that loss was thus occasioned.

"If it were the fact that the trustees, through any mistake or neglect for which the defenders are responsible, misunderstood the proposed transaction, it might follow that they would be entitled in law to repudiate it altogether, and to demand of the defenders repayment of the money upon an assignation to the security. For in this view the transaction as actually proposed was never authorised.

"If, on the other hand, the loan was authorised upon the security ultimately accepted, the responsibility of the defenders as law-agents would be of a different kind. It is not disputed by the defenders that every such authority is granted subject to the title of the borrower being found sufficient ; and if the agent fail, through gross negligence, to obtain a satisfactory title, he must be answerable for the consequences. If the title to the subjects of the security should be only the remainder of a lease, it would appear to the Lord Ordinary to be, in the general case, a proper measure of precaution on the part of the agent, to obtain the instructions of his clients as to accepting it ; but the Lord Ordinary cannot say that, an agent advising his client that such a title as a building lease of ninety-nine years, duly registered, affords a valid heritable security, and is legally sufficient if the margin of value be satisfactory, would be chargeable with gross ignorance or want of skill. Nor is the Lord Ordinary of opinion that in no case can a law-agent, without express authority, accept a ninety-nine years' lease as a satisfactory and sufficient title. Some consideration must be given to the circumstances of the case, and if these shew that there is a substantially good and marketable title to a building lease of ninety-nine years, on the strength of which valuable buildings have been erected by the lessee, an agent, in the opinion of the Lord Ordinary, could not be held responsible for the loan, merely because he accepted the title without special instructions from his client. The subjects may fail to realise sufficient to meet the debt, owing to other causes, and from no weakness or insufficiency in the title.

"The facts of the present case, when considered apart from the colour reflected on them by subsequent events and by the allegations of the pursuers, are simple enough. Mr Simpson's proposal of loan, as originally submitted, offered in security only a postponed bond over Kinglassie. The meeting at which the proposal was submitted was attended by all of the trustees. It was submitted

The pursuers reclaimed.
At advising,—

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LORD CRAIGHILL.—The reclaimers against the interlocutor now submitted to review are the testamentary trustees of the late George Gray, coalmaster, Leaven-

by Mr Drummond as Mr Simpson's agent, and according to the Lord Ordinary's view of the evidence (which, however, is somewhat conflicting on this point) the margin of security was considered, the proposal was discussed upon its merits, and the trustees unanimously, and with the concurrence of Mr Drummond, if not by his advice, rejected it. But what followed seems to shew that the trustees must have parted on the footing that an amended proposal, by which the villa at Harthill should be included in the security, should, if made, be entertained, and that the agents were to communicate with Mr Waldie as to whether it should be agreed to. Mr Drummond's evidence is quite distinct to this effect, and it appears to the Lord Ordinary to be corroborated rather than contradicted by the terms of the letter No. 100 of process. The evidence of Messrs Waldie and M'Kelvie, when contrasted with that of Mr Ronaldson, appears to the Lord Ordinary to be insufficient to throw doubt upon the positive statement of Mr Drummond. Mr M'Kelvie's recollection of what occurred was evidently far from complete, and Mr Waldie's reply to the letter No. 100 of process, agreeing to the proposal 'as now altered,' can scarcely be explained consistently with the other evidence without believing that there must have been a good deal more before the meeting than he states. It is the fact, however, that the trustees were not informed of the nature of the title upon which the villa property at Harthill was held. Mr Drummond knew it to be leasehold, and the trustees, generally, seem to have had some knowledge of the subjects, and were acquainted with Mr Simpson. The only information, however, which they can be said to have had, or which they thought necessary, was that the subject was a villa, and not land yielding agricultural rental, and that Mr Simpson had expended £10,000 upon it. This appears to have been thought by the trustees sufficient. They considered it, as regards value, an excellent security. And the result was, that the minute bearing date 10th May 1877 was written out, and Messrs Drummond & Reid as agents proceeded to act upon the resolution as authorising the completion of the transaction. At the same time, it is undisputed that the authority, as understood by them to have been given, was subject to their being satisfied that the title was such as they could recommend as legally sufficient. They accordingly paid over the money by transferring it to Mr Simpson's account, and procured from him the deed referred to in condescendence 4, being a postponed bond and disposition in security over Kinglassie, and an assignation or disposition to the two leases, Nos. 14 and 15 of process, of ground at Harthill, the one portion being 2 roods and 27 poles, and the second portion extending to 3 roods 38 poles, but excepting 3 roods 38 poles said to be described in an assignation by George Simpson to James Watt.

"Now, two mistakes were undoubtedly committed in the preparation of this deed. In the first place, it was overlooked that the two leases referred to did not contain the whole ground occupied by the villa, offices, and garden. A considerable part of the subjects stood upon ground to which Mr Simpson's only title was a memorandum by the agents of Mr Halkett Craigie Inglis, followed by possession. In the second place, the excepted portion of ground was erroneously stated to be 3 roods and 38 poles instead of only 9 poles, which had been transferred to James Watt, and 25 poles sub-let to one Brockett. The pursuers also contend that there was a gross breach or neglect of professional duty on the part of the defenders in not informing them that Mr Simpson's only right to the ground was of the nature of a lease, and was not a feu. But, however this may be in point of law, it does not appear from the evidence that there was any mistake about it in point of fact, so far as the agents were concerned. For they knew the nature of the title, and did not consider it

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seat, who died in 1873 leaving a settlement by which the reclaimers were appointed trustees and executors on the trusts specified in the deed. These, after

necessary to communicate it to the trustees, or to take their instructions on the subject.

"What followed was, that in November 1878 Mr Simpson became insolvent, and was sequestrated. No interest was paid at Martinmas 1878. Other events affecting the value and saleableness of property occurred about the same time, from which the country has not yet recovered. Kinglassie, though proved by very reliable evidence to be still of the value of upwards of £31,000 at thirty years' purchase upon a moderate rental, has been exposed for sale three times at the upset prices of £30,000, £27,000, and £25,000, and has not been sold. A title to the Harthill subjects was completed in the persons of the trustees in manner shewn by the supplementary assignation and disposition No. 8 of process, and writs therein mentioned. This title corrects the misdescription in the original deed of security, and includes the whole ground occupied in connection with the villa, the defenders having obtained from Mr Craigie Halkett's commissioner a ninety-nine years' lease, including the ground to which no formal title had previously been procured. Under the arrangement contained in the joint minute, No. 17 of process, these subjects have been sold with the concurrence of Mr Simpson's trustee, and the price of £2110 has been made available to the pursuers towards payment of the loan and interest. A sale of the furniture in the villa has also been effected for behoof of the lenders, and the nett proceeds, amounting to £1119, 7s. 5d., have been received by the pursuers to account of the loan. The defenders appear to have offered to complete the necessary arrangements for realising the subjects for the trust before this action was commenced. But the pursuers appear to have been advised to insist in their claim to repudiate the whole transaction, and they maintain the present action to the effect of recovering the balance and the expenses of the sale on that footing. The question is, whether the circumstances justify this demand.

"There seem to be three points which require to be considered—Firstly, what was the extent of the authority implied in the resolution of the trustees as expressed in the minute of 10th May? For it is not disputed that that minute correctly records the conclusion that was reached by them. Secondly, if that resolution implied authority to complete the transaction, subject only to the title being such as the law-agents could recommend as good in law, and capable of being made effectual as a security for loan, was there anything in the steps by which the trustees were led to grant such authority which entitles the trustees to repudiate their act, and renders the defenders responsible for it? Thirdly, if the trustees cannot repudiate the transaction altogether, a subordinate question arises, viz., whether any loss or damage has been suffered by the trust for which the defenders are responsible, in addition to the expense incurred by them in completing the security as it ought to have been completed at the beginning?

"On the first question the Lord Ordinary is of opinion that the defenders were justified in assuming that they were authorised to complete the loan and to accept the 'dwelling-house at Harthill' as with Kinglassie a sufficient security, provided the title, whether feu or leasehold, was good in law, and available as a security for the debt. The trustees knew that it was only a villa property, and not land yielding agricultural rental, and they had shewn themselves to be apparently satisfied, as regards value, with the fact that Mr Simpson had expended £10,000 upon it. House and villa property is not always held in feu. It is not unfrequently held upon building lease, and such a lease, if duly registered under the Act of 1857, is, in the opinion of the Lord Ordinary, recognised by the law as affording a title of property, and as capable of being dealt with as affording heritable security for debt. The statute and relative schedules leave no doubt upon this point, and it appears to the Lord Ordinary that it must depend upon the conditions of the tenure whether such a lease does not afford as good a security as a feu. The same piece of ground, with the same buildings upon it, may be less valuable as a security under feu-holding than it would be under a long lease upon favourable terms. The question therefore is,

the payment of debts, were the payment of the income of the estate to the trustee's sisters, and upon their death the division of the fee or *corpus* of the estate

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whether there was anything in the character or conditions of Mr Simpson's right which should have deterred the defenders from accepting it without special authority? Upon this point the Lord Ordinary is of opinion that the two existing leases, together with the right to obtain a similar lease for the additional ground if duly completed, might be regarded as all one lease for ninety-nine years. The conditions are the same in each. The rate of ground-rent (about £5 per acre) cannot be said to be high, or to be more burdensome than was expected, and, in short, the title, had it been complete at the beginning, would have been quite unobjectionable. It would to some extent affect the value of the subjects in case of sale that the right was limited to the eighty or ninety years remaining under the leases. But even putting the difference at from twenty to twenty-five per cent, as contended for the pursuers, there seems to have been no ground in 1877 for doubting the substantial character of the right as a supplementary security for £3500. It must be remembered, that notwithstanding the depressing influences of 1878, and of the great amount of property thrown upon the market by the stoppage of the City of Glasgow Bank, the place has actually realised £2110. It may well be doubted whether a higher price could have been obtained had it been a feu. Unless the feu had been on equally favourable terms—as to which no inquiry would appear to have been thought by the pursuers necessary—there is really no reason to suppose that more could have been made of such a security. But according to the pursuers' view it would not have been incumbent on the defenders to make any report on the subject had the title been a feu. The feu-duty might have been higher than the ground-rent exigible under the rights as they stood, and the conditions otherwise more stringent and unfavourable. But the agents might in that case have gone on to complete the loan as they did without exposing themselves to any observation. But because the title was leasehold they are said to be liable to have the whole transaction thrown upon their hands, by the trustees, in consequence of their not reporting that fact for instructions. The position is, in the opinion of the Lord Ordinary, a little unreasonable on the part of Messrs Waldie, McKelvie, and Ronaldson. They were not qualified to form an opinion upon the comparative merits of the titles in point of law, and they plainly enough, in point of fact, considered the value of the subjects as a villa, and were satisfied with that, and with leaving the matter of title to their agents.

"On the second question, the Lord Ordinary cannot hesitate to say that the allegations which suggest that the trustees were induced to agree to the minute by inaccurate representations on the part of the agents as to the title are not supported by the evidence. Even if it should be held that the non-disclosure of the leasehold character of the right was a mistake, the keenness which seems to have dictated some of the pursuers' allegations was, in the Lord Ordinary's opinion, unnecessary, and calculated to mislead. The defenders appear to have had no motive in what they did excepting the usual desire on the part of a man of business to obtain an investment for one client and a loan for another at the same time. They seem to have arranged for five per cent interest being payable to the trustees, and to have obtained what at that time must have been considered very good security for a loan of £3500 in these terms. The evidence of the trustees themselves proves that, apart from the character of the tenure, they considered the security ample, and the Lord Ordinary is of opinion, as to the tenure, that they have adopted a worse opinion of it than it deserved. It is perhaps not surprising that they should have adopted a somewhat prejudicial view of the title considering the alarming and very unfavourable report upon it which was given to them by their present agent. All of the objections, however, which are noticed in that report have turned out upon examination to be more apparent than real, unless the leasehold character of the tenure be held to be a good objection. The mistake in the extent of the excepted ground was discoverable upon reference to the assignation to which reference was made in the bond, and could not affect the right of the trustees to the subjects held by

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among the appointed fiars. The trustees were left with a discretion as to the investment of the funds; but for their guidance so far the truster empowered them to invest on heritable securities. The defender Mr Drummond was one of these trustees, and he, as did the reclaimers, accepted, and has acted under the appointment. But though a trustee he was named agent of the trust—power to make this nomination having been conferred on the trustees by the truster, and Mr Drummond's right to remuneration for his services as agent being declared to be the same as if he were not a trustee. The result has been that from the commencement of the trust until April 1879 Mr Drummond and the firm of which he was a partner acted as agents for the trust.

One of the most important duties of trustees and their agents is the investment of the moneys of the trust. The first occasion on which, in the administration of Mr Gray's trust, this duty had to be performed, so far as appears in these proceedings, occurred at Martinmas 1876, when £6000 was lent to George Simpson, coalmaster, Benhar, on a bond and disposition in security over two properties in the west of Fife. This bond was not a first, but only a second security. This was known to the trustees at the time the proposal for the loan was accepted, but the other circumstances submitted to their consideration have not been stated. No reflection, however, upon Mr Drummond or his firm is made by the reclaimers in connection with this transaction.

Mr Simpson in connection with his villa. And the omission of the ground to which a formal title had not been obtained by Mr Simpson admitted of correction in the way in which the defenders, by their letter of 18th June 1879, intimated their willingness to correct it. It appears to the Lord Ordinary that the only effect to which these objections could legitimately be pressed, was that the defenders should be held personally responsible to put these matters right. With regard to Dr Clark's feu, the pursuers appear to have authorised the loan before it was added by Mr Simpson to the grounds held as a part of his villa property; and it might perhaps have been contended by the defenders that they were not bound to bring that piece of ground within the security right. But as it had become a part of the garden before this question arose, it is quite natural and proper that no question should have been raised as to extending the security over it. On this point the Lord Ordinary is of opinion that nothing in the conduct of the defenders justifies the contention that they are responsible for the loan, as having induced it either by inaccurate representations or by gross negligence and want of professional skill.

"On the third question it is scarcely necessary, after what has been said, to add anything. The Lord Ordinary thinks that the defenders were clearly responsible for their mistake in not including the whole villa ground as a part of the security, and also for the correction of the error in the description of the excepted subjects, although this last was copied from a bond taken some years before over the same subjects by a different creditor acting by different agents. But he cannot find that any damage has been sustained through these mistakes which has not been made good by the correction of them.

"Nor can he say, upon his view of the evidence, that he believes one farthing of damage was caused by the title being leasehold and not feu. He is satisfied that any difficulty which has arisen in the realisation of the securities for this loan is fully accounted for by the circumstances which have affected other securities of a higher class, and yielding a different rate of interest, as, for instance, the first bond on Kinglassie.

"The following cases were referred to by the pursuers' counsel, viz.,—*Haldane v. Donaldson*, 14 Sh. 610, affirmed 1 Rob. App. 226; *Campbell v. Clason*, 1 D. 270, 2 D. 1113, 5 D. 1081; *Graham v. Hunter's Trustees*, 9 Sh. 543; *Stuart v. Miller*, 3 D. 255; *Sim v. Clark*, 10 Sh. 85, 6 Wil. and Sh. 452. But the Lord Ordinary is of opinion that none of them is applicable to the present question."

In May 1877—that is to say, six months after the previous loan—a proposal on the part of Mr Simpson for another loan was made through Mr Drummond to the reclaimers. The reason why he was the intermediary is explained by the fact that not only was Mr Drummond the agent of the trust, but he was the agent also of Mr Simpson. This obviously rendered his position one of delicacy, perhaps one of difficulty, but to this no complaint is made by the defenders, as they knew that Mr Drummond was also agent for Mr Simpson.

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The proposal which was submitted to the reclaimers in May 1877 was for a loan of £3500; and the minute of the trust in which the consent of the trustees to lend this sum is recorded bears that it was resolved “to lend £3500 of trust moneys about to come into the hands of the trustees on bond and disposition in security by Mr Simpson over lands at Kinglassie and dwelling-house at Harthill, there being a prior charge on the former, and the loan forming the only loan on the latter.”

The character of this investment, and the circumstances in which it was authorised, will be considered in the sequel. Meantime it is only necessary to mention that the money passed from the trust to the credit of Mr Simpson; and that what was given in exchange was a deed by which, in addition to the personal obligation, which as usual was the first thing granted, there were disposed, heritably but redeemably, under burden of two previous bonds for £25,500, the lands of Kinglassie in the county of Fife, and there were assigned the two leases of ground at Harthill in the county of Lanark, the one portion extending to 2 roods and 27 poles, and the other to 3 roods and 38 poles, but excepting 3 roods and 38 poles said to be described in an assignation by Mr Simpson to a person called James Watt. The pieces of ground so conveyed were supposed by Messrs Drummond & Reid to be the whole of the villa ground of Harthill. The bond thus given in security was afterwards registered in the Register of Sasines, and the security, such as it was, thereby rendered real. Interest on this loan was paid at Martinmas 1877 and Whitsunday 1878, but not at the rate specified in the bond and disposition and assignation in security. What was stipulated there to be paid was five per cent, but four per cent was all that was paid, it having, as is alleged by Messrs Drummond & Reid in answer to the minute of amendment, been agreed between Mr Simpson and Mr Gray's trustees when the loan was made, that until otherwise arranged interest should be paid only at four per cent. This agreement, it is added, was never altered. All this is of importance, because it shews how the investment was regarded by the trustees. Had five per cent been the rate to be exacted, the inference would have been that they must have known the security was not first class, as five per cent on a first class security could not have been obtained—four per cent having at the time been the full market rate on such investments.

At Martinmas 1878 no interest was paid, nor has any been paid since; Mr Simpson indeed became bankrupt in 1879, and thenceforward all that could be looked to either for interest or principal was the subjects conveyed by the disposition and assignation in security.

In existing circumstances it was thought better that Messrs Drummond & Reid should not continue as the agents, and accordingly in April 1879 the agency was transferred to the present agent, Mr Hill. The particulars connected with the loan in question subsequently became known to the reclaimers, and extrajudicial demands by them that they should be relieved of this loan by Messrs

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Drummond & Reid having been resisted, the present action was raised against the latter.

The summons concluded that the defenders should be decreed to pay the £3500 in question, receiving on so doing an assignation to the security granted to the trustees, but as by agreement of parties *Harthill Villa* has been sold for £2110, and as the furniture in the house, under a poinding of the ground, has brought in £1084, 18s., the difference between these two sums and the £3500 with interest, and the expenses connected with the realisation, has come to be the pecuniary value of the controversy maintained in this litigation. This is set forth by the pursuers in their minute of amendment.

The grounds on which the defenders' liability is maintained are—first, that the security on which the trust-money was lent was of a different kind and class from that which was brought before the trustees by the defenders; second, that the security was insufficient, and ought not to have been offered by the defenders for the acceptance of the trustees; and third, that the giving of the loan and the consequent loss are to be ascribed to want of reasonable care and skill on the part of the defenders, who neither ascertained for themselves nor communicated to the trustees all that ought to have been ascertained and communicated. The defence, again, is to be found in the second of the defenders' pleas, in which it is set forth that “the averments of the pursuer being unfounded in fact, and, in particular, the defenders having been guilty of no negligence in the premises, they are entitled to absolvitor.”

The issues raised by these grounds of action, and this plea in defence, are those to be tried and decided, and they are truly issues of fact to be disposed of upon the proof before the Court. For it can scarcely be said that the parties are in controversy as to the law of the case. If the security was different in kind and class from that for which the pursuers gave authority, if it was insufficient, and if there was want of reasonable care and skill on the part of the defenders in their conduct of the transaction, it could not be, and it has not been, contended that sufficient ground for the defenders' liability has not been established.

On a consideration of the facts which appear to me to be proved, my opinion is that the pursuers ought to have judgment. I acquit the defenders of all intention to deceive, and of any conscious failure to perform their duty to the pursuers. Moral impropriety, indeed, has not been charged against them by the pursuers; but good faith on their part may co-exist with admission or commission of something involving amenability for consequences such as those of which the pursuers seek to be relieved. On this point reference may be made to the case of *Haldane v. Donaldson* (14 S. 610, and 1 Rob. App. 226) referred to in the note of the Lord Ordinary. That there was in many things connected with this loan transaction want of care in inquiry, and in doing what was required, is too clear to be gainsaid. For example, the trust-money was put to the credit of *Simpson*, on the *Whitsunday* term-day of 1877, though the deed by which this money was to be secured was not signed until the 5th of June following. Again, only a part of the villa ground of *Harthill*, all of which was to be covered by the security, was embraced in the security conveyance, and one of the lots purporting to be conveyed was unwittingly taken out of this conveyance by a clause in which this quantity of ground was excepted. Nay more, *Simpson* the borrower had at the time a completed title to only a portion of this ground; and last of all, even one of the deeds subsequently granted to rectify previous

deficiencies or errors in the title, being the disposition to the bit of ground No. 143. unexpectedly discovered to be held in feu, is inaccurate, because the subject conveyed to the reclaimers is so described as to convey minerals, while in the deed by Clark to Simpson and his trustee, which is their title to convey, the minerals are excepted. It is not, however, upon these errors and oversights that my opinion in this case is rested, these in the end having been substantially remedied. But I by no means suggest that they might not afford ground for a judgment in favour of the reclaimers. There are other oversights and mistakes not remedied, by which, as I think, such a judgment is necessitated. The first duty of an agent of trustees, when an offer by an intending borrower is under consideration, is to give them full information on all particulars, and especially to advise them whether the transaction is one into which they ought to enter, and this duty is shewn by the proof—parole and documentary—as I read it, to have been throughout neglected by the defenders. Mr Drummond, on the part of Mr Simpson, first offered a second bond over Kinglassie as the security for the £3500 wanted. In other words, he as good as recommended the proposal to the trustees; for the agent of a trust who introduces a proposal for an investment, saying nothing against it, must be taken to represent it as satisfactory. But this offer was rejected by the trustees in consequence of the doubts of Mr Waldie. And what was the next? It was the second bond over Kinglassie previously offered, and a first bond over Harthill. Was this a suitable investment? Kinglassie, no doubt, had been bought in 1875 for £34,500, and there had been, subsequent to the purchase, a valuation which represented this sum to be even less than the full value of the property. But what it would bring should a sale be forced was only conjectural. Nor was this uncertainty the only objection, for the rental of the lands was no more than was required to meet the interest of the prior bonds. And what of Harthill Villa? Mr Drummond knew, only because Mr Simpson had told him, that the buildings had cost over £10,000, and he put this fact before the trustees as if the cost price could safely be taken as the measure of its value. The contrary is known to every professional man, and the remarks on this subject of Judges by whom reported cases have been decided ought to have operated as a warning to the defenders.

The uncertainty as to value was not the only drawback. Simpson, who wanted the loan was in occupation of the premises, and thus there was no rent by which value could be gauged, or to which lenders could look as a source from which interest might be derived. Mr Drummond says the trustees were satisfied with the information which was given by the mention of the cost. They may have acted wisely or unwisely in not requiring a valuation, but their omission to do this did not relieve the defenders or the agents of the trust of the duty of furnishing all needful information and advice. These they did not supply. Had they said to the trustees, as they might have said, that the selling price, or in other words the fund which was to constitute the security, was uncertain, and at any rate could not safely be calculated on as sufficient to cover the loan, increased as the debt might be by the accumulation of interest and the expense of realisation, the trustees on advice by the defenders to this effect never would have entered into the transaction; and this omission alone would be enough to bring liability on the defenders. But there were other omissions. Mr Drummond knew that a portion, and he assumed that the whole, of the ground at Harthill was leasehold; nevertheless he left the trustees to conclude,

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and they were in the circumstances warranted in concluding, that the subject was a feu. That is the ordinary tenure, and if the tenure of Harthill was different the trustees were entitled to the information. They say—and there is no reason to doubt the statement—that if they had been aware that the subject of the proposed security was leasehold, they would not have agreed to lend the £3500 to Mr Simpson. The objection would not have been fanciful or sentimental. There is substance in it, because coming to a reasonable conclusion on the evidence of the witnesses who have been examined on this subject, Harthill is fully 20 per cent less valuable than it would have been if a feu. Of course, had there been a valuation, this difference would have been allowed for, and so far as the mere value is concerned this objection would in that case have been obviated, but there was no valuation, and the defenders were left without information and without advice to lay out the trust-money on a subject which was 20 per cent less valuable than it would have been had Harthill been such a subject as they took it to be, nothing to the contrary having been suggested or represented.

There still remains to be noticed another omission of the defenders, viz., to inquire and communicate, what burdens in the shape of rent or feu affected Harthill. This was not inquired into, and was not made matter of communication to the trustees. Why Mr Drummond did not communicate these particulars he explains in his evidence by saying that no questions were put to him on the subject. But this is no excuse. His business and his duty were to make the trustees aware of everything material, even without solicitation. Why he did not inquire is not explained. Perhaps the reason is that he assumed the rent charge was disclosed in the two leases handed to him by Mr Simpson, which he took to be a title covering the whole ground, but these in the end proved to be only leases of comparatively small parts of the ground, and so it came to pass that the annual return to be paid for the ground, in place of being only £11 as Mr Drummond supposed, was more than £29. From all which it appears that the subject of the security was a subject of a different kind, and was of a different value, from that on which the money of the trust, as he misunderstood, was to be invested.

The defenders resist judgment on another ground. They say that as Kinglassie remains unsold it has not been proved that the loan transaction will in the end result in a loss to the trust. As things look at present, there seems little probability that loss will be avoided. But even if better hopes could be entertained than any wise man in the circumstances would adopt, this consideration would not obviate the ground on which, as I think, the pursuers are entitled to judgment. They were led into a transaction into which they would not have entered if the duties incumbent on the defenders had been performed, and the defenders' neglect to fulfil these duties entitles the pursuers to be relieved of the transaction, the defenders obtaining by the assignation they are to receive any benefit which may in the end be derived from the second bond held over Kinglassie. On this point the case of *Stuart v. Miller*, Dec. 12, 1840, 3 D. 255, may be consulted. I have only to say further that in proposing that the defenders should be ordained to take over the loan on an assignation I suggest nothing which is inconsistent with the judgment in *Campbell v. Campbell & Clason*, Dec. 20, 1838, 1 D. 270, where the agents' failure was to discover and communicate a perpetual burden. The subject of the security was otherwise what was represented. Therefore when the inhibition was discharged the subject of the lenders' security was all that was expected. But here the subject

of the security originally was, and still is, different from that on which the loan was authorised ; and therefore the defenders, in my opinion, must relieve the trustees from all consequences resulting from their connection with this transaction.

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LORD YOUNG.—When this case was before me in the Outer-House at its earlier stage, I recommended parties to concur in having the subjects of the security sold, so that the question in dispute between them might have regard only to the loss incurred if there should be a loss. Parties took that advice, and the subject of security being sold upon that arrangement, it has been found that loss has actually resulted, and they are agreed that in that case the liability for the same, or any part thereof, shall be determined in the present action. I think the exact amount of the loss was explained to us by the pursuers' counsel at the debate as being something under £1000, taking the principal and interest together. The question before us is, whether the defenders are liable for that loss or not ?

The facts upon which the question depends are within very narrow compass indeed. They are found in terms by the Lord Ordinary in a short interlocutor. I can find no ground for taking exception to the facts as found by him, except (but it is a large exception, for it is the most material of the findings) that he finds it not proved that the said security was insufficient, or that the pursuers, as trustees aforesaid, have suffered loss and damage "through negligence or want of skill on the part of the defenders in making the said loan, or in taking security therefor." With that exception, all the other findings in point of fact are unexceptionable, and I think they exhaust the case.

Now, on the law of the case, as my brother Lord Craighill has said, there is hardly any controversy between the parties, the question being how the admitted law of the land is to be applied to the facts as they exist in this case. The Lord Ordinary, applying that law, is of opinion that the defenders are not liable, and it appears from his note that he has been influenced chiefly, if not altogether, by these two considerations. In the first place, he has been influenced by the fact that the trustees had a meeting to consider the proposal for the loan in question, or the proposal which immediately preceded it—that they took it into their consideration, themselves judging of it, and in the exercise of their judgment, and not relying upon their law-agent, they agreed to it, and that with information from their law-agent of all material facts that he was bound to communicate to them, except only that one subject of the security, and, as it turned out, the most material one, was leasehold and not feu, which the Lord Ordinary, having regard to the nature of the property—a villa—thought was not such a material omission as to infer liability,—I mean the omission on the part of the agent to inform his lending clients that it was leasehold.

The second circumstance to which the Lord Ordinary seems to have attached importance, and which, therefore, may be taken to have governed his judgment, appears to be that the loss which has actually occurred was reasonably to be attributed to the recent, and since the date of the loan, fall in the value of property.

I am free to confess that I was originally not disinclined to be influenced by these considerations ; but further consideration of the matter has removed that original inclination, and I am now satisfied that the Lord Ordinary has fallen into error, and that the conclusion arrived at by Lord Craighill is the right one.

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I think the trustees, who are testamentary trustees, and of whose number Mr Drummond, one of the partners of the defenders' firm, is one, did not so act as to take the liability upon themselves and relieve their man of business of that liability. Being testamentary trustees engaged in a duty so important as that of investing trust-funds, if they had so acted as to relieve their man of business of responsibility for the sufficiency of the security in such respects as are here in question, the result would have been that they personally would have been liable for the loss thence arising. I can find nothing in the case to suggest the idea that the trustees other than Mr Drummond have so acted as to relieve their man of business from his liability for the proper discharge of his proper duty, thereby taking personal liability upon themselves as in a question with their beneficiaries. I can hardly say that the position of Mr Drummond was, so far as my opinion goes, a delicate one. As himself one of a body of testamentary trustees, and as a man of business upon whose advice others who were not men of business—I mean professional men of business—necessarily relied, he had no delicate duty to advise them as to the investment of trust-money—I mean his course was obvious, especially in advising them to lend the trust-funds to another client of his own. I suppose it is quite clear that a testamentary trustee could not lend trust-money to himself. That is quite clear upon the ordinary law; and if he happens to be a man of business with clients, I think the transaction a very questionable one, upon other considerations than we have occasion to determine here, whether he could lend trust-money for which he was a guardian, as in a question with beneficiaries, to a client of his own—at all events the greatest circumspection of conduct would be required from him in such a case; and we would look at it not at all narrowly, but expecting, nevertheless, to be thoroughly satisfied as in a plain case that he, acting as a trustee and the professional adviser of the other trustees, had not lent the trust-funds to a client of his own, except under circumstances and upon a security which any independent man of business would have recommended.

Now, regarding the conduct of the defenders here—for Mr Drummond was the “defenders here,” he was their partner acting for them in this matter—I cannot think that he made proposals and gave advice to the testamentary trustees which can be upheld. It is quite true that the trustees did not consent to act blindfolded, but exercised some judgment for themselves; and it is very lucky for the defenders that they did so; for if they had not, they would have accepted Mr Drummond's first proposal, with the advice which such a proposal always implies, and have invested £3500 of trust-money upon Kinglassie alone. That was the proposal that he made to them, and the advice which he gave to them; and, I repeat, it is very lucky that the trustees exercised judgment enough to reject that proposal and advice by their man of business, for if they had not, the liability would have been for the full amount of the loan, for it would all have been lost.

Now, just consider for a moment what the proposal and the advice implied in the proposal given by a professional member of the trust acting as agent for the trust was:—Kinglassie had a rental of £1000 a-year. That was the whole rental. The estate had, no doubt, a few years before, brought £34,500. But, as I think, there is no suggestion that it was under-rented, and we, of course, frequently find that people, if they fancy a property, are willing to give thirty-four years' purchase for it. But notwithstanding all that, the rental was £1000 a-year. The property was already burdened with £25,500, and the

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proposal and advice given is that this property with a rental of £1000 a-year would carry £3500 more, affording a safe security for the whole amount, that is, £29,000. The advice, therefore, given to the testamentary trustees about to invest trust-money is that a landed estate is a good and safe security for twenty-nine years' purchase of the rent. I say it is lucky that that advice was not taken or acted on blindly, for then the loss would have been £3500. But then Mr Drummond consults with his client who was requiring the accommodation, and, as he himself expressed it, the client is willing to throw in a villa leasehold. Well, are Kinglassie and the villa together security for the money which these testamentary trustees were advised to lend their ward's money upon? I think, very clearly, they were not. It has proved insufficient within a very short period. It is not very much to the purpose to say that Kinglassie cost £34,000, and was valued at £35,000. Properties, when they are brought to the hammer upon pressure by a creditor wanting payment of his debt do not bring valuation prices, or at least they may not. They are not security for them; and it is because of that, that in taking a security men of business always allow a large margin. There may be security and safety at the time the purchase is made, by which large prices are got; but when a debt remains unpaid by a debtor, when the debtor is unable to pay the principal, and the creditor has to bring the estate to the hammer, it may be with considerable difficulty that the same price is got for it—it may be difficult indeed to secure the amount of the debt alone. The creditor cannot wait for a favourable opportunity although the property may be sacrificed. Now, thirty years' purchase of the rental would be only £30,000, and this estate in question was already burdened with £25,500. The trustees, or rather the trustees other than Mr Drummond, told Mr Drummond—"We don't like a second security over this property, and we won't lend money on that." As I have said, it was considered advisable to add the villa leasehold. Well, what is that value that is thrown in? It is a property which within two years realised £2110. Is it possible to think that an independent man of business advising these trustees would have told them that this Kinglassie, already burdened up to the very teeth—that is to say, up to the amount that in ordinary circumstances a man of business would lend upon it—with this villa, was a security for testamentary trust-money up to the amount of £3500? I cannot conclude that it was; and without dealing with the matter of leasehold, which is a new one, but looking only to the sufficiency, or rather the insufficiency, of the two subjects, I am unable to arrive at the conclusion which the Lord Ordinary has reached—that these testamentary trustees were rightly advised in this matter by a member of their own body who was at the same time their professional adviser.

I do not wish to indicate any view which would reflect upon that course which is generally attended with much practical convenience—that a man of business may act for both borrower and lender. I should myself say that the case of a testamentary trust of which the agent is a member ought to be an exception to that rule. But in truth I think the rule is only followed where it is quite clear that it is a thoroughly safe security which is recommended for the money. Where you come to run fine, as in the most favourable view to the defenders you are doing here—sailing very close to the wind—not leaving anything like the margin which is customarily left even upon valuation prices, it is not convenient that the same party should act for both borrower and lender. A man who has no other security to go upon than a property already burdened

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to the teeth, and a villa such as this, ought not to get the accommodation through the instrumentality of his own man of business who happens to be one of a body of testamentary trustees.

Now, these are the features of this case, and I think the whole of the features of this case. I have upon reconsideration—I confess very much in deference to what I knew to be the opinion of both your Lordships—been brought very strongly to a different conclusion from the Lord Ordinary. I think, with Lord Craighill, that upon these grounds, but upon these only, liability for the loss ascertained upon the realisation of the security here attaches to the defenders, and that the pursuers are entitled to decree accordingly.

LORD JUSTICE-CLERK.—I entirely concur in the result at which both your Lordships have arrived, and indeed in the observations you have made. With what Lord Young has added, Lord Craighill's opinion has my entire approval, and I therefore think it unnecessary to add anything more.

SUBSEQUENTLY the following interlocutor was pronounced:—"21st June 1881.—Recall the said interlocutor: Find that the defenders are bound to pay, and accordingly ordain them to pay to the pursuers (first), the sum of £643, 8s. 7d., being the balance due as at 11th November 1880 on the bond p. £3500, mentioned in the record, after deducting the sums realised from the subjects at Harthill, all as brought out in the account or state No. 125 of process, with interest on the said sum of £643, 8s. 7d. at the rate of four and a-half per cent per annum from said 11th November 1880 till the date of this interlocutor, and thereafter at the rate of five per cent per annum till paid; and (second) the sum of £120, 12s. 3d., being the *cumulo* amount of the sums disbursed by the pursuers for advertising and other charges connected with the realising the said subjects at Harthill, as set forth in the said account or state, with interest on the said sum of £120, 12s. 3d., at the rate of five per cent per annum from said 11th November 1880, till paid," &c.

J. L. HILL & Co., W.S.—THOMAS WHITE, S.S.C.—Agents.

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 Marr & Sons
 v. Lindsay.

JOHN S. MARR & SONS, Appellants.—*Asher—Jameson.*
 ROBERT LINDSAY, Respondent.—*Guthrie Smith—M'Kechnie.*

Bankruptcy—Appeal against Sheriff's deliverance refusing sequestration—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), secs. 19, 31, 169, 170.—An appeal to the Court of Session is competent against a deliverance of a Sheriff refusing a petition for sequestration.

1ST DIVISION.
 Sheriff of
 Lanarkshire.
 M.

ON the 2d April 1881 John S. Marr & Sons, stationers, Glasgow, presented a petition in the Sheriff Court of Lanarkshire for the sequestration of the estates of Robert Lindsay, bookseller, Glasgow.

Lindsay opposed the application.

There was a good deal of discussion in the Sheriff Court, extending over several days, and on the 30th April the Sheriff-substitute (Spens) dismissed the petition for sequestration, and found the petitioner liable in expenses, which he modified to £5.

The petitioner appealed to the Court of Session.

When the case was called in the Single Bills, the respondent objected to the competency of the appeal.

LORD PRESIDENT.—The question as to the competency of this appeal depends upon the operation of the Bankruptcy Statute of 1856, and it is necessary to attend to several sections of that statute, in order to arrive at a decision upon the point, which is one of great importance.

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The matter of appeal is regulated by the 169th and 170th sections of the statute. The 169th section provides for appeals against resolutions of the creditors, and deliverances of the trustee or commissioners, to the Lord Ordinary or the Sheriff, and the 170th section provides for appeals against deliverances of the Sheriff, but only after sequestration has been awarded, and consequently it does not embrace this appeal. The petitioners have therefore no direct authority in the statute, entitling them to appeal in a case of this kind. But on the other hand, there are no express words taking away the right of appeal.

The sections of the statute which bear specially upon this matter are (1) the 31st, which provides that "the deliverance awarding sequestration shall not be subject to review." The remedy provided in that case is a petition to the Lord Ordinary for recall of the sequestration. The words are that "any debtor whose estate has been sequestrated without his consent, or the successors of any deceased debtor, whose estate has been sequestrated without their consent, . . . or any creditor, whether the sequestration has been awarded by the Lord Ordinary or by the Sheriff, may, within forty days after the date of such deliverance, present a petition to the Lord Ordinary, setting forth the grounds for recall, and praying for recall." That section does not apply to the present deliverance, but to a deliverance which might have been made in this case, namely, a deliverance awarding sequestration.

The only section which deals with the case of a refusal to sequester is the 19th, in which it is provided, amongst other things, that "in any case in which the Sheriff has refused to sequester it shall be competent to present a petition for sequestration to the Court of Session, notwithstanding such judgment of refusal." It is contended by the respondent that these words imply a provision that a deliverance of the Sheriff refusing sequestration shall be final, and not subject to review. The section certainly does not expressly enact that, and the general rule is that the right of appeal from an inferior to a superior Court cannot be taken away except by express words. That is a rule which may be said to be subject to some qualification, because, if the jurisdiction exercised by the Sheriff is a jurisdiction which is specially given to him by statute, and in which this Court has not previously had jurisdiction, it may be much more easily implied that the Sheriff's jurisdiction is not only privative, but final, and not subject to review. But that consideration cannot apply in the present case, because the sole jurisdiction in matters of bankruptcy and sequestration was vested in this Court, and exclusively vested in this Court until the Bankruptcy Act of 1856 gave the Sheriff the power of awarding sequestration. The rule, therefore, that express words are required to exclude jurisdiction seems to me to apply directly to the present case, and there being none such, either in the 19th section or in any other part of the statute, I am of opinion that this appeal is competent.

But further, I think, that to hold otherwise would not only be inconvenient but might also be mischievous. It is to be observed that we are dealing with a deliverance which, besides refusing sequestration, finds the petitioners liable in expenses. It would be no redress against that to allow them to come to this

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Court and apply for sequestration, for they could not recover expenses by such a process. And a still more formidable objection would be that, if the sequestration had been improperly refused, the creditors of the bankrupt generally would be deprived of the benefit of the first deliverance, which would otherwise be the date of the sequestration, when it afterwards came to be awarded. That difficulty could not be got the better of by a fresh application for sequestration in this Court. The present case is a very good example of the mischief which might thereby be done. The first deliverance was pronounced upon the 1st April, but the Sheriff did not refuse the petition until the 30th of the same month. And so a long time would have necessarily elapsed before a new petition could have been presented here, and a first deliverance pronounced upon it. During that interval there would have been opportunity for many preferences being established which would have been excluded if an appeal were competent and had been taken.

Some difficulties have been raised as to the form of the appeal, the time and conditions of presenting it, and whether it should come through the Bill-Chamber or through this Court. To all such difficulties I make one answer: If the right of appeal be not taken away, and if the statute prescribes no particular form of appeal, then a party cannot be deprived of his right by any technicalities of that kind. They must be met by an order of Court. But no such objection can interfere with the petitioner's right of appeal, unless it has been taken away by statute.

LORD DEAS concurred.

LORD MURE.—The question here raised appears to me to be attended with some nicety, owing to the terms of the 170th section of the Bankrupt Act, 1856, which regulates the right of appeal from the Sheriff to this Court. That section is limited to deliverances "of the Sheriff after sequestration has been awarded (except where the same is declared not to be subject to review)," and it would at first sight, therefore, seem to be implied that until sequestration has been awarded, there is to be no review of the Sheriff's judgment. But I agree with what your Lordship has said upon this subject, for I am of opinion that, as a general rule, review cannot be excluded by implication. So that if the matter had rested upon that section alone I should have had no difficulty.

But the 19th and 31st sections have been referred to as confirming the view of the respondent that this interlocutor is not appealable; and the 31st section, which declares that "the deliverance awarding sequestration shall not be subject to review," when taken in connection with the 170th, is said to support the contention that the Legislature meant to exclude review where the Sheriff has declined to grant sequestration. But I rather think the implication is the other way. Because this express exclusion of review would seem to lead to the inference that the framers of the Act supposed that but for the terms of the 31st section there would have been nothing to prevent review of a deliverance awarding sequestration, and the provision of that section cannot be extended to the present case.

With reference to the 19th section, there is no doubt some remedy there provided for the case where the Sheriff has refused to sequester. But it is not a very complete remedy, and it is clear that there may be cases in which such a course of procedure as that of presenting a petition for sequestration to the Court of Session after refusal of a first petition by the Sheriff, might be

very prejudicial to the interests of the parties concerned, because the preferences of creditors fall to be regulated by the date of the first deliverance on the petition for sequestration. Now, it is quite possible that in many cases a considerable time might elapse between the date of the first deliverance and the date of a Sheriff's judgment refusing sequestration. In the present case the whole month of April was taken up in disposing of the question, and if the only remedy had been that of a new application in the Court of Session it is plain, assuming the judgment refusing sequestration to be wrong, that the preferences of the creditors at whose instance that application proceeded might be defeated if that judgment were not appealable.

I am therefore of opinion that, as there is no express exclusion in the statute of the review by this Court of interlocutors refusing sequestration, there is no incompetency in this appeal.

LORD SHAND concurred.

THE COURT repelled the objection to the competency, and sent the case to the roll.

DOVE & LOCKHART, S.S.C.—JOHN GILL, S.S.C.—Agents.

PETER BEATTIE (Inspector of Barony Parish), Pursuer.—*Burnet—Ure*. No. 144.
JOHN GROZIER (Inspector of Cathcart Parish), Defender.—
Sol.-Gen. Balfour—Scott.

June 7, 1881.
Beattie v.
Grozier.

Poor—Pauper Lunatic—Relief—Lunacy Act, 1862 (25 and 26 Vict. cap. 54), secs. 14 and 15.—A family consisted of a father and mother and nine children, five being sons and four daughters. One of the sons was an imbecile. The father had an annual income of £120; two of the sons contributed between them £65 per annum to the household expenses; and two of the daughters were in service. *Held* that, in the circumstances, the father had no claim to be relieved by the parochial board of the maintenance of his imbecile son in an asylum.

DAVID HUNTER OLIPHANT, who had been an imbecile from his birth in 1858, was sent in November 1870 to the Larbert Institution for the Training of Imbeciles, where he remained till January 1878, when he returned to his father's house in Barony Parish, Glasgow. He resided for a month there, and was then removed on 19th February 1878 to the lunatic asylum at Woodilee, in Cathcart Parish, where his father had a residential settlement. His removal there was at the instance of the inspector of the Barony Parish, to whom the father had applied. After inquiry, the inspector presented a petition, accompanied by the necessary certificates, to the Sheriff of Lanarkshire, under the 14th section (not under the 15th, which deals with applications in the public interest regarding the custody of dangerous lunatics) of the Lunacy (Scotland) Act, 1862 (25 and 26 Vict. cap. 54),* praying for authority to transmit

1st Division.
Lord Adam.
B.

* Sec. 14 of the Act 25 and 26 Vict. cap. 54, provided:—" . . . The Sheriff of any county in Scotland may grant an order for the reception into and detention in any asylum, lunatic ward of a poor-house, or house as before provided, of any lunatic, if such lunatic be resident or be found within such county . . . but no such order" (by the Sheriff) "shall be granted unless upon a petition subscribed by the party applying for the same, accompanied by a statement of particulars in the form of schedule C to the first recited Act annexed, and setting forth the degree of relationship, or other capacity, in which the petitioner stands to such lunatic, and also accompanied by certificates . . . under the hands of two medical persons," &c.

Sec. 15 provided:—" . . . When any lunatic shall have been appre-

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him to the asylum. A warrant was granted, and the board arranged that the father should contribute 5s. a-week for his son's maintenance—the whole cost was £32 per year.

This was an action by the inspector of Barony against the inspector of Cathcart for relief of the expenses incurred in maintaining the pauper at Woodilee. The defence was (1) that the pauper was not a proper object of parochial relief, and (2) that, in any case, the pursuer ought to have presented his petition under section 15, and not under section 14, of the Lunacy Act, 1862, and on that ground could not recover.

It appeared from the proof that at the date of the imbecile's alleged chargeability to Cathcart his father, Robert Oliphant, was a clerk in Glasgow at a salary of £120 a-year, and was residing with his wife and family at Park Road, Glasgow, in the Barony Parish. They had three rooms and a kitchen there, at a rent of about £26 a-year. The family consisted of Mr and Mrs Oliphant and eight children besides the imbecile, six of whom resided there. The eldest, Robert, was twenty-one years of age, and had a salary of £50 per annum, which he gave to his mother for the expenses of the establishment. The two next were daughters, nineteen and seventeen respectively, who were at home, but were of an age to do something for themselves. The next was a boy of fourteen, who earned 6s. a-week as a message boy. The two youngest, eleven and eight respectively, were boys at school.

Up to June 1876 Oliphant had paid a sum for his son's maintenance at Larbert, but in that year his estates were sequestrated, and he no longer contributed. In March 1879 he went to Bowmore, Islay, with the view of bettering his position. He admitted that he was no worse off at Bowmore than he had been previously.

A good deal of evidence was led at the proof as to the actual mental state of the imbecile, but that question was not argued.

The Lord Ordinary, on 11th February 1881, assolizied the defender. *

hended, charged with assault or other offence inferring danger to the lieges, or when any lunatic shall be found in a state threatening danger to the lieges, or in a state offensive to public decency, it shall be lawful for the Sheriff of the county in which such lunatic may have been apprehended or found, upon application by the procurator-fiscal or inspector of the poor, or other person, accompanied by a certificate from a medical person bearing that the lunatic is in a state threatening such danger, or in a state offensive, or threatening to be offensive, to public decency, forthwith to commit such lunatic to some place of safe custody, &c.

* "NOTE.—(After stating the facts)—In this state of matters the Lord Ordinary is of opinion that the pursuer was not called upon to interfere in this case. It is not a little startling that the child of a man in receipt of £120 a-year should be treated as a pauper lunatic, and the expense of his maintenance in a large measure thrown upon the public. It is a heavy affliction in a family to have an imbecile child among its members. The burden of having to support him in an asylum, out of limited means, is no doubt a heavy one, but it appears to the Lord Ordinary that it is a burden which a person in Oliphant's circumstances cannot and ought not to throw upon the public.

"Had this been a case where the lunatic was dangerous to the lieges, and it had been necessary to take proceedings under the 15th section of 25 and 26 Vict. cap. 54, the pursuer would have had relief against the parish of settlement; but there is no case of that kind. The proceedings were taken under the 14th section of the Act.

"The pursuer further maintains that, even if the lunatic's father be able to provide for his maintenance, it lies with the parish of Cathcart, as the lunatic's parish of settlement, to enforce his liability—*Dinwoodie v. Graham*, January 27, 1870, 8 Macph. 436. But this is quite a different case from that of *Dinwoodie*. If in this case the lunatic's father was able to provide for his main-

The pursuer reclaimed, and argued that his interference had been justified by the insufficiency of the father's means, and that he had proceeded according to the usual practice under the 14th section of the statute, which saved the expense attending procedure under the 15th.¹ No. 145.
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The defender argued that the father's circumstances did not warrant the pursuer's interference, and that, in any event, the pursuer should have proceeded under the 15th section of the statute quoted above.¹

LORD PRESIDENT.—There is no doubt that in the administration of the Lunacy Acts the parochial boards and the poor-law inspectors have very important and somewhat delicate duties to discharge, and I should be very sorry if any judgment which we were to pronounce had the effect of interfering unnecessarily with the way in which they administer them, or of discouraging these boards or inspectors from taking up any case that may properly fall under their charge. And I am therefore very unwilling to assume that the proceedings of the inspector in this case, which were taken under the 14th section of the statute, were unauthorised. We were told that in practice inspectors present similar applications under that section, and I have no intention of expressing an opinion adverse to that practice. But I think that, primarily at least, the 14th section was intended to apply to the parents or guardians or friends of the person whom it is desired for their benefit to send to an asylum, and if an inspector proceeds under that section I think he must take care that he does so without merely stepping into the shoes of such parents or guardians with the object of saving them at the expense of the parish from the charges for which they must otherwise have become liable.

The defence to this action is that the lunatic is not a pauper, or, in other words, is not a proper object for parochial relief under the Poor-Law and Lunacy Acts, and if that is made out I cannot entertain a doubt of the soundness of the Lord Ordinary's interlocutor. If the parochial board has taken up a case in which the party relieved is not a proper object of parochial relief it cannot expect to recover the expenditure from the parish of settlement. It seems to be established beyond dispute that there comes into this house an income of £185 a-year. No doubt the father is said to be in difficulties, and to have incurred debts to other establishments where his son had been placed for treatment. But that does not interfere with the fact that along with his two sons he had the income of which I have been speaking, and the question which presents itself to my mind is whether a person in receipt of an income of £120 can be said to be in a position entitling him to relief at the expense of the rates,—that is, at the joint expense of all the ratepayers in the parish, rich and poor, in many instances I may say infinitely poorer than the person whose son it is proposed should be thus maintained. The ratepayers, in my opinion, ought to

tenance, he was not a proper object of parochial relief, and ought not to have been so treated. The pursuer had all the facts before him at the time when he removed the lunatic to the asylum, which ought to have led him to that conclusion, and the defender is not bound to relieve him of a burden which he ought never to have incurred."

¹ *Additional authorities.*—Palmer v. Russell, Dec. 1, 1871, 10 Macph. 185; M'Crorie v. Cowan, March 7, 1862, 24 D. 723; Milne v. Henderson and Smith, Dec. 3, 1879, *ante*, vol. vii. 317; Lunatics (Scotland) Act, 1857 (20 and 21 Vict. cap. 71), secs. 75 and 76; Fraser v. Robertson, June 4, 1867, 5 Macph. 819; Lawson v. Gunn, Nov. 21, 1876, *ante*, vol. iv. 151; Anderson v. Pater-son, June 12, 1878, *ante*, vol. v. 904.

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be secured against any such burden. An annual payment of £40 a year will no doubt reduce the father's income, and will interfere to some extent with some home comforts with which he might otherwise be supplied—in fact, he will have to reduce his expenditure to that extent. But that is only one of the misfortunes which attend persons in that rank of life who may have a lunatic child. The leading rule of parochial law is that where the father is not himself a pauper he must bear his own burden. The Lunacy Acts provide that the sufferer must be sent to an asylum, and if it is clearly established that the father is unable to pay for the son's maintenance it is only in such a case that the parish can be called upon. That does not appear to be the case here, and the expense must be met by the father, even although it cause him some sacrifice.

I quite agree with the judgment of the Lord Ordinary.

LORD DEAS.—While I arrive at the same result, I do so on the single ground that the father is, at all events, quite able to maintain his imbecile son in his own house and family—that humanity and expediency require that, for the benefit and comfort of the imbecile, he should be allowed to remain there for the present—that, so far as regards safety to the rest of the family and to the public, there has been no reason in the past, and there is none now, to apprehend danger, and it will be time enough to consider what should be done under a change of circumstances for the worse, if such should unhappily and unexpectedly occur.

LORD MURE and **LORD SHAND** concurred.

THE COURT adhered.

MACKENZIE, INNES, & LOGAN, W.S.—J. & J. GALLETTY, S.S.C.—Agents.

No. 146.

June 8, 1881.
Sandeman v.
Scottish Property Investment
Company Building Society, Limited.

FRANK STEWART SANDEMAN, Pursuer.—*D.-F. Kinnear—H. Johnston.*
THE SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY, LIMITED, Defenders.—*Keir—Moody Stuart.*

Superior and Vassal—Sub-vassal—Feu-duty—Liability of Sub-vassal to Over-superior.—Held that an over-superior has not a direct personal action for the whole *cumulo* feu-duty against a sub-vassal holding part of the feu.

Opinion, per cur., that the over-superior is entitled to enforce for his own benefit the obligations come under by the sub-vassal to his own immediate superior.

1ST DIVISION.
Lord Rutherford
Clark.
B.

By feu-contract, recorded 23d February 1876, Frank Stewart Sandeman feued out for building purposes to William Stiven, accountant, and Henry Gibson, solicitor, Dundee, five acres of the lands of Clepington, being part of a larger piece of ground held by himself from William Neish of Clepington. The stipulated feu-duty was £480 per annum.

By feu-contract, recorded 26th February 1876, Stiven and Gibson sub-feued to Alexander McCulloch, architect, Dundee, a small part of the ground held by them from Sandeman, extending to 22½ poles, at an annual feu-duty of £22, 12s. 4d. The feu-contract contained this clause:—"And declaring farther, that these presents are granted always with and under the real burdens, conditions, provisions, and declarations specified in (first) the feu-contract entered into between the said William Neish of Clepington on the one part, and the said Frank Stewart Sandeman . . . on the other part; . . . and (second) the foresaid feu-contract entered into between the said Frank Stewart Sandeman on the one part, and the said William Stiven and Henry Gibson on the other part, dated as aforesaid, and recorded as aforesaid, . . . in so far as the same are applicable, and which are likewise appointed to be, in all

transmissions and investitures of the said piece of ground hereby disposed, No. 146. validly referred to as contained in the said feu-contract respectively, otherwise the same shall be void and null."

On 24th March 1876 M'Culloch disposed his sub-feu to the Heritable Securities Investment Association by disposition *ex facie* absolute. And the Heritable Securities Investment Association, with consent of M'Culloch, subsequently disposed the sub-feu to the Scottish Property Investment Company Building Society, also by disposition *ex facie* absolute, which was recorded on 24th January 1877.

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The feu-duty due to Sandeman was paid by Stiven and Gibson up to and including Martinmas 1877. But thereafter both Stiven and Gibson became bankrupt, and no further payments of feu-duty were made by them, or on their behalf. The trustees on their sequestrated estates refused to take up the property. With the exception of M'Culloch's subfeu, no part of the ground had been built upon.

The feu-duties having run in arrear for three years, Sandeman raised an ordinary petitory action, *inter alios*, against the Scottish Property Investment Society, concluding for payment of six half years' feu-duty, with corresponding interest. He averred that the Investment Society had been proprietors infest in M'Culloch's sub-feu, and had received the rents and profits therefrom during the three years to which the summons referred.

This the investment company substantially admitted. They stated that they had paid the subfeu-duty for the first of the years in question to Stiven and Gibson, but that they had withheld the subfeu-duties for the last two years, and they tendered the amount of the said two years subfeu-duties as the measure of their liability to the pursuer as over-superior.

The pursuer pleaded;—1. The defenders having been owners infest in parts of the lands contained in the said feu-contract during the whole period for which the feu-duties claimed are payable, they are liable therefor, and decree should be pronounced in terms of the summons.

The defenders pleaded;—2. The defenders, being sub-vassals of the pursuer in a small portion of the lands feued out by him, cannot be called on to pay the feu-duties effeiring to the whole lands, as concluded for.

The Lord Ordinary, on 28th January 1881, pronounced this interlocutor:—"Assoilzies the defenders, The Scottish Property Investment Company Building Society, from the conclusions of the summons, and decerns, reserving to the pursuer all claim competent to him for sub-feu-duty: Finds the pursuer liable in expenses," &c.*

The pursuer reclaimed, and argued;—The opinions in *Hyslop v. Shaw*, 1 Macph. at 551, and *Marquis of Tweeddale's Trustees v. Earl of Haddington*, ante, vol. vii, at p. 627, though of great weight, were, in regard to the questions raised in this case, *obiter dicta* merely, and, though treating of the superior's remedies against a sub-vassal and others, where his

* "NOTE.—The question in this case is whether a superior has a direct petitory action against a sub-vassal for the whole feu-duty payable for the lot of ground of which the property of the sub-vassal forms a part.

"It is conceded by the pursuer that the opinion of the Lord President in the case of the *Marquis of Tweeddale*, 7 R. 620, and of the majority of the Judges in the case of *Hyslop*, 1 M. 535, is against him. But he says that this opinion is expressed *obiter*, is inconsistent with the older authorities, and is contrary to the decision of the Court in *Wemyss*, 14 S. 233, and *Moncrieff*, M. 4185. But it appears to the Lord Ordinary to be so direct and authoritative as to be binding on him. He has given judgment accordingly.

"The said defenders do not dispute their liability for the subfeu-duty in so far as in arrear. The pursuer contended that he was entitled to exact the sub-feu-duty even though it had been paid. But as this question is not raised in the record, the Lord Ordinary did not think it proper to decide it."

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own vassal was in arrear with his feu-duties, did not pretend to give an exhaustive statement of those remedies, so as to exclude that here claimed. The question was an open one, whether the sub-vassal infest in part of a feu was personally liable to the over-superior for the whole *cumulo* feu-duty. The contention of the pursuer was that the personal liability was commensurate with the real liability, that as the superior was unquestionably entitled to attach the ground of the sub-feu or any part of it for the whole *cumulo* feu-duty, his right of personal action against the sub-vassal extended also to the whole *cumulo* feu-duty. It might be assumed that the sub-vassal lay under some liability to the over-superior, as that was admitted in the two opinions above referred to.* The question was, what was the limit of that liability? Did it (1) extend to the whole *cumulo* feu-duty; or (2) was it limited to the value of the subject possessed by the sub-vassal as represented by the yearly rents or profits; or (3) was it confined to the amount of the subfeu-duty? In order to give an answer to these questions it was necessary to consider the ground of the sub-vassal's admitted liability. Was it (1) intromission; or (2) contract; or (3) tenure? It was submitted, in the first place, that it was not intromission; for if it was intromission it must cease the moment the intromission ceased, which, unquestionably, was not the case. Intromission was certainly a ground of liability in some cases, and as such had been recognised,¹ but it was not the ground of a sub-vassal's liability, for the reason above stated,—that the sub-vassal could not get rid of his liability by ceasing to intromit. On the other hand, if the ground was held to be intromission, then the liability must extend to the full amount of the intromission, and the measure of liability must be the amount of the yearly rents or profits reaped by the vassal. Neither (*secondly*) was it contract. For the only contract was between the sub-vassal and his own superior. Yet it was maintained that the consideration to be given annually by the sub-vassal under that contract was the measure of his liability to the over-superior, as if the over-superior were the contracting party. While, at the same time, it was apparently assumed that if that consideration was illusory or not the true value of the sub-feu, then the superior would be entitled to get something more than the mid-superior had contracted for, viz., a proportional part of his *cumulo* feu-duty, as if it had been allocated. It was difficult to see how either of these results could arise on the theory of contract, or how they could both arise without inconsistency. But there remained, in the *third* place, the ground of tenure—possibly only another name for contract, but that contract the one on which alone the superior gave out his ground, viz., that the payment of feu-duty should be a condition attaching to the entire estate and every part of it, that every one who held directly or indirectly of him should take his estate subject to that burden as one of the conditions of his tenure. By his infestment the sub-vassal at once puts himself in the feudal relation to the superior out of which this obligation arises. By his possession on a feudal title he adopts those obligations of the tenure under which he possesses. The property is truly reserved to the superior to the extent of his feu-duties. The sub-vassal possesses or intromits, knowing the condition of the tenure under which he possesses or intromits. He does so, therefore, at his own peril, and by taking the land takes on him personally all the obligations which run with the land.² The principle of tenure, therefore, gave a ground, and the only intelligible ground, for the personal liability of the sub-vassal. If this was not the ground of

* See also Bell's Pr., section 700.

¹ Biggar v. Scott, 1738, M. 4191.

² Clark v. City of Glasgow Life Assurance Company, June 19, 1850, 12 D. 1047, 22 Scot. Jur. 459, August 8, 1854, 1 Macq. 668; Stewart v. Duke of Montrose, February 15, 1860, 22 D. 755, 32 Scot. Jur. 308, March 27, 1863, 4 Macq. 499.

liability, then it was not possible to find any principle on which to account for the liability which admittedly did exist, and still less for the limitation of that liability which was proposed. No. 146.

The view contended for by the pursuer had been recognised in the early case of *Moncrieff*,¹ and had been adopted without limitation by all the standard authorities on conveyancing.² The case of *Creditors of Eyemouth*,³ which was founded on by the Lord President in the case of the *Marquis of Tweeddale's Trustees*, was not really to the contrary effect, for there the superior had actually entered the disponees of his vassal for a proportional, though indefinite, part of the feu-duty, and the only question was how it was to be allocated. An argument had been founded on the inconvenience and interference with the commerce in land which would result from giving effect to the pursuer's contention. But that was an argument to which no effect could be given in a matter of right. Besides it applied with equal force to the admitted real remedy which the superior had against every part of the ground.

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Argued for the defender;—The sub-vassal was undoubtedly liable to have his lands and the effects upon them carried off by real diligence or action to satisfy the over-superior's demand for his feu-duty. But what the pursuer in this case sought was to bring his whole fortune under the same liability. Such an attempt had never previously been made, and its success would be to interfere very seriously with the commerce in land. Admittedly the sub-vassal was under a certain personal liability to the over-superior, but the limitations on that liability were distinctly and correctly laid down in the authoritative opinions delivered in the cases of *Hyslop* and *Marquis of Tweeddale's Trustees*, referred to by the Lord Ordinary. Whatever the ground of liability was, whether intromission or implied contract, it was well settled that the extent of that liability was the extent of the sub-vassal's obligation to his own immediate superior. So that all that the over-superior was entitled to do was to enforce for his own benefit the obligations come under by the sub-vassal to the mid-superior. The cases referred to on the other side did not support the principles attempted to be deduced from them. And of the standard writers, Duff and Menzies had been misled by the unsatisfactory and manifestly incomplete report of the case they founded on, while Stair and Erskine laid down no such broad doctrine as was assumed, but one quite consistent with the defenders' contention. Bankton did not directly deal with the point, but what he says (1, 621) with reference to the liability of heirs-portioners leads to the necessary inference that *a fortiori* he would have attributed a similar limitation to the liability of a sub-vassal.

At advising,—

LORD PRES. INT.—In this case the original feu was granted by the pursuer Frank Stewart Sandeman to William Stiven and Henry Gibson, and the feu-contract was dated 9th, 12th, and 18th February 1876. The subjects conveyed were of considerable extent, and the feu-duty agreed to be paid was £480 per annum.

In the same month of February 1876 there was a sub-feu granted by William Stiven and Henry Gibson to Alexander M'Culloch of a small portion of the original subject. There was no prohibition against subinfeudation in the original feu-contract, nor indeed could there be, for by the Act of 1874 all such

¹ 1630, M. 4185, see Spottiswood's report at p. 4186, of cases in *Mor. Dic. sub voce* Feu-duties, and *Wemyss v. Thomson*, January 19, 1836, 14 S. 234, 8 Scot. Jur. 181; see also *Magistrates of Edinburgh v. Edinburgh Ropery Company*, November 12, 1878, *ante*, vol. vi., H. L. p. 1, Lord Selborne's opinion.

² *Stair*, ii., 3, 55; *Duff*, ii., 4, 7; *Ersk.*, ii., 5, 2; *Duff*, *Feudal Conveyancing*, pp. 80 and 85; *Bell's Pr.*, sec. 700; *Menzies' Lect.*, 3d ed., p. 819.

³ 1759, 5 Brown's Sup., 856.

No. 146. prohibitions are made illegal, and, therefore, under the existing law it must always be contemplated that the purpose of taking a feu of a large piece of ground may be—and where the ground lies in close proximity to a town in all probability is—to feu it out, or sell it off in smaller lots for building. Accordingly in subfeuing to M'Culloch, Stiven and Gibson were quite within their right. The feu-duty agreed to be paid was £22, 12s. 4d., which seems fairly proportional to the amount of ground given out. The feu-contract declares, however, “that these presents are granted always with and under the real burdens, conditions, provisions, and declarations specified in . . . the foresaid feu-contract entered into between the said Frank Stewart Sandeman on the one part, and the said William Stiven and Henry Gibson on the other part, dated as aforesaid, . . . in so far as the same are applicable, and which are likewise appointed to be, in all transmissions and investitures of the said piece of ground hereby disposed, validly referred to as contained in the said feu-contract, otherwise the same shall be void and null.”

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M'Culloch's sub-feu came, in January 1877, to be vested in the defenders the Scottish Property Investment Building Society, on a title *ex facie* absolute.

Stiven and Gibson have become bankrupt, and, according to the 5th article of the condescendence, they were at the date of the summons in arrear three full years' feu-duty, and that is the sum concluded for in this action against the sub-vassal. The result of the pursuer's success would be to compel the defenders in the meantime to pay at the rate of £480 a-year, with interest, for the past three years, and the further result would be to make them liable in the same sum for every future year during which they remained proprietors.

In these circumstances the question has arisen which is stated by the Lord Ordinary in his note—“Whether a superior has a direct petitory action against a sub-vassal for the whole feu-duty payable for the lot of ground of which the property of the sub-vassal forms a part.”

Now, there are some principles of the feudal law as applicable to the rights of superior and vassal that are now incontrovertible. There is, no doubt, for instance, that, notwithstanding the granting of a feu-right, the superior remains dominus of his estate, and, therefore, being creditor in an obligation for payment out of it of a sum of money, which is a *debitum fundi*, he has right to attach any portion of the estate by any real diligence, and, in particular, by an action of poiding the ground. Indeed, a mere security holder has rights of the same kind. And the rights of the superior are much higher than those of a mere security holder. All that is perfectly clear in so far as real diligence is concerned. But it is quite different when you come to a question of personal liability. A sub-vassal must certainly submit to have his estate carried off by real diligence, but is he, beyond that, liable to be compelled to employ his whole means, wherever situated, in satisfying the demands of the superior.

That is a very serious question, and it is one which I have had occasion to consider more than once. In the case of *Huslop* (1 Macph. 535) I concurred with Lords Cowan, Benholme, Neaves, and MacKenzie, in giving an opinion (p. 551) that the right of personal action could not be carried to that length, but was limited to the enforcement, for his own benefit, of the obligations come under by the sub-vassal to his immediate superior, with reference to that portion of the original feu of which he had got possession and a title.

Again, in the case of the *Marquis of Tweeddale's Trustees* (ante, vol. vii., p. 620), I repeated this opinion (p. 627), qualifying it with a statement that if the obligations come under by the sub-vassal were not proportional to the portion of the

original subject sub-feued to him as compared with the original *cumulo* feu-duty, No. 146. the superior would be entitled to exact from the sub-vassal that portion of the *cumulo* feu-duty which would correspond to the extent of the sub-feu.

I have, however, listened attentively to all that has been urged on behalf of the superior in this case, and have carefully reconsidered the question, irrespective of the opinion I had already formed and expressed, and I am bound to say that the result of my reconsideration has been not to shake, but rather to confirm, that opinion.

If the superior was entitled to go not merely against his own vassal, but also against any sub-vassal by personal action, I should expect to find some statement of that right in our institutional writers. Craig may be supposed to state the rights of the superior in their strictest and strongest aspect. Walter Ross, on the other hand, was very jealous of any extension or exaggeration of the claims of the feudalists, and was constantly stating what he conceived to be the extreme demands of the superior for the purpose of bringing the system into disfavour. Yet in neither of these writers do I find the slightest mention of such a right.

Stair and Erskine are equally silent, and Bankton, though he does not mention this particular point, does touch on an analogous subject in a way which indicates pretty clearly how he would have dealt with it had the question occurred to him. In treating of the succession of heirs-portioners, and the separation which then by operation of law takes place, Bankton gives it as his opinion that each is only personally liable for his or her own proportion of any duty that consists in money, while the ground remains liable for the whole.

It is quite true that in some modern books of practice the rule has been laid down somewhat more broadly, and I am not disposed to undervalue the opinion given either by Mr Duff or Professor Menzies. But I think that they have stated the law on this point in reliance on two authorities which are not sufficient to warrant their conclusion.

The first of these is the case of *Moncrieff*, 1630, M. 4185, as reported by Spottiswood. The report is in these terms:—"The King having feued the half land of the barony of Gaynes, by virtue of the Act of Annexation, to the laird of Balnagowan, he set sub-feus thereof to be holden of himself, to others. The King disposed to Mr Archibald Moncrieff a pension of £224, to be paid out of the same feu-duties of Balnagowan. Mr Archibald pursued one of Balnagowan's sub-vassals for payment of the whole pension. He alleged he could be convened for no more than the feu-duty of his subaltern infeftment. The Lords found, that as the King might seek his feu-duty out of the whole lands, or any part thereof, it being *debitum fundi*, so might the pensioner, against any one of the sub-vassals." Now, it is apparent that this report is not complete or satisfactory. The King might seek his feu-duty by real action out of the whole lands or any part thereof. That is indisputable. And one is led to doubt whether after all the case was not one of pointing of the ground, and not a personal action, in which case the decision would be no authority for the present pursuer. At all events, a decision of that date, so imperfectly reported, can hardly make law unless supported by the institutional writers and practice, or followed in subsequent cases.

The next case is that of *Wemyss*, 14 S. 233. But that, to my mind, does not decide the question we have here. I do not dispute that there are some observations by the Judges which touch the subject, but they are not so distinct as to lay down a rule that the superior has a right of personal action for his whole feu-duty against every sub-vassal who comes to be infeft in any portion of the

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feu. The point there raised was the condition on which the superior was bound to receive vassals who came to him as part-purchasers. He insisted that his charters by progress should contain obligations on each of the dispoonees to pay the full *cumulo* feu-duty, with right of relief against the rest for their share. That contention on the part of the superior was adjudged to be a reasonable one in the circumstances, and charters were adjusted accordingly. But that does not amount to a decision that proper sub-vassals are under the same obligation.

I, therefore, retain my opinion expressed in the cases of *Hyslop* and *Marquis of Tweeddale's Trustees*, and am for adhering to the judgment of the Lord Ordinary.

LORD DEAS.—Your Lordship has correctly stated the nature of the case. I am of opinion that the superior is entitled to resort to real diligence, by which he may probably attain the same end as that which he has here in view, but that he has no personal action against the sub-vassals for the feu-duties due to him by his immediate vassal.

In the case of the *Marquis of Tweeddale's Executors v. Earl of Haddington* I did not enter upon the consideration of what might be the general law as to the liability of sub-vassals apart from contract, because I was of opinion that the general law did not rule that case. The ground of my judgment there was that the obligation of relief on which the pursuers founded their claim against the Earl was by the Earl's titles expressly made a burden upon him as an inherent condition of his right. I had no occasion to question the general law as stated by your Lordship, but the Marquis of Tweeddale's trustees were not suing as superiors but as vassals for relief of what they had paid on account of their co-vassal.

The following passages in my opinion (as it is correctly reported in the Session Cases) will best shew that this was its import, and I shall therefore make no apology for quoting them. After stating the terms of James Hamilton's sasine of 1837, and of Earl Thomas's sasine of 1849, I went on to say,—“It was the title thus obtained and completed by Earl Thomas in December 1849 which enabled him to execute the entail dated 22d April 1851, and recorded in the Register of Tailzies 8th March 1859, on which entail his successors, since his death on 25th June 1870, have possessed and continue to possess the lands.” After farther observing that the acceptance of this title implied an unequivocal obligation of relief as to the burden in question, I added,—“Neither can I see any doubt that the burden thus imposed on Earl Thomas was an inherent condition of the right conveyed to him, his heirs and successors, and consequently ran with the land in accordance with the authority of the case of *Coutts v. The Tailors of Aberdeen*, decided in the House of Lords 3d August 1840 (1 Robinson's Appeals, 296), and the case of *Stewart v. The Duke of Montrose*, decided in this Court 15th February 1860 (22 D. 755), and affirmed in the House of Lords 27th March 1863 (4 Macqueen, 409).”

Having thus rested my opinion in the Marquis of Tweeddale's case substantially on the footing that the obligation sought to be enforced was an inherent condition of his right, I took occasion to observe that while a properly constituted real burden for debt had the advantage of creating an absolutely indefeasible preference to the creditor named, which was not conferred by an inherent condition of the right—“on the other hand, an inherent condition of the right has the advantage of being enforceable by personal action against the proprietor or proprietors for the time being, at the instance of whomsoever has an interest to enforce it, whether named in the deed or not.”

On this footing I was of opinion in the Marquis of Tweeddale's case that

personal action lay to enforce the claim of his trustees and executors, who were pursuers, against the Earl of Haddington, who was defender. But the reasoning throughout that opinion inevitably leads me to the result that in the present case the pursuer, while I see no objection to his right and title to proceed by real diligence against the land for recovery of his feu-duties, has no personal action for them against the defenders, and consequently cannot obtain decree under the conclusions of this summons.

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LORD MURE concurred.

LORD SHAND.—In the case of the *Marquis of Tweeddale*, I reserved my opinion on the question raised by the present case. But having now considered that question carefully, I have come, without hesitation, to the conclusion at which your Lordships have arrived.

If the over-superior had been, by real diligence, seeking to adjudge the property in question for the arrears of feu-duty due to him, there could be no doubt of his right to do so. The principle and reason of this is, that by the original feu-contract, which is a necessary part of the defenders' title, he has made the feu-duty a *debitum fundi* on every portion of the feu. But here the point in dispute is whether the sub-vassal has come under a personal obligation for the original feu-duty. Now, one thing is clear, namely, that there is no express obligation, for the only obligation undertaken is for a feu-duty of £22, 13s. 4d. a very small amount compared with £480 a-year. If so, how, then, is this personal obligation said to arise? It can only be from the relation said to subsist between the superior and the sub-vassal. But there is no direct relation between them, and I see nothing in the indirect relation which does subsist to create such an obligation. It may be quite just that the superior should get the benefit of any personal obligation undertaken by the sub-vassal to his own superior—that the superior should have right to enforce against the sub-vassal by personal action the payment of the subfeu-duty due to the mid-superior; and to that extent the defender admits the pursuer's right. It may even be that the right goes farther, so that when the sub-vassal having paid a price down, undertakes payment of a blench feu-duty only, the superior may, nevertheless, be entitled to exact from him a portion of the *cumulo* feu-duty proportional to the extent of his feu. That is a more difficult question, on which it is unnecessary to express an opinion. But the superior's personal remedy against the sub-vassal appears to me to be founded on an equitable right to the benefit of the personal obligation which the sub-vassal has undertaken to his own superior, and I am not inclined to stretch it farther. The law has gone as far as reason can carry it.

Two cases were relied on by the pursuer. In the case of *Wemyss* (14 S. 233) subinfeudation was prohibited. Accordingly the superior was not bound to receive a disponee in part of the subject, except under a personal obligation for the whole feu-duty. He was not bound to split his feu-duty, and to seek from many what he had stipulated for from one. The disponees came to him asking an entry, and he was entitled to make conditions with them which would secure his right, and these conditions the Court approved. That case does not affect a case like the present, where sub-feuing is not prohibited, and where the parties against whom liability is sought to be enforced are not disponees asking an entry, but sub-vassals, possessing on the title from their own superior. With reference to the case of *Moncrieff* (M. 4185), I may add to what was said by your Lordship, that I think the question raised depended in all probability on

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the particular terms of the feu-contracts. It may be that these terms entitled the Crown, or the Crown donatary, to go against the sub-vassals personally, and, in any view, the reason given by the reporter for the judgment, that because there is a *debitum fundi* there is also a personal action, is most unsatisfactory.

THE COURT adhered.

LEBURN & HENDERSON, S.S.C.—AULD & MACDONALD, W.S.—Agents.

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venue.

STRATHEARN HYDROPATHIC COMPANY, LIMITED, Appellants.—

Mackintosh—Shaw.

INLAND REVENUE, Respondents.—*Lord-Adv. M'Laren—*

Sol.-Gen. Balfour—Rutherford.

Revenue—Inhabited House-Duty—Hotel—Hydropathic Establishment—Customs and Inland Revenue Act, 1871, 34 and 35 Vict. c. 103, sec. 31.—Held that section 31 of the above Act restricting to sixpence per pound the inhabited house-duty on houses occupied by any person who shall carry on therein “the business of a hotel-keeper or an innkeeper or coffeehouse-keeper,” although not licensed, &c., applied to a house occupied as a hydropathic establishment.

1st Division.
Exchequer
Cause.
C.

THE STRATHEARN HYDROPATHIC COMPANY, LIMITED, who carried on the usual business of a hydropathic company near Crieff, were assessed, under the Inhabited House-Duty Act, 1851 (14 and 15 Vict. c. 36), by the Commissioners of Property and Income-tax, at the usual rate of 9d. in the pound on the rental of the establishment for the year ending Whit-sunday 1881. They appealed against this assessment, and maintained that the establishment should be assessed at the rate of 6d. in the pound, the usual rate for a hotel which is not licensed for the sale of exciseable liquors under section 31 of 34 and 35 Vict. c. 103.

The Inhabited House-Duty Act, 1851 (14 and 15 Vict. cap. 36), provides, in the schedule thereto attached, that inhabited house-duty shall be payable “for every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of £20 or upwards by the year. Where any such dwelling-house shall be occupied by any person in trade, who shall expose to sale and sell any goods, wares, or merchandise in any shop or warehouse, being part of the same dwelling-house, and in the front and on the ground or basement story thereof, and also where any such dwelling-house shall be occupied by any person who shall be duly licensed by the laws in force to sell therein by retail beer, ale, wine, or other liquors, although the room or rooms thereof in which any such liquors shall be exposed to sale, sold, drunk, or consumed, shall not be such shop or warehouse as aforesaid, . . . there shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of sixpence. And where any such dwelling-house shall not be occupied and used for any such purpose, and in manner aforesaid, there shall be charged for every twenty shillings of such annual value thereof the sum of ninepence.”

The Customs and Inland Revenue Act, 1871 (34 and 35 Vict. cap. 103), sec. 31, provides—“From and after the 5th day of April 1871 every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of £20 or upwards by the year, which shall be occupied by any person who shall carry on in the said dwelling-house the business of a hotel-keeper or an innkeeper or coffeehouse-keeper, although not licensed to sell therein by retail beer, ale, wine, or other liquors, there shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of sixpence.”

The Commissioners having confirmed the assessment the company No. 147. appealed to the Court of Exchequer. In the case stated by the Commissioners the following statements were made:—“(3) The object of the hydropathic establishment is the treatment, under the advice of a resident physician, of patients by hydropathy, and for the boarding and lodging of them in the establishment. The company board and lodge visitors who may not desire to undergo hydropathic treatment. (4) The patients and visitors are subject to the strict rules of the establishment. They are rung up in the morning at a fixed hour. The meals are served only at certain fixed hours, and any inmate sitting down to table after grace is said, or making allusion to hydropathic treatment during meals, is fined. Family worship is held morning and evening. The front door is locked at 10.30 p.m., and the gas turned off at 11 p.m., when perfect quietness must be maintained by all. (5) By the rules and regulations of the company, which are hung up in the bedrooms of the establishment, for the information of the public, the officials of the company are empowered to refuse admission and to send away such as they judge unsuitable. No children under six years of age are admitted except under special arrangement. (6) The company board and lodge patients and visitors at a certain fixed rate per day or per week. Visitors wishing to invite a friend to the *table d'hôte*, or to spend the evening, require to give notice at the office. The company decline to say that they are bound to supply the travelling public with meals at odd hours, but they stated they had never refused to do so. (7) The company have no signboard, and they have never, in their official papers, nor in their advertisements to the public, designated themselves as hotel-keepers or as inn-keepers, nor their establishment as a hotel or an inn.”

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Argued for the company;—The hydropathic establishment was just a temperance hotel. No doubt it was also a medical establishment, but the fact that a hotel-keeper carried on another business did not deprive him of the privilege of being a hotel-keeper.¹

Argued for the Inland Revenue;—The establishment differed in many ways from a hotel, and should be assessed as an inhabited house. The main object was the cure of disease by hydropathic treatment. The guests were not treated like the guests of a hotel, but had to submit to restrictions of their liberty which no hotel-keeper would impose.²

At advising,—

LORD PRESIDENT.—It is of course conceded that a person carrying on the business of a hotel-keeper in any dwelling-house is liable in respect of that dwelling-house to be charged only at the rate of sixpence in the pound for inhabited house-duty. But it seems to have been thought, prior to the year 1871, that it depended in some degree upon whether the hotel-keeper held a licence for the sale of exciseable liquors; and by the statute which was passed in that year, section 31, it is provided that for the future every “inhabited dwelling-house which . . . is or shall be worth the rent of £20 or upwards by the year, which shall be occupied by any person who shall carry on in the said dwelling-house the business of a hotel-keeper, or an innkeeper, or coffee-house-keeper, although not licensed to sell therein by retail beer, ale, wine, or other liquors, there shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of sixpence.” Now, this section in itself contains from the date of this statute the whole law applicable to the particular

¹ Ewing v. Campbells, Nov. 23, 1877, *ante*, vol. v. p. 230.

² Douglas v. Young, Nov. 14, 1879, *ante*, vol. vii. p. 229; Glasgow Coal Exchange Co. v. Inland Revenue, March 18, 1879, *ante*, vol. vi. p. 860.

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kind of hotel here mentioned—a hotel in which there is not a licence to sell exciseable liquors, and therefore I think we may confine our attention to the construction of this particular clause. And upon that I observe, in the first place, that if the dwelling-house be occupied by any person who shall carry on in the said dwelling-house the business of a hotel-keeper, he is to be charged only at the rate of sixpence per pound. It certainly is not necessary in order to enable him to claim the lower rate that he shall carry on no other business or no other occupation in that dwelling-house. He must carry on the business of a hotel-keeper there, but I should suppose that he might carry on another business also; and in many hotels which have licences to sell exciseable liquors we know very well that the hotel-keeper carries on the business of a wine-merchant as well as that of a hotel-keeper. That is quite a common thing; and I suppose where the hotel-keeper has a conscientious objection to selling exciseable liquors he might deal in provisions, and that would not prevent him from being a hotel-keeper within the meaning of this section. Therefore the circumstance that the people who dwell in this house that we are dealing with, to a certain extent come there for medical treatment, is, I think, not by any means conclusive as to its not being a hotel, or conclusive against the keepers of this establishment carrying on in the building the business of a hotel-keeper.

In the next place, it must be observed that the essential business of a hotel-keeper is entertaining guests at bed and board, and it certainly is very difficult to say that the appellants in this case do not carry on that kind of business. Every person that comes to their house is entertained at bed or board. Some of them get, in addition to that, medical treatment, but that does not prevent them being guests who use this house just as other persons use a hotel, viz., by sleeping and eating and drinking in it, and sleeping and eating and drinking nowhere else. So that the business carried on, independent of and in addition to the medical treatment, is undoubtedly of the nature of the business of a hotel-keeper. But then it is said that the rules and regulations of this establishment are such as no hotel-keeper could be allowed to make or to carry into effect, and that a hotel-keeper is bound to open his house to all lawful travellers, unless there be any special objection to particular individuals who claim admission; that he is liable for the property of the persons in his establishment under the edict *nautæ carpones*; and that the guests who resort to his house are not liable to have their liberty infringed or limited in the manner that is proposed in the regulations of this establishment. Now, in the first place, with regard to the obligation of a hotel-keeper to receive all lawful travellers unless there is some special objection to individuals, I do not find in the regulations of this establishment anything at all inconsistent with that. It is said that the officials—by which, of course, are meant the persons who under the company are carrying on this business—have power to refuse admission and to send away such as they judge unsuitable—and that those “suffering from infectious diseases or intoxication cannot be received or allowed to remain in the establishment.” It does not appear to me that that, properly construed, would enable the keepers of this establishment to refuse guests capriciously or maliciously; and every hotel-keeper must have a certain power of selecting his guests, or, perhaps, to speak more precisely, of rejecting certain guests. He is bound to attend to the decency and order of his establishment. That is one of his obligations, and that would be inconsistent with admitting certain classes of guests. He is bound also to attend to the health of his guests and salubrity of his house, and that would lead to his rejecting

certain guests. He is bound, also, I think, to exercise a discretion as to the class of people whom he will admit to his hotel. A man who is carrying on business as a hotel-keeper in a first-class establishment is not bound to admit to his hotel persons in every rank and condition of life. Sometimes persons in the condition of working-men become for the time very rich and very extravagant. We have heard tales of navvies drinking up all the champagne and eating all the spring chickens of a whole neighbourhood; and if any of that class of people presented themselves to a hotel-keeper of the character we are supposing, I cannot doubt that he would have a discretion to reject them, because their manners and habits are not suitable to the class of people whom he receives. So that there is a pretty wide discretion in hotel-keepers as to rejecting guests that are not suitable, which are the very words used in this regulation; and I do not think, therefore, that that regulation is intended, or can be fairly construed as meaning anything more than the exercise of such a discretion as the law allows to every hotel-keeper. It is said, further, that they do not admit their liability under the edict for the property of their guests. Now, it does not appear to me to be at all material whether they admit that or not, because I should not have much difficulty in holding that they were liable under the edict if the case arose. Then, as to all those little regulations about hours and the like, I cannot say that I think there is anything in that to shew that this differs from the business of a hotel. I can quite understand a hotel-keeper saying to his guests and to the public—"My establishment is of such a limited character that I cannot afford and have not the means of giving dinners in private apartments—you must all dine in the public room when you come to my hotel." I can quite understand that, and if he can say that, he can also surely fix the hour at which the dinners in the public apartments are to be prepared. People cannot expect to have a table-d'hôte every hour for a great number of hours. They must be satisfied with one or perhaps two dinners being allowed in the course of a day in a hotel of that kind. Then with reference to the fines, I must say that appears to me to be ridiculous. Whether they are in practice exacted we do not know, because the case does not tell us, but I am very clear of this, that if they were attempted to be exacted and were resisted this hotel-keeper would have no means of enforcing them. And therefore I do not attach any importance to that. Upon the whole matter I cannot say that this company are not carrying on the business of hotel-keepers. They are carrying on the business of a hydropathic establishment, which may be represented as having for its primary use the cure of disease, but that is not inconsistent with carrying on in the same building, and with reference to the very same people who come there to have their diseases cured, the business of a hotel-keeper. I think, therefore, the determination of the Commissioners is wrong, and that the rate should be reduced.

LORD DEAR.—I confess I have had a good deal of difficulty about this case, according as I directed my attention to one clause or another of the statute; but I have come latterly to think that it all depends on section 31, and that the other clauses of the statute have very little to do with the question. Section 31 deals with inhabited dwelling-houses, and it enacts that every one who lives in an inhabited dwelling-house, if he carries on certain kinds of business, shall on that account, and that account alone, pay sixpence in the pound in place of ninepence. Now, this is undoubtedly an inhabited dwelling-house,

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kind of hotel here mentioned—a hotel in which there is not a licence to sell exciseable liquors, and therefore I think we may confine our attention to the construction of this particular clause. And upon that I observe, in the first place, that if the dwelling-house be occupied by any person who shall carry on in the said dwelling-house the business of a hotel-keeper, he is to be charged only at the rate of sixpence per pound. It certainly is not necessary in order to enable him to claim the lower rate that he shall carry on no other business or no other occupation in that dwelling-house. He must carry on the business of a hotel-keeper there, but I should suppose that he might carry on another business also; and in many hotels which have licences to sell exciseable liquors we know very well that the hotel-keeper carries on the business of a wine-merchant as well as that of a hotel-keeper. That is quite a common thing; and I suppose where the hotel-keeper has a conscientious objection to selling exciseable liquors he might deal in provisions, and that would not prevent him from being a hotel-keeper within the meaning of this section. Therefore the circumstance that the people who dwell in this house that we are dealing with, to a certain extent come there for medical treatment, is, I think, not by any means conclusive as to its not being a hotel, or conclusive against the keepers of this establishment carrying on in the building the business of a hotel-keeper.

In the next place, it must be observed that the essential business of a hotel-keeper is entertaining guests at bed and board, and it certainly is very difficult to say that the appellants in this case do not carry on that kind of business. Every person that comes to their house is entertained at bed or board. Some of them get, in addition to that, medical treatment, but that does not prevent them being guests who use this house just as other persons use a hotel, viz., by sleeping and eating and drinking in it, and sleeping and eating and drinking nowhere else. So that the business carried on, independent of and in addition to the medical treatment, is undoubtedly of the nature of the business of a hotel-keeper. But then it is said that the rules and regulations of this establishment are such as no hotel-keeper could be allowed to make or to carry into effect, and that a hotel-keeper is bound to open his house to all lawful travellers, unless there be any special objection to particular individuals who claim admission; that he is liable for the property of the persons in his establishment under the edict *nautæ caupones*; and that the guests who resort to his house are not liable to have their liberty infringed or limited in the manner that is proposed in the regulations of this establishment. Now, in the first place, with regard to the obligation of a hotel-keeper to receive all lawful travellers unless there is some special objection to individuals, I do not find in the regulations of this establishment anything at all inconsistent with that. It is said that the officials—by which, of course, are meant the persons who under the company are carrying on this business—have power to refuse admission and to send away such as they judge unsuitable—and that those “suffering from infectious diseases or intoxication cannot be received or allowed to remain in the establishment.” It does not appear to me that that, properly construed, would enable the keepers of this establishment to refuse guests capriciously or maliciously; and every hotel-keeper must have a certain power of selecting his guests, or, perhaps, to speak more precisely, of rejecting certain guests. He is bound to attend to the decency and order of his establishment. That is one of his obligations, and that would be inconsistent with admitting certain classes of guests. He is bound also to attend to the health of guests and salubrity of his house, and that would lead to his rejecting

certain guests. He is bound, also, I think, to exercise a discretion as to the class of people whom he will admit to his hotel. A man who is carrying on business as a hotel-keeper in a first-class establishment is not bound to admit to his hotel persons in every rank and condition of life. Sometimes persons in the condition of working-men become for the time very rich and very extravagant. We have heard tales of navvies drinking up all the champagne and eating all the spring chickens of a whole neighbourhood; and if any of that class of people presented themselves to a hotel-keeper of the character we are supposing, I cannot doubt that he would have a discretion to reject them, because their manners and habits are not suitable to the class of people whom he receives. So that there is a pretty wide discretion in hotel-keepers as to rejecting guests that are not suitable, which are the very words used in this regulation; and I do not think, therefore, that that regulation is intended, or can be fairly construed as meaning anything more than the exercise of such a discretion as the law allows to every hotel-keeper. It is said, further, that they do not admit their liability under the edict for the property of their guests. Now, it does not appear to me to be at all material whether they admit that or not, because I should not have much difficulty in holding that they were liable under the edict if the case arose. Then, as to all those little regulations about hours and the like, I cannot say that I think there is anything in that to shew that this differs from the business of a hotel. I can quite understand a hotel-keeper saying to his guests and to the public—"My establishment is of such a limited character that I cannot afford and have not the means of giving dinners in private apartments—you must all dine in the public room when you come to my hotel." I can quite understand that, and if he can say that, he can also surely fix the hour at which the dinners in the public apartments are to be prepared. People cannot expect to have a table-d'hôte every hour for a great number of hours. They must be satisfied with one or perhaps two dinners being allowed in the course of a day in a hotel of that kind. Then with reference to the fines, I must say that appears to me to be ridiculous. Whether they are in practice exacted we do not know, because the case does not tell us, but I am very clear of this, that if they were attempted to be exacted and were resisted this hotel-keeper would have no means of enforcing them. And therefore I do not attach any importance to that. Upon the whole matter I cannot say that this company are not carrying on the business of hotel-keepers. They are carrying on the business of a hydropathic establishment, which may be represented as having for its primary use the cure of disease, but that is not inconsistent with carrying on in the same building, and with reference to the very same people who come there to have their diseases cured, the business of a hotel-keeper. I think, therefore, the determination of the Commissioners is wrong, and that the rate should be reduced.

LORD DEAR.—I confess I have had a good deal of difficulty about this case, according as I directed my attention to one clause or another of the statute; but I have come latterly to think that it all depends on section 31, and that the other clauses of the statute have very little to do with the question. Section 31 deals with inhabited dwelling-houses, and it enacts that every one who lives in an inhabited dwelling-house, if he carries on certain kinds of business, shall on that account, and that account alone, pay sixpence in the pound in place of ninepence. Now, this is undoubtedly an inhabited dwelling-house,

No. 147. and I think it is hardly contested that if a party carries on in his inhabited dwelling-house a temperance hotel he is liable only at the rate of sixpence. As your Lordship has observed, there is no restriction upon a man who has an inhabited dwelling-house in which he carries on the business of a hotel-keeper as to what kind of other business he should carry on in that dwelling-house. A hotel-keeper may also carry on the business of a horse and carriage hirer, and that would not make him liable for any higher rate than he would otherwise be liable for. If that is the right construction of the statute, what does it matter what other kind of business it is that a party carries on? And if he can carry on a temperance hotel and only be liable at the rate of sixpence, I think that comes very near the case of this hydropathic establishment. It comes more under the category of a temperance hotel than any other; and therefore, on the whole matter, I come to the same conclusion as your Lordship.

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venue.

LORD MURE.—The words of section 31 are very broad. They expressly provide that any person who shall carry on in the said dwelling-house the business of a hotel-keeper, or an innkeeper, or coffee-house keeper, although not licensed to sell by retail intoxicating liquors, shall be assessed in the sum of sixpence per pound instead of ninepence. It extends to every one who carries on the business of a hotel-keeper, and I confess I have come to the same conclusion as your Lordship. I do not see how it is possible to say that what is carried on in this house, according to the admitted facts of this case, is not, in part at all events, the business of a hotel-keeper. People are received and lodged there and fed, and they are charged for that a certain sum. No doubt there are certain specialties. They are said to be treated hydropathically. That is so, but the establishment is not exclusively for that—because it is admitted that people go there who are not so treated. It seems, in fact, to be a kind of temperance hotel, where, besides conforming to the rule of abstaining from alcoholic liquors, the guests are treated hydropathically by means of the water cure, and I cannot see how that puts the case in a different category from that of a hotel-keeper. I cannot see how that can be maintained under the words of section 31, and although there may be some rather absurd rules, as it seems to me, I do not think that they are so inconsistent with the carrying on of the business of a hotel-keeper as to take the case out of the exemption in the 31st section.

LORD SHAND.—Throughout the discussion in this case I thought the question rather attended with difficulty and doubt, but at the same time, having heard the reasons stated by your Lordships, I do not feel that I am in a position to differ from the judgment which your Lordship proposes. If the case had been one in which the building was exclusively devoted to the reception of persons for medical treatment, although an incident of that treatment was that they should be boarded and reside in the house, I should certainly have been of opinion that this was not in any reasonable sense within the meaning of section 31 a carrying on of the business of a hotel-keeper, or an innkeeper, or coffee-house keeper. But it appears there is a large class of persons coming as visitors who do not want medical treatment, but who merely come to a beautiful district to live for a time, as people live in hotels in the country, paying for their rooms and for their board, or for separate meals if they choose to have them. In that respect, undoubtedly, the establishment is substantially

of the same kind as a hotel. The difficulty I have felt in the case has arisen from the two circumstances that I do think the rules leave some power in the hands of those who are managing their business to exclude guests as in their opinion unsuitable, and in addition to that when guests are received they are put under some very remarkable restrictions, which are not, I think, to be found in any hotel in this country. At the same time, I am not disposed to give undue weight to these circumstances. The broad features of the case are, as your Lordship has put it, that people are there living temporarily in a house which is practically open to the public, and they are living there as at a hotel at bed and board, paying hotel charges or what may be represented as hotel charges; and therefore, looking to the whole matter, I do not differ from the judgment which your Lordship proposes.

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THE COURT pronounced this interlocutor:—"Being of opinion that the appellants carry on in their establishment the business of a hotel-keeper within the meaning of the 31st section of the statute 34 and 35 Vict. cap. 103, remit to the Commissioners to reduce the assessment appealed against from £36, 7s. 6d. to £24, 5s., and decern."

HENRY & SCOTT, S.S.C.—SOLICITOR OF INLAND REVENUE.—Agents.

ARCHIBALD POWRIE, Complainer.—*D.-F. Kinnear—H. Johnston.*
ALBERT LOUIS, Respondent.—*Scott—Rhind.*

No. 148.

June 15, 1881.
Powrie v.
Louis.

Expenses—Proof—Copies of evidence for debate before Lord Ordinary.—Exceptional circumstances, under which the charge for one copy of the evidence for use of counsel at an adjourned hearing on evidence in the Outer-House was allowed against the losing party.

THIS action was a suspension of a charge on a bill on the ground of forgery.

1ST DIVISION.
Lord Ruther-
furd Clark.
B.

The defence was adoption.

Proof was led on 13th and 14th December 1880 before Lord Craighill. The evidence was directed to the proof of what occurred at certain meetings between the parties during the currency of the bill, and to collateral matters bearing on the credibility of the witnesses, upon which the decision of the case mainly turned, as the evidence in chief was contradictory. The proof was, in consequence, led at considerable length, the shorthand writer's notes occupying 150 manuscript pages.

At the close of the proof the Lord Ordinary indicated his opinion that counsel should have an opportunity of considering the proof led before being heard on the evidence, and he accordingly pronounced an order appointing parties to be heard on the proof adduced and whole cause, and intimated that, as he could not give a day for the hearing before the Christmas recess, he would cause the case to be put out on the earliest possible day after the Court met in January.

Owing to the illness of Lord Gifford, Lord Craighill was called on to sit in the Second Division continuously until the retirement of Lord Gifford, when he took his seat there permanently. The present case was then transferred from his Outer-House roll to that of Lord Rutherford Clark, who appointed parties to be heard on the proof on 16th February.

Lord Rutherford Clark decided against the respondent, with expenses, and the First Division refused a reclaiming note against his interlocutor, with additional expenses.

In taxing the complainer's account of expenses, the Auditor struck off

No. 148. the charge for copies of the evidence made for senior and junior counsel for use at the hearing before the Lord Ordinary, intimating that, in his opinion, it was not in his discretion to allow the charge, though he considered the case an exceptional one.

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The complainer objected to the Auditor's report in respect of the disallowance of these charges.¹

LORD PRESIDENT.—I think the general rule laid down in the case of *Birrell v. Beveridge*, Feb. 15, 1868, 6 Macph. 421, is a very salutary rule, and must be adhered to. While it was distinctly laid down there, both by my brother Lord Deas and myself, that in the general case the discussion upon the evidence led at a proof ought to take place at once and without postponement, we both intimated that there might and would be exceptional cases in which delay might be for the interest of parties, and conducive to the ends of justice, and where counsel would, therefore, require written or printed copies of the evidence.

As regards the present case, I am not quite sure that its circumstances would have warranted its being considered an exceptional case if counsel had spoken upon the proof within a day or two subsequently to its being led. It does not appear to me that any study of the evidence here would have been likely to lead to a better or more useful discussion. It would have been much more satisfactory if the Lord Ordinary had at once heard the parties. But his Lordship seems to have at once made up his mind that the hearing must stand over till after the Christmas recess. That creates a specialty in this case which, I rather think, ought not to have occurred, but which makes it in some degree a matter of necessity that counsel should be furnished with a copy of the evidence. Counsel cannot be expected to carry in their minds all the details of the evidence in a case like the present for any length of time. In addition, we have also this fact occurring, through no fault of the party, that the Lord Ordinary who decided this case was not the same Lord Ordinary who heard the evidence. It was therefore necessary for counsel to go into the evidence with much more detail and elaboration than would otherwise have been required.

It accordingly appears to me that the lapse of time which took place between the leading of the evidence and the discussion upon it, and the fact that the Judge before whom the discussion took place was not the same Judge who took the proof, make this just such an exceptional case as was contemplated in the opinions which were delivered in *Birrell's* case. At the same time I do not think that more than one copy of the evidence was required—one counsel only is allowed to be heard, and it should be arranged beforehand which counsel is to take the debate, and he only need be supplied with the copy of evidence. I think, therefore, that the charge for one copy should be allowed.

LORD DEAS.—I see no reason for not adhering to the general rule laid down in the case to which your Lordship has referred. I should not be disposed to think that the mere fact that the case turns mainly upon the credibility of the witnesses makes it an exception to the general rule. There is the greater reason for a case of that kind being heard at once. But the matters referred to by your Lordship as causing the delay in the hearing do appear to introduce a specialty, and I therefore concur.

¹ Evidence Act, 1866 (29 and 30 Vict. c. 112), sec. 1; Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 32; *Birrell v. Beveridge*, Feb. 15, 1868, Macph. 421.

LORD MURE and LORD SHAND concurred.

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THE COURT sustained the objection to the extent of allowing the charge for one copy of the evidence.

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LEBURN & HENDERSON, S.S.C.—WILLIAM OFFICER, S.S.C.—Agents.

THE ROYAL BANK OF SCOTLAND, Pursuers and Real Raisers.

No. 149.

THE ROYAL BANK OF SCOTLAND, Defenders and Claimants.—*Asher—Graham Murray.*

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THE COMMERCIAL BANK OF SCOTLAND, Defenders and Claimants.
DAVID MYLES (James Ramsay junior's Trustee), Defender and Claimant.
—*R. Johnstone—Macfarlane.*

JOHN RHIND AND ANOTHER (George Saunders & Son's Trustees),
Defenders and Claimants.—*D.-F. Kinnear—H. Johnston.*

Bankruptcy—Bills—Lien—Pledge—Bills accepted against goods; bankruptcy of both drawer and acceptor while bills in hands of onerous holder; how goods to be dealt with—English rule of ex parte Waring inapplicable.—When A accepts the drafts of B against B's goods in A's hands, if both A and B fail while the goods are still in A's hands, and the bills are in the circle, (1) the billholder is entitled to claim against the estate of each for the amount of the bill, to the effect of recovering on the whole full payment; (2) A's estate has a lien over the goods to the effect of entire relief and indemnification against any payments which A's estate may be required to make in respect of the bills; and (3) B's estate is entitled to demand the goods after such indemnification has been given out of the proceeds, or on full security being given to relieve A and his estate of the bills.

The English rule of *ex parte Waring*, 19 Ves. 345, is inconsistent with the rules and principles of the Scotch bankruptcy system, and has not been adopted in Scotland.

In connection with an agreement, whereby A undertook to employ his works in spinning on hire for B, it was stipulated that A should be bound, if required, to grant his acceptances to B for a sum not exceeding three-fourths of the market value of the raw material and yarns held by him on account of B, and that he should be entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances. It was also specially provided that all materials and yarns sent to A's works should continue to be the sole property of B, subject only to the lien of A for the advances which he might have made to B, or for debts which in any way B might be resting owing to him. Both A and B became bankrupt while bills to a large amount were in the circle in the hands of an onerous holder. At the date of his bankruptcy A held in his hands certain material and yarns belonging to B.

In a competition for the proceeds of these goods between A's trustee, B's trustee, and the billholder, *held* (1) that A's right under the above agreement was strictly that of pledgee, viz., to hold the goods in his hands at the time till relieved of his obligations under the bills, and to indemnify himself out of the proceeds for any payments which he might be required to make in respect of his acceptances, and that A's trustee was entitled to work out this indemnity in exactly the same way as A would himself have done had he remained solvent; (2) that the English rule of *ex parte Waring* whereby in similar circumstances the billholder is entitled to have the security subject applied directly in or towards payment of the bills, and to rank on the estates both of drawer and acceptor for any balance, had not been and could not be adopted in Scotland, as it was inconsistent with the rules and principles of the bankruptcy law of Scotland, and as, while conferring a gratuitous benefit on the billholder to which he had right neither by law nor contract, it would inflict injustice on the creditors of the acceptor by violating, to their prejudice, the agreement under which their debtor held the goods; and (3) that B's trustee was not entitled, in virtue of

No. 149. the title he acquired to B's estate under the Bankruptcy Act, 1856, to have the goods delivered over to him subject to all claims against them to be established in the sequestration, but that the security being a real security by way of pledge, A's trustee was entitled to retain them until the object of the pledge was fulfilled.

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1st Division.
Lord Ruther-
furd Clark.
B.

ON 22d April 1870 a minute of agreement was entered into between James Ramsay junior, merchant, Dundee, and David Hogg Saunders, sole partner of George Saunders & Sons, millspinners, Westfield Works, Blairgowrie, whereby Saunders agreed to employ his whole machinery in spinning on hire for Ramsay on certain terms, and Ramsay undertook to supply material sufficient to keep Saunders' machinery fully employed. The agreement was to endure for ten years, and was truly of the nature of a joint adventure, both parties, while retaining a distinct and independent position, being interested in the surplus profits. A supplementary agreement was subsequently entered into on 25th June 1872 making certain modifications on the original agreement. These two agreements contained stipulations whereby, on the one hand, Ramsay was to give the use of his name to Saunders by way of accommodation to enable him to extend his works, and, on the other, Saunders was to accommodate Ramsay as he might require to enable him to provide raw material, and, generally, to carry on his part of the business.

In particular, the original agreement provided,—“Eighth, All material and yarns sent to Westfield Works by the said James Ramsay junior shall continue to be the sole property of the said James Ramsay junior, subject only to the lien of the said David Hogg Saunders over said material and yarns for the heckling or spinning of the same, or for the advances which he may have made to the said James Ramsay junior, or for debts which in any way the said James Ramsay junior may be resting owing to the said David Hogg Saunders. Ninth, The said David Hogg Saunders shall be bound, if required by the said James Ramsay junior, to grant his own acceptances, or the acceptances of Messrs G. Saunders & Sons, in the said James Ramsay junior's option, for a sum not exceeding three-fourths of the market value of the raw material and yarns held by him on account of the said James Ramsay junior at Westfield Works, and whether he shall grant his own acceptances or the acceptances of the said G. Saunders & Sons he shall be entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances.”

Ramsay and Saunders continued to carry on business under these agreements till the close of 1878, when both became insolvent.

Saunders and his firm of George Saunders & Sons stopped payment on 28th November 1878, and on 10th December 1878 granted a trust-deed for behoof of creditors in favour of John Rhind, merchant, Dundee, and John Panton, banker, Blairgowrie. It was a condition of this trust-deed that the trustees should liquidate the estate as if sequestration had been awarded, and the Bankruptcy Act, 1856, was, so far as necessary, held as incorporated in the trust-deed.

Ramsay was sequestrated on 23d December 1878, and David Myles, accountant, Dundee, was appointed his trustee.

Ramsay had from time to time drawn bills upon Saunders and his firm of George Saunders & Sons against yarns and raw material in Saunders' hands in terms of article 9 of the original agreement. These bills were discounted by the Royal Bank of Scotland, and at the date of Ramsay's bankruptcy amounted to the sum of £16,000. Saunders, and his firm of George Saunders & Sons, also drew bills upon Ramsay, which were discounted from time to time with the Commercial Bank of Scotland, and at the date of Saunders' bankruptcy amounted to £10,637, 10s. 8d. These

latter bills originated under the agreement in accommodations to enable Saunders to extend his works, but were kept up and increased without apparent reference to any particular purpose. No. 149.

At the date of Ramsay's sequestration Saunders held goods belonging to Ramsay as cover for his £16,000 of acceptances. Claims having been made to these goods by the Royal Bank, the Commercial Bank, Saunders' trustees, and Ramsay's trustee, they were, by arrangement of parties interested, sold. Owing to depression of trade, forced sale, and other causes, the goods, which were valued in Ramsay's and Saunders' books at £13,000, only realised £4052, 14s. 2d., which sum was deposited with the Royal Bank of Scotland, who then raised this multiplepounding to determine the rights of parties.

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I. The Royal Bank of Scotland claimed the whole fund *in medio*. The grounds of their claim, as disclosed in their pleas, were, "(1) The goods in question having, by agreement between the drawer and acceptors, been specially appropriated to the retirement of the bills in question, and both drawer and acceptors having become insolvent, the claimants, as holders of the said bills, are entitled to have the said goods applied towards payment of the said bills. (2) The goods in question having been specially appropriated to the retirement of the bills in question by agreement among all concerned, including the claimants, the claimants are entitled to be ranked and preferred to the whole fund *in medio* in terms of their claim."

The first of these pleas was intended to raise the point whether the English rule of *ex parte Waring*, 19 Ves. 345, which the bank represented as having been long followed in practice in Scotland, ought to be recognised as part of the law of Scotland.

In support of their second plea they stated,—(Cond. 2) "The bills, to the amount of £16,000, discounted by the claimants, were so discounted in the belief, founded on the statements both by the drawer and acceptors, that said bills were accepted against stock or other material in the hands of the acceptors belonging to the drawer, and over which the acceptors had and could exercise a lien for all their acceptances to the drawer. In point of fact, it was understood and agreed among all concerned, viz., (1) the drawer, (2) the acceptors, and (3) the claimants as indorsees of the said bills, that the said stock and other materials in the hands of the acceptors should be specially appropriated to providing for the retirement of the said bills, and held by the acceptors primarily in trust for that purpose."

A proof was allowed to the bank of these averments, but the bank admittedly failed to establish them.

II. The Commercial Bank also claimed the whole fund *in medio*, but as their claim was, after proof, rejected by the Lord Ordinary, and not insisted on in the Inner-House, it need not be farther mentioned.

III. David Myles (Ramsay's trustee) claimed the whole fund *in medio*, on the ground of the following plea:—"The fund *in medio* being the proceeds of a sale, after deducting all charges and expenses of manufacture and otherwise, of property belonging to the said James Ramsay, the claimant, as trustee on his sequestrated estate, is entitled to be ranked and preferred in terms of his claim."

IV. Messrs Rhind and Panton (Saunders' trustees) "as representing David Hogg Saunders and his firm of George Saunders & Sons, claimed to be ranked and preferred *primò loco* on the fund *in medio* in relief of their obligation to the Royal Bank of Scotland as acceptors of the said £16,000 of bills drawn by James Ramsay junior and accepted by George Saunders & Sons or David Hogg Saunders, and held by the said bank, in which bills the said James Ramsay junior was the true debtor, and to

No. 149. have the whole of the said fund *in medio* set aside until the amount of dividend to be paid by them to the said Royal Bank of Scotland in respect of the said bills be ascertained.”

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They pleaded ;—“The said James Ramsay junior being the true debtor upon the said £16,000 of bills drawn by him, and accepted by David Hogg Saunders, or his firm of George Saunders & Sons, and discounted with the Royal Bank of Scotland, the lien which the said David Hogg Saunders held over the goods, for which the fund *in medio* is the *surrogatum*, under the 8th and 9th heads of the above-mentioned original agreement of 1870, and at common law, is effectual to the claimants, and entitles them to operate their relief by means thereof of all payments made by them in respect of the said £16,000 of bills.”

The Lord Ordinary, on 28th January 1881, pronounced this interlocutor :—“Repels the claim for the Royal Bank, the claim for the Commercial Bank, and the claim for David Myles : Finds that the yarns mentioned in the record were pledged with Saunders & Sons as a security for the obligations undertaken by them as acceptors of the bills held by the Royal Bank : Finds that the claimants, Rhind and Panton, are entitled to the fund *in medio*, in order that they may apply it in operating their relief from the said obligations, but subject to the declaration that the balance, if any, is payable to the claimant Myles : Therefore ranks and prefers the claimants Rhind and Panton to the fund *in medio*, and decerns : Finds them entitled to expenses ; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report.” *

* “NOTE.—Ramsay drew bills on Saunders & Sons against yarns belonging to him which had been sent to them to be spun. These bills are now in the hands of the Royal Bank.

“Ramsay and Saunders & Sons have become bankrupt. The estates of the former have been sequestrated. The estates of the latter are being wound up under a private trust.

“The yarns against which the bills were drawn, or at least over which a security is said to have been constituted, were sold, and the proceeds form the fund *in medio*.

“1. The Royal Bank at first contended that it held a security over the yarns. But it has yielded this point, and relies exclusively on the English law of *Waring*, 19 Vesey, 345, as giving it a right to be ranked preferably on the fund.

“Though holding no security over the yarns, it maintains that it has a right to the fund, springing out of the equitable rights subsisting between the estates of the drawer and acceptors of the bills held by it. It says that the acceptors are entitled to hold the security as an indemnity against the liability which they have incurred by accepting the bills ; that it is the interest of the acceptors’ other creditors that the security should be applied in extinction of the bills ; that it is likewise the interest of the creditors of the drawer that the security should thus be dealt with, and that, as the drawer cannot recover the security from the acceptors without relieving them of the obligations undertaken on the bills, he has no interest or title to object to this application of the security. The result is, to use the language of a commentator on the case of *Waring*—‘The billholder gets an apparently gratuitous preference, merely because the Court, in administering the two insolvent estates, can, by this means alone, secure the interests of their respective creditors.’—Eddis, p. 7.

“It appears to the Lord Ordinary that the case of the Royal Bank is within the rule laid down in *Waring*. But he has grave doubts whether it is possible for him to give effect to this rule. It has existed in England for nearly seventy years, but no Scottish authority has been referred to in which it has been recognised or even mentioned. In these circumstances it cannot be said to have been adopted as a part of the law of Scotland.

“But, further, the Lord Ordinary thinks that he cannot give effect to the plea

The Royal Bank of Scotland reclaimed, and argued;—The rule of *ex parte Waring*¹ had been established in England for more than sixty years. No. 149.
 It was laid down by Lord Chancellor Eldon in 1815, and had been June 15, 1881.
 anxiously reconsidered in a long series of cases since that date by Judges of the greatest eminence, both in the Courts at Westminster Hall and in the House of Lords, with the result of confirming the principle and extending its operation. In a matter of mercantile law it would be a grave
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of the Royal Bank in this action. The bank has no right in or over the yarns. The yarns belong to the estate of Ramsay, subject to whatever security has been created over them in favour of Saunders & Sons. In consequence, the bank has only a claim for a ranking, and if it has any preferable claim it must make it good in the sequestration or in the trust, if it is an acceding creditor, or by the use of diligence if it is not. There is no more well ascertained rule in bankruptcy than that the trustee ingathers the estate for division among the creditors according to their rights, and that any claim to a preference must be made in the sequestration or in the trust. To give effect to the claim of the bank would be a violation of this rule. It may be that the bank can establish the preference which it claims, but not the less is its claim in this action ill-founded.

"2. The claim of the Commercial Bank is founded on the same considerations as that of the Royal Bank. But, in the opinion of the Lord Ordinary, it fails on the facts.

"3. There remains the claim of the trustees for Saunders & Sons, and the claim for Ramsay's trustee. The latter admits that the former hold a security over the yarns to a certain extent, or, in other words, that they were held in pledge by Saunders & Sons as against their liability, on part, at least, of the bills in the hands of the Royal Bank. But he maintains that he is entitled to the fund because the yarns belonged to Ramsay, and because any preference arising under the pledge must be made good in the sequestration.

"It is no doubt settled that any money attached by arrestment must be paid to the trustee in bankruptcy, subject to any preference created by the arrestment. And it has been held that when a law-agent has a hypothec over the title-deeds of the bankrupt, he must give up the deeds and claim his preference in the sequestration. See Johnstone, 2 S. 133; Paul, 4 S. 424; Skinner, 3 Macph. 867. It has thence been argued that the Court has recognised the right of the trustee to ingather the whole estate of the bankrupt, so that the security holder can never himself realise his security, but must make his claim in the sequestration for a preference.

"The argument goes too far. It is certain that in the case of a heritable security the creditor is entitled to realise it. No doubt there is a statutory power to this effect given by the 112th section of the Act, and but for this power it may be urged that the creditor could not sell. But then the 62d and 65th sections, which are applicable to all classes of security, give a title to the trustee to require a conveyance of the security on payment of the value put on it by the creditor, with 20 per cent added in the case mentioned in the former section. These clauses seem to the Lord Ordinary to be inconsistent with the claim made for Ramsay's trustee. For his argument is that he is entitled to a conveyance or a surrender of the security in all cases, subject only to the preference which the security may create. And this leads the Lord Ordinary to think that the 112th section is to be read, not as creating the right of the creditor, but as a mere recognition of it.

"It appears to him, therefore, that the vesting clause must be construed as giving the estate to the trustee, subject to such real rights as have been created over it, and that where, as here, the creditor has a right of pledge, he cannot be required to surrender the subject of the pledge so long as his debt is unpaid.

"4. The only remaining question is, whether Saunders & Sons' right of security covered the whole bills held by the Royal Bank? The Lord Ordinary thinks that on a fair construction of the agreement of 22d April 1870 this question must be answered in the affirmative."

¹ 19 Ves. 345. See also Eddis on the rule of *ex parte Waring*, ed. 1876.

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misfortune if a different rule were to prevail in the sister country. There was nothing special in the law of Scotland with reference to the subject-matter which should make the authority of *ex parte Waring* inapplicable, and as the rule thereby introduced had long been recognised in mercantile practice in Scotland without challenge, it should now receive the sanction of the Court.

The principle on which the rule of *ex parte Waring* was founded was that bills having been accepted against goods of the drawer placed in the hands of the acceptor, the drawer could not recover his goods without paying the bills and clearing the acceptor of all liability under them, and the acceptor could make no demand against the drawer without first applying the proceeds of the goods in the discharge *pro tanto* of the acceptances. On the bankruptcy of both parties, therefore, a deadlock occurred; the drawer could not touch the goods because he could only redeem them on retiring the bills, and that he was unable to do, and the acceptor could not apply the security subjects as part of his estate without making full payment of the bills, and that he was also unable to do. The only way out of the difficulty was that introduced by Lord Eldon, viz., to apply the goods *pro tanto* in payment of the bills, not out of any favour to the billholder, but from the necessities connected with the administration of the two insolvent estates.

The argument might be summarised in this way (1) the contract between the parties was that the goods should be applied to retire the acceptances; (2) it was beyond the power of either party after bankruptcy to alter the contract; and (3) the rights of the creditors of both being unalterably fixed by bankruptcy, it was impossible to extricate those rights in any other way than by handing over the proceeds of the goods to the billholders. That must be the practical result of carrying out to the letter the contract between the parties.

The most eminent Judges in England, Lord Cranworth in *Powles v. Hargreaves*,¹ Lord Hatherley in *City Bank v. Luckie*,² and Lord Cairns in *Banner v. Johnston*,³ and many others,⁴ had, after deliberate consideration, added the weight of their authority to the rule.

Ramsay's Trustee adopted the argument presented by the bank on the rule of *ex parte Waring*, and also argued, *separatim*;—(1) By the letter of the agreement between the parties Saunders was only to accept to the value of three-fourths of the goods in his hands; that, therefore, was the limit of the security he held, and if he accepted beyond that he did so at his own risk, and without any security for indemnification. (2) The claim of Saunders' Trustees omitted to notice that Ramsay had accepted £10,600 worth of bills for the accommodation of Saunders. There must, in any view, be a balancing of accounts before Saunders could come on the subject of pledge, and, therefore, as there were £16,000 of bills accepted by Saunders and £10,600 by Ramsay, it followed that all Saunders' Trustees could claim was to be recouped the dividend they paid in respect of the difference of £5400.⁵ Ramsay, notwithstanding that the goods were in Saunders' hands under the agreement, remained the radical owner. The

¹ 3 D. M. and G., 430, and 23 L. J. Chan. 1.

² L. R. 5 Ch. App. 773.

³ L. R. 5 E. and I. App. 174.

⁴ Bank of Ireland v. Perry, L. R. 7 Exch. 14; *in re Barned's Banking Co.*, L. R. 19 Eq. 1, and 10 Ch. App. 198, and contrast *ex parte Copeland*, 3 Dea. and Ch. 199, where there was privity of contract between the billholder and the parties to the bill.

⁵ *Christie v. Keith*, June 29, 1838, 16 S. 1224; *Anderson v. Mackinnon*, March 17, 1876, *ante*, vol. iii., 608.

Bankruptcy Statute, 1856, sec. 102, vested his whole property in his trustee. The claimant was therefore entitled to have the security subjects or their proceeds handed over to him as trustee that he might administer them in the sequestration. Any creditor claiming a preference on them could only make good his security by claiming in the usual way.¹ A creditor was not entitled under the Bankruptcy Act to realise his own security except in the case of a heritable security, where special power was given under the 112th and following sections; and the fact of this exception being made was proof of the comprehensiveness of the general rule.

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Argued for Saunders' Trustees;—(1) The terms of the agreement were the measure of Saunders' obligation, not of his right. If he chose to accept for more than three-fourths the value of the goods in his hands, or chose to part, as was the actual case, with some of the goods after having accepted the bills, that did not affect the extent of his lien. It covered the whole goods in his hands at any one time. (2) The argument of Ramsay's Trustee that the fund *in medio* was vested in him *vi statuti*, by his act and warrant, omitted to consider the words in the vesting clause of the statute (the 102d section of the Act of 1856)—“subject always to such preferable securities as existed at the date of the sequestration.” The fund *in medio* was subject to a preferable security by way of pledge. The radical right, or right to the reversion after the pledgee was satisfied, might be vested in the pledgor's trustee, but that was not to take away the pledgee's security, which, by its very conception, consisted in holding the subject of pledge till satisfied, and, if necessary, realising it. The trustee's interpretation of the statute would destroy the value of the security in the very circumstances in which it was most required, whereas the statute expressly saved the security.² (3) There was truly no question of balancing of accounts between Saunders and Ramsay. The argument that Ramsay's acceptances must be deducted from Saunders' acceptances before Saunders could make his lien effectual really assumed a double ranking on Saunders' estate, which was contrary to law, and at the same time ignored the fact that Saunders was secured, while Ramsay was not. But, besides, the question was not before the Court, as it was not raised on record, and had never been suggested in the Outer-House, either before or after the proof.³ (4) If so, the real question was, what, apart from this specialty, was the proper mode of working out the security which Saunders undoubtedly had over these goods. It was admitted by the Royal Bank that they had no right to the goods *ex contractu*. But they pleaded that by the rule of *ex parte Waring* the goods must be handed over to them as the only possible way of working out the rights or the equities of the two bankrupt contracting parties. They represented that the double bankruptcy created a deadlock, and that the obstacle could only be removed by the application of the rule ingeniously invented by Lord Eldon. It was as much as admitted that the rule was not founded on any intelligible principle, and was merely a rule of thumb, which cut the assumed knot in a very simple and comparatively equitable way. But the necessity of its application, even on the bank's own shewing, depended

¹ Skinner v. Henderson, June 2, 1865, 3 Macph. 867, 37 Scot. Jur. 449, and cases therein referred to.

² Royal Bank v. Bain, July 6, 1877, *ante*, vol. iv. 985; Dick's Trustees v. Whyte's Trustees, Jan. 28, 1879, *ante*, vol. vi., 584.

³ Jamieson v. Forrest, May 25, 1875, *ante*, vol. ii. 701; Hannay & Sons' Trustee v. Armstrong Brothers & Co., March 22, 1877, *ante*, vol. iv. (H. L.) 43, L. R. 2 App. Ca. 399.

No. 147. and I think it is hardly contested that if a party carries on in his inhabited dwelling-house a temperance hotel he is liable only at the rate of sixpence. As your Lordship has observed, there is no restriction upon a man who has an inhabited dwelling-house in which he carries on the business of a hotel-keeper as to what kind of other business he should carry on in that dwelling-house. A hotel-keeper may also carry on the business of a horse and carriage hirer, and that would not make him liable for any higher rate than he would otherwise be liable for. If that is the right construction of the statute, what does it matter what other kind of business it is that a party carries on? And if he can carry on a temperance hotel and only be liable at the rate of sixpence, I think that comes very near the case of this hydropathic establishment. It comes more under the category of a temperance hotel than any other; and therefore, on the whole matter, I come to the same conclusion as your Lordship.

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LORD MURE.—The words of section 31 are very broad. They expressly provide that any person who shall carry on in the said dwelling-house the business of a hotel-keeper, or an innkeeper, or coffee-house keeper, although not licensed to sell by retail intoxicating liquors, shall be assessed in the sum of sixpence per pound instead of ninepence. It extends to every one who carries on the business of a hotel-keeper, and I confess I have come to the same conclusion as your Lordship. I do not see how it is possible to say that what is carried on in this house, according to the admitted facts of this case, is not, in part at all events, the business of a hotel-keeper. People are received and lodged there and fed, and they are charged for that a certain sum. No doubt there are certain specialties. They are said to be treated hydropathically. That is so, but the establishment is not exclusively for that—because it is admitted that people go there who are not so treated. It seems, in fact, to be a kind of temperance hotel, where, besides conforming to the rule of abstaining from alcoholic liquors, the guests are treated hydropathically by means of the water cure, and I cannot see how that puts the case in a different category from that of a hotel-keeper. I cannot see how that can be maintained under the words of section 31, and although there may be some rather absurd rules, as it seems to me, I do not think that they are so inconsistent with the carrying on of the business of a hotel-keeper as to take the case out of the exemption in the 31st section.

LORD SHAND.—Throughout the discussion in this case I thought the question rather attended with difficulty and doubt, but at the same time, having heard the reasons stated by your Lordships, I do not feel that I am in a position to differ from the judgment which your Lordship proposes. If the case had been one in which the building was exclusively devoted to the reception of persons for medical treatment, although an incident of that treatment was that they should be boarded and reside in the house, I should certainly have been of opinion that this was not in any reasonable sense within the meaning of section 31 a carrying on of the business of a hotel-keeper, or an innkeeper, or coffee-house keeper. But it appears there is a large class of persons coming as visitors who do not want medical treatment, but who merely come to a beautiful district to live for a time, as people live in hotels in the country, paying for their rooms and for their board, or for separate meals if they choose to have them. In that respect, undoubtedly, the establishment is substantially

of the same kind as a hotel. The difficulty I have felt in the case has arisen from the two circumstances that I do think the rules leave some power in the hands of those who are managing their business to exclude guests as in their opinion unsuitable, and in addition to that when guests are received they are put under some very remarkable restrictions, which are not, I think, to be found in any hotel in this country. At the same time, I am not disposed to give undue weight to these circumstances. The broad features of the case are, as your Lordship has put it, that people are there living temporarily in a house which is practically open to the public, and they are living there as at a hotel at bed and board, paying hotel charges or what may be represented as hotel charges; and therefore, looking to the whole matter, I do not differ from the judgment which your Lordship proposes.

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THE COURT pronounced this interlocutor:—"Being of opinion that the appellants carry on in their establishment the business of a hotel-keeper within the meaning of the 31st section of the statute 34 and 35 Vict. cap. 103, remit to the Commissioners to reduce the assessment appealed against from £36, 7s. 6d. to £24, 5s., and decern."

HENRY & SCOTT, S.S.C.—SOLICITOR OF INLAND REVENUE.—Agents.

ARCHIBALD POWRIE, Complainer.—*D.-F. Kinnear—H. Johnston.*
ALBERT LOUIS, Respondent.—*Scott—Rhind.*

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Expenses—Proof—Copies of evidence for debate before Lord Ordinary.—Exceptional circumstances, under which the charge for one copy of the evidence for use of counsel at an adjourned hearing on evidence in the Outer-House was allowed against the losing party.

THIS action was a suspension of a charge on a bill on the ground of forgery.

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furd Clark.
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The defence was adoption.

Proof was led on 13th and 14th December 1880 before Lord Craighill. The evidence was directed to the proof of what occurred at certain meetings between the parties during the currency of the bill, and to collateral matters bearing on the credibility of the witnesses, upon which the decision of the case mainly turned, as the evidence in chief was contradictory. The proof was, in consequence, led at considerable length, the shorthand writer's notes occupying 150 manuscript pages.

At the close of the proof the Lord Ordinary indicated his opinion that counsel should have an opportunity of considering the proof led before being heard on the evidence, and he accordingly pronounced an order appointing parties to be heard on the proof adduced and whole cause, and intimated that, as he could not give a day for the hearing before the Christmas recess, he would cause the case to be put out on the earliest possible day after the Court met in January.

Owing to the illness of Lord Gifford, Lord Craighill was called on to sit in the Second Division continuously until the retirement of Lord Gifford, when he took his seat there permanently. The present case was then transferred from his Outer-House roll to that of Lord Rutherford Clark, who appointed parties to be heard on the proof on 16th February.

Lord Rutherford Clark decided against the respondent, with expenses, and the First Division refused a reclaiming note against his interlocutor, with additional expenses.

In taxing the complainer's account of expenses, the Auditor struck off

No. 148. the charge for copies of the evidence made for senior and junior counsel for use at the hearing before the Lord Ordinary, intimating that, in his opinion, it was not in his discretion to allow the charge, though he considered the case an exceptional one.

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The complainer objected to the Auditor's report in respect of the disallowance of these charges.¹

LORD PRESIDENT.—I think the general rule laid down in the case of *Birrell v. Beveridge*, Feb. 15, 1868, 6 Macph. 421, is a very salutary rule, and must be adhered to. While it was distinctly laid down there, both by my brother Lord Deas and myself, that in the general case the discussion upon the evidence led at a proof ought to take place at once and without postponement, we both intimated that there might and would be exceptional cases in which delay might be for the interest of parties, and conducive to the ends of justice, and where counsel would, therefore, require written or printed copies of the evidence.

As regards the present case, I am not quite sure that its circumstances would have warranted its being considered an exceptional case if counsel had spoken upon the proof within a day or two subsequently to its being led. It does not appear to me that any study of the evidence here would have been likely to lead to a better or more useful discussion. It would have been much more satisfactory if the Lord Ordinary had at once heard the parties. But his Lordship seems to have at once made up his mind that the hearing must stand over till after the Christmas recess. That creates a specialty in this case which, I rather think, ought not to have occurred, but which makes it in some degree a matter of necessity that counsel should be furnished with a copy of the evidence. Counsel cannot be expected to carry in their minds all the details of the evidence in a case like the present for any length of time. In addition, we have also this fact occurring, through no fault of the party, that the Lord Ordinary who decided this case was not the same Lord Ordinary who heard the evidence. It was therefore necessary for counsel to go into the evidence with much more detail and elaboration than would otherwise have been required.

It accordingly appears to me that the lapse of time which took place between the leading of the evidence and the discussion upon it, and the fact that the Judge before whom the discussion took place was not the same Judge who took the proof, make this just such an exceptional case as was contemplated in the opinions which were delivered in *Birrell's* case. At the same time I do not think that more than one copy of the evidence was required—one counsel only is allowed to be heard, and it should be arranged beforehand which counsel is to take the debate, and he only need be supplied with the copy of evidence. I think, therefore, that the charge for one copy should be allowed.

LORD DEAS.—I see no reason for not adhering to the general rule laid down in the case to which your Lordship has referred. I should not be disposed to think that the mere fact that the case turns mainly upon the credibility of the witnesses makes it an exception to the general rule. There is the greater reason for a case of that kind being heard at once. But the matters referred to by your Lordship as causing the delay in the hearing do appear to introduce a specialty, and I therefore concur.

¹ Evidence Act, 1866 (29 and 30 Vict. c. 112), sec. 1; Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 32; *Birrell v. Beveridge*, Feb. 15, 1868, 6 Macph. 421.

LORD MURE and LORD SHAND concurred.

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THE COURT sustained the objection to the extent of allowing the charge for one copy of the evidence.

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LEBURN & HENDERSON, S.S.C.—WILLIAM OFFICER, S.S.C.—Agents.

THE ROYAL BANK OF SCOTLAND, Pursuers and Real Raisers.

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THE ROYAL BANK OF SCOTLAND, Defenders and Claimants.—*Asher—Graham Murray.*

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THE COMMERCIAL BANK OF SCOTLAND, Defenders and Claimants.
DAVID MYLES (James Ramsay junior's Trustee), Defender and Claimant.
—*R. Johnstone—Macfarlane.*

JOHN RHIND AND ANOTHER (George Saunders & Son's Trustees),
Defenders and Claimants.—*D.-F. Kinnear—H. Johnston.*

Bankruptcy—Bills—Lien—Pledge—Bills accepted against goods; bankruptcy of both drawer and acceptor while bills in hands of onerous holder; how goods to be dealt with—English rule of ex parte Waring inapplicable.—When A accepts the drafts of B against B's goods in A's hands, if both A and B fail while the goods are still in A's hands, and the bills are in the circle, (1) the billholder is entitled to claim against the estate of each for the amount of the bill, to the effect of recovering on the whole full payment; (2) A's estate has a lien over the goods to the effect of entire relief and indemnification against any payments which A's estate may be required to make in respect of the bills; and (3) B's estate is entitled to demand the goods after such indemnification has been given out of the proceeds, or on full security being given to relieve A and his estate of the bills.

The English rule of *ex parte Waring*, 19 Ves. 345, is inconsistent with the rules and principles of the Scotch bankruptcy system, and has not been adopted in Scotland.

In connection with an agreement, whereby A undertook to employ his works in spinning on hire for B, it was stipulated that A should be bound, if required, to grant his acceptances to B for a sum not exceeding three-fourths of the market value of the raw material and yarns held by him on account of B, and that he should be entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances. It was also specially provided that all materials and yarns sent to A's works should continue to be the sole property of B, subject only to the lien of A for the advances which he might have made to B, or for debts which in any way B might be resting owing to him. Both A and B became bankrupt while bills to a large amount were in the circle in the hands of an onerous holder. At the date of his bankruptcy A held in his hands certain material and yarns belonging to B.

In a competition for the proceeds of these goods between A's trustee, B's trustee, and the billholder, *held* (1) that A's right under the above agreement was strictly that of pledgee, viz., to hold the goods in his hands at the time till relieved of his obligations under the bills, and to indemnify himself out of the proceeds for any payments which he might be required to make in respect of his acceptances, and that A's trustee was entitled to work out this indemnity in exactly the same way as A would himself have done had he remained solvent; (2) that the English rule of *ex parte Waring* whereby in similar circumstances the billholder is entitled to have the security subject applied directly in or towards payment of the bills, and to rank on the estates both of drawer and acceptor for any balance, had not been and could not be adopted in Scotland, as it was inconsistent with the rules and principles of the bankruptcy law of Scotland, and as, while conferring a gratuitous benefit on the billholder to which he had right neither by law nor contract, it would inflict injustice on the creditors of the acceptor by violating, to their prejudice, the agreement under which their debtor held the goods; and (3) that B's trustee was not entitled, in virtue of

No. 149. the title he acquired to B's estate under the Bankruptcy Act, 1856, to have the goods delivered over to him subject to all claims against them to be established in the sequestration, but that the security being a real security by way of pledge, A's trustee was entitled to retain them until the object of the pledge was fulfilled.

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ON 22d April 1870 a minute of agreement was entered into between James Ramsay junior, merchant, Dundee, and David Hogg Saunders, sole partner of George Saunders & Sons, millspinners, Westfield Works, Blairgowrie, whereby Saunders agreed to employ his whole machinery in spinning on hire for Ramsay on certain terms, and Ramsay undertook to supply material sufficient to keep Saunders' machinery fully employed. The agreement was to endure for ten years, and was truly of the nature of a joint adventure, both parties, while retaining a distinct and independent position, being interested in the surplus profits. A supplementary agreement was subsequently entered into on 25th June 1872 making certain modifications on the original agreement. These two agreements contained stipulations whereby, on the one hand, Ramsay was to give the use of his name to Saunders by way of accommodation to enable him to extend his works, and, on the other, Saunders was to accommodate Ramsay as he might require to enable him to provide raw material, and, generally, to carry on his part of the business.

In particular, the original agreement provided,—“ Eighth, All material and yarns sent to Westfield Works by the said James Ramsay junior shall continue to be the sole property of the said James Ramsay junior, subject only to the lien of the said David Hogg Saunders over said material and yarns for the heckling or spinning of the same, or for the advances which he may have made to the said James Ramsay junior, or for debts which in any way the said James Ramsay junior may be resting owing to the said David Hogg Saunders. Ninth, The said David Hogg Saunders shall be bound, if required by the said James Ramsay junior, to grant his own acceptances, or the acceptances of Messrs G. Saunders & Sons, in the said James Ramsay junior's option, for a sum not exceeding three-fourths of the market value of the raw material and yarns held by him on account of the said James Ramsay junior at Westfield Works, and whether he shall grant his own acceptances or the acceptances of the said G. Saunders & Sons he shall be entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances.”

Ramsay and Saunders continued to carry on business under these agreements till the close of 1878, when both became insolvent.

Saunders and his firm of George Saunders & Sons stopped payment on 28th November 1878, and on 10th December 1878 granted a trust-deed for behoof of creditors in favour of John Rhind, merchant, Dundee, and John Panton, banker, Blairgowrie. It was a condition of this trust-deed that the trustees should liquidate the estate as if sequestration had been awarded, and the Bankruptcy Act, 1856, was, so far as necessary, held as incorporated in the trust-deed.

Ramsay was sequestered on 23d December 1878, and David Myles, accountant, Dundee, was appointed his trustee.

Ramsay had from time to time drawn bills upon Saunders and his firm of George Saunders & Sons against yarns and raw material in Saunders' hands in terms of article 9 of the original agreement. These bills were discounted by the Royal Bank of Scotland, and at the date of Ramsay's bankruptcy amounted to the sum of £16,000. Saunders, and his firm of George Saunders & Sons, also drew bills upon Ramsay, which were discounted from time to time with the Commercial Bank of Scotland, and at the date of Saunders' bankruptcy amounted to £10,637, 10s. 8d. These

latter bills originated under the agreement in accommodations to enable No. 149.
Saunders to extend his works, but were kept up and increased without
apparent reference to any particular purpose.

At the date of Ramsay's sequestration Saunders held goods belonging to Ramsay as cover for his £16,000 of acceptances. Claims having been made to these goods by the Royal Bank, the Commercial Bank, Saunders' trustees, and Ramsay's trustee, they were, by arrangement of parties interested, sold. Owing to depression of trade, forced sale, and other causes, the goods, which were valued in Ramsay's and Saunders' books at £13,000, only realised £4052, 14s. 2d., which sum was deposited with the Royal Bank of Scotland, who then raised this multiplepounding to determine the rights of parties.

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I. The Royal Bank of Scotland claimed the whole fund *in medio*. The grounds of their claim, as disclosed in their pleas, were, "(1) The goods in question having, by agreement between the drawer and acceptors, been specially appropriated to the retirement of the bills in question, and both drawer and acceptors having become insolvent, the claimants, as holders of the said bills, are entitled to have the said goods applied towards payment of the said bills. (2) The goods in question having been specially appropriated to the retirement of the bills in question by agreement among all concerned, including the claimants, the claimants are entitled to be ranked and preferred to the whole fund *in medio* in terms of their claim."

The first of these pleas was intended to raise the point whether the English rule of *ex parte Waring*, 19 Ves. 345, which the bank represented as having been long followed in practice in Scotland, ought to be recognised as part of the law of Scotland.

In support of their second plea they stated,—(Cond. 2) "The bills, to the amount of £16,000, discounted by the claimants, were so discounted in the belief, founded on the statements both by the drawer and acceptors, that said bills were accepted against stock or other material in the hands of the acceptors belonging to the drawer, and over which the acceptors had and could exercise a lien for all their acceptances to the drawer. In point of fact, it was understood and agreed among all concerned, viz., (1) the drawer, (2) the acceptors, and (3) the claimants as indorsees of the said bills, that the said stock and other materials in the hands of the acceptors should be specially appropriated to providing for the retirement of the said bills, and held by the acceptors primarily in trust for that purpose."

A proof was allowed to the bank of these averments, but the bank admittedly failed to establish them.

II. The Commercial Bank also claimed the whole fund *in medio*, but as their claim was, after proof, rejected by the Lord Ordinary, and not insisted on in the Inner-House, it need not be farther mentioned.

III. David Myles (Ramsay's trustee) claimed the whole fund *in medio*, on the ground of the following plea:—"The fund *in medio* being the proceeds of a sale, after deducting all charges and expenses of manufacture and otherwise, of property belonging to the said James Ramsay, the claimant, as trustee on his sequestrated estate, is entitled to be ranked and preferred in terms of his claim."

IV. Messrs Rhind and Panton (Saunders' trustees) "as representing David Hogg Saunders and his firm of George Saunders & Sons, claimed to be ranked and preferred *primo loco* on the fund *in medio* in relief of their obligation to the Royal Bank of Scotland as acceptors of the said £16,000 of bills drawn by James Ramsay junior and accepted by George Saunders & Sons or David Hogg Saunders, and held by the said bank, in which bills the said James Ramsay junior was the true debtor, and to

No. 149. have the whole of the said fund *in medio* set aside until the amount of dividend to be paid by them to the said Royal Bank of Scotland in respect of the said bills be ascertained.”

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They pleaded ;—“ The said James Ramsay junior being the true debtor upon the said £16,000 of bills drawn by him, and accepted by David Hogg Saunders, or his firm of George Saunders & Sons, and discounted with the Royal Bank of Scotland, the lien which the said David Hogg Saunders held over the goods, for which the fund *in medio* is the *surrogatum*, under the 8th and 9th heads of the above-mentioned original agreement of 1870, and at common law, is effectual to the claimants, and entitles them to operate their relief by means thereof of all payments made by them in respect of the said £16,000 of bills.”

The Lord Ordinary, on 28th January 1881, pronounced this interlocutor :—“ Repels the claim for the Royal Bank, the claim for the Commercial Bank, and the claim for David Myles : Finds that the yarns mentioned in the record were pledged with Saunders & Sons as a security for the obligations undertaken by them as acceptors of the bills held by the Royal Bank : Finds that the claimants, Rhind and Panton, are entitled to the fund *in medio*, in order that they may apply it in operating their relief from the said obligations, but subject to the declaration that the balance, if any, is payable to the claimant Myles : Therefore ranks and prefers the claimants Rhind and Panton to the fund *in medio*, and decerns : Finds them entitled to expenses ; allows an account thereof to be lodged, and remits the same to the Auditor to tax and report.” *

* “ NOTE.—Ramsay drew bills on Saunders & Sons against yarns belonging to him which had been sent to them to be spun. These bills are now in the hands of the Royal Bank.

“ Ramsay and Saunders & Sons have become bankrupt. The estates of the former have been sequestrated. The estates of the latter are being wound up under a private trust.

“ The yarns against which the bills were drawn, or at least over which a security is said to have been constituted, were sold, and the proceeds form the fund *in medio*.

“ 1. The Royal Bank at first contended that it held a security over the yarns. But it has yielded this point, and relies exclusively on the English law of *Waring*, 19 Vesey, 345, as giving it a right to be ranked preferably on the fund.

“ Though holding no security over the yarns, it maintains that it has a right to the fund, springing out of the equitable rights subsisting between the estates of the drawer and acceptors of the bills held by it. It says that the acceptors are entitled to hold the security as an indemnity against the liability which they have incurred by accepting the bills ; that it is the interest of the acceptors’ other creditors that the security should be applied in extinction of the bills ; that it is likewise the interest of the creditors of the drawer that the security should thus be dealt with, and that, as the drawer cannot recover the security from the acceptors without relieving them of the obligations undertaken on the bills, he has no interest or title to object to this application of the security. The result is, to use the language of a commentator on the case of *Waring*—‘ The billholder gets an apparently gratuitous preference, merely because the Court, in administering the two insolvent estates, can, by this means alone, secure the interests of their respective creditors.’—Eddis, p. 7.

“ It appears to the Lord Ordinary that the case of the Royal Bank is within the rule laid down in *Waring*. But he has grave doubts whether it is possible for him to give effect to this rule. It has existed in England for nearly seventy years, but no Scottish authority has been referred to in which it has been recognised or even mentioned. In these circumstances it cannot be said to have been adopted as a part of the law of Scotland.

“ But, further, the Lord Ordinary thinks that he cannot give effect to the plea

The Royal Bank of Scotland reclaimed, and argued ;—The rule of *ex parte Waring*¹ had been established in England for more than sixty years. It was laid down by Lord Chancellor Eldon in 1815, and had been anxiously reconsidered in a long series of cases since that date by Judges of the greatest eminence, both in the Courts at Westminster Hall and in the House of Lords, with the result of confirming the principle and extending its operation. In a matter of mercantile law it would be a grave

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of the Royal Bank in this action. The bank has no right in or over the yarns. The yarns belong to the estate of Ramsay, subject to whatever security has been created over them in favour of Saunders & Sons. In consequence, the bank has only a claim for a ranking, and if it has any preferable claim it must make it good in the sequestration or in the trust, if it is an acceding creditor, or by the use of diligence if it is not. There is no more well ascertained rule in bankruptcy than that the trustee ingathers the estate for division among the creditors according to their rights, and that any claim to a preference must be made in the sequestration or in the trust. To give effect to the claim of the bank would be a violation of this rule. It may be that the bank can establish the preference which it claims, but not the less is its claim in this action ill-founded.

"2. The claim of the Commercial Bank is founded on the same considerations as that of the Royal Bank. But, in the opinion of the Lord Ordinary, it fails on the facts.

"3. There remains the claim of the trustees for Saunders & Sons, and the claim for Ramsay's trustee. The latter admits that the former hold a security over the yarns to a certain extent, or, in other words, that they were held in pledge by Saunders & Sons as against their liability, on part, at least, of the bills in the hands of the Royal Bank. But he maintains that he is entitled to the fund because the yarns belonged to Ramsay, and because any preference arising under the pledge must be made good in the sequestration.

"It is no doubt settled that any money attached by arrestment must be paid to the trustee in bankruptcy, subject to any preference created by the arrestment. And it has been held that when a law-agent has a hypothec over the title-deeds of the bankrupt, he must give up the deeds and claim his preference in the sequestration. See *Johnstone*, 2 S. 133 ; *Paul*, 4 S. 424 ; *Skinner*, 3 Macph. 867. It has thence been argued that the Court has recognised the right of the trustee to ingather the whole estate of the bankrupt, so that the security holder can never himself realise his security, but must make his claim in the sequestration for a preference.

"The argument goes too far. It is certain that in the case of a heritable security the creditor is entitled to realise it. No doubt there is a statutory power to this effect given by the 112th section of the Act, and but for this power it may be urged that the creditor could not sell. But then the 62d and 65th sections, which are applicable to all classes of security, give a title to the trustee to require a conveyance of the security on payment of the value put on it by the creditor, with 20 per cent added in the case mentioned in the former section. These clauses seem to the Lord Ordinary to be inconsistent with the claim made for Ramsay's trustee. For his argument is that he is entitled to a conveyance or a surrender of the security in all cases, subject only to the preference which the security may create. And this leads the Lord Ordinary to think that the 112th section is to be read, not as creating the right of the creditor, but as a mere recognition of it.

"It appears to him, therefore, that the vesting clause must be construed as giving the estate to the trustee, subject to such real rights as have been created over it, and that where, as here, the creditor has a right of pledge, he cannot be required to surrender the subject of the pledge so long as his debt is unpaid.

"4. The only remaining question is, whether Saunders & Sons' right of security covered the whole bills held by the Royal Bank ? The Lord Ordinary thinks that on a fair construction of the agreement of 22d April 1870 this question must be answered in the affirmative."

¹ 19 Ves. 345. See also *Eddis* on the rule of *ex parte Waring*, ed. 1876.

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In these circumstances, it is not possible to maintain successfully that the bank has any title or right to ask that the goods held by Saunders & Sons, or the proceeds, shall be handed over to them in extinction *pro tanto* of the bill debt due to them. It has never been said, so far I am aware, that in such circumstances the bank can plead any equity giving them such a right or claim. To give such a right to the bank would simply be to give them the right to a security for which they never stipulated, and this, carrying out the same principle, might even be carried the length of giving them the right to a security of the existence of which they were entirely ignorant. Accordingly Lord Eldon, in *ex parte Waring*, observed that "if these billholders are to have payment in preference to the other creditors, it must be by the effect of an equity between those two houses" (*i.e.*, between the drawers and acceptors) "rather than by any demand directly in their own right." While in the case of *Banner v. Johnston*, L. R. 5 E. & I. Appeals, 174, Lord Cairns observed,—"It has always been most carefully said that the right of the billholder under *ex parte Waring* is not a right founded on contract; it does not spring out of the contract; but it springs out of the necessities connected with the administration of the two insolvent estates."

If, then, the bank is to obtain the direct benefit of the goods, or proceeds of the goods, in question, it is not because they have any legal right or claim to it. They would obtain a resulting benefit entirely because, in the settlement of accounts between the two insolvent estates, the interests of the creditors on these estates respectively would be thereby secured. If the trustees on these respective estates, in the interests of the creditors whom they severally represent, should arrange to dispose of the proceeds of the goods between themselves in a way satisfactory to them in the fair discharge of their respective duties, it follows that the bank could not maintain any such direct claim to the proceeds of the goods as they here assert.

The question remains, are they entitled to the resulting benefit asked, because the trustee on the estate of Ramsay, the owner of the goods, demands that the proceeds of the goods should be applied at once to the part-payment of the bill debt, so as to reduce the ranking on Ramsay's estate?

The answer to that question seems to me to depend entirely on the terms of the agreement on which the goods were placed in the hands of Saunders & Sons, and I think there is no difficulty in determining what these terms were. The acceptances of Saunders and his firm were given on the agreement that they should hold the goods in hand at any time as a security in relief of their obligations, or, in other words, to indemnify them for any payments they might be required to make in respect of their acceptances. Although they became acceptors of the bills it was quite understood and agreed, in a question between them and Ramsay, that Ramsay, the true debtor, should retire the bills at maturity, and in point of fact he did retire them till his bankruptcy occurred, when the bills then in the circle were dishonoured. The case is not one in which goods were put into the hands of the acceptor of a bill on the agreement that as he was to pay the bill at maturity he should in the meantime sell the goods and apply the proceeds to the purpose of meeting the bill. According to the agreement, it was not contemplated that the acceptors should have any payment to make, but if through the default of Ramsay, the drawer, Saunders &

Sons, the acceptors, had to make such payment, then they were to be entitled No. 149.
to have recourse to their security for reimbursement.

This being the agreement of the parties, there can, I think, be no doubt as to what are their respective rights, or rather as to what are the respective rights of their creditors according to the law of Scotland in the circumstances that have occurred. These rights are clearly stated in the passage from Bell's Commentaries which your Lordship has quoted (i. p. 294), and the same view is expressed in a subsequent part of his work, volume ii. p. 532.

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land, &c.

In the first place, in a question between both parties and the bank, they must equally submit to a ranking for the full amount of the bills, for the simple reason that they have each granted a personal obligation, the one as drawer and the other as acceptor for that amount. When, however, the bank obtains a ranking on each estate, it receives all that was stipulated for as the consideration of discounting the bills, viz., the full effect of the personal obligation of each of the parties. The drawer, the owner of the goods, can have no good reason for complaint against a ranking to the full extent, for he not only drew the bills for his own behoof, but actually received the money for them for which the bank ranks. The acceptors must submit to a ranking, because *ex facie* of the bills they are the primary obligants for their contents.

Again, as regards the acceptors, the goods they hold are not their property, and the trustees for their creditors are no more entitled to throw them into their general estate than they themselves were entitled to do so. They must keep the goods, in terms of the agreement on which they were obtained, as a security merely to indemnify the estate against such loss as may arise to it from the non-payment of the bills and the consequent ranking of the bank, but it seems to me to be clear that they are entitled to keep the goods and apply the proceeds to the last farthing, in so far as necessary to recoup every payment of a dividend made to the bank. When no farther payment can be demanded they are bound to restore to the owner the remainder of the goods, or of the proceeds in their hands. There is, I conceive, no difficulty in carrying this out practically in the way described by your Lordship, and shewn in the illustrative states used on behalf of the trustees on Saunders & Sons' estate in the course of the argument. Though in this way and in these states, for the purpose of clearness, it is shewn that after the payment of each of several dividends on the estate of Saunders & Sons, paid out of their own proper funds or estate, recourse is had to the proceeds of the security in order to recoup or reimburse the estate to the extent of the dividends paid to the bank, I do not doubt that a formula could be supplied by an accountant which would simplify the process so as to admit of the sum to be drawn from the proceeds of the goods being ascertained at once, or, at all events, finally on the payment of a second dividend. It will be observed that in this way the creditors on the estate of Saunders & Sons get no benefit from the goods beyond the security for which their debtor stipulated, and to which he was entitled under his agreement with the owner of the goods. No part of the proceeds is taken possession of and distributed by them as part of the general estate of their debtors liable for their debts. What really occurs is this, that they are relieved of the effects of the bank's ranking in carrying off part of the general estate; for to the extent of the ranking the security is made available. And it is so made available, not by the operation of any special rule in bankruptcy, but simply and solely in carrying out to the letter and in the spirit

No. 149. the agreement under which their debtor got possession of a security or indemnity fund.

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It follows that, as regards the owner of the goods, or his creditors in bankruptcy in his place, their only claim is for the balance of the proceeds of the goods remaining after the security has served its purpose of indemnifying the estate which held the goods in security. It is conceded that the owner or his creditors could only demand the delivery of the goods on securing total relief from the obligations in respect of which they were given over. The concession seems to me to lead directly to the inference that till such relief is obtained the security-holder cannot be required to part with the goods to the billholder or any one else.

The trustee on Ramsay's estate claims that, in order to give effect to a rule of equity, the proceeds of the goods should be wholly paid over to the bank in diminution of their ranking on both estates. The answer to the proposal is, in my opinion, conclusive, that in asking this to be done the creditors of Saunders & Sons, who are precluded from ranking on the estate of Ramsay because of the rule against double ranking, are required to forego, to a great extent, the benefit of the agreement under which their debtors acquired the goods, viz., as an indemnity to them against all loss they might sustain through their being called on to pay the debt truly due by Ramsay; and I confess I am therefore unable to appreciate the reasoning which can justify this demand on any principle of equity.

I observe that in the case *in re Barned's Banking Company, ex parte Joint Stock Discount Company* (1875), L. R., 10 Ch. App. 200, the billholders went so far as to maintain that they should not even deduct the proceeds of securities of which they had got the benefit under the rule of *ex parte Waring*, but should be entitled to rank for their full debt without such deduction, but the opinion of the Master of the Rolls to a contrary effect was affirmed. That opinion was thus expressed:—"If I apply *ex parte Waring* for the benefit of the billholder, the billholder must take it with the limitation, and under the conditions, expressed in the order in *ex parte Waring*, that is to say, the security is to be considered as having been applied in the first instance. I have no disposition myself to give a billholder any further benefit than that he has already obtained under it." In that case Lord Justice Mellish observed—"I am entirely of the same opinion. It appears to me that if any other rule prevailed, we should be taking away from the persons who really owned the security the value of it. As it is, they only get it very imperfectly, but still to a certain extent they do get it, by the diminution of the sum which may be proved against the estate. If it were not to be diminished it might wholly, in some cases, be given to the billholder, and taken away from them altogether."

The opinion of this very learned Judge evidently was, that the effect of the rule *ex parte Waring* in that case was to give the security-holder a very imperfect benefit from his security. That would certainly be the result of applying the rule in this case, and I can see no good reason either in law or equity for giving the holders of the security an imperfect or partial right only to the benefit of the security, when the agreement of the parties was that they should have the benefit of the security to its full value.

There were three other matters upon which argument was offered, and upon each of which I desire to say a single word.

In the first place, it was maintained that, whatever right in security Saunders

& Sons had over these goods, they were bound to deliver over the goods to the trustee on Ramsay's estate, because Ramsay was the owner of that estate, and his trustee was, under the Bankrupt Statute, vested with the right of the whole creditors of that estate, wherever situated. I agree with the Lord Ordinary in thinking that although, no doubt, the trustee, by virtue of the title he acquired under the Bankrupt Statute, is in the general case entitled to ingather the whole of the bankrupt's property, the right conferred on him is subject to such securities as existed on that estate, and where there is a real security such as we have here—for, in point of fact, these goods are a real security pledged to a creditor who has made advances or undertaken an obligation on the security of that pledge—I cannot read the statute as entitling the trustee to take away that pledge, by the delivery of which the creditor has been secured in his advance.

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In the next place, it was maintained that Saunders & Sons in this case were not entitled to hold the goods in question for so large a sum as the amount of the acceptances for which they were pledged in terms of the agreement under which the advance was made, and that they were only entitled to retain goods to the extent of three-fourths of the market value under the agreement. It appears to me that the Lord Ordinary is clearly right in the view he takes of articles 8 and 9 of this agreement, that it was stipulated that whatever obligation Saunders & Sons undertook should be covered by any goods belonging to Ramsay that were to be in their hands.

A third point was also made the subject of argument on behalf of Ramsay's trustee, arising in this way:—It was said that although Saunders & Sons had accepted bills, which I may call accommodation bills, in favour of Ramsay, to the extent of £16,000, yet, on the other hand, it appears upon the proof that Ramsay had accepted accommodation bills in favour of Saunders & Sons to the amount of £10,600, and that on that account the trustee on Saunders & Sons' estate should only be held entitled to retain goods of the value of the difference between these two sums,—that goods should not be retained to the full value of £16,000, because Saunders & Sons had themselves obtained accommodation bills to the extent of £10,600. I refrain from expressing any opinion on this point, because I do not think it is raised under this action. The Commercial Bank bills for £10,600 were expressly mentioned in the condescendence of the fund *in medio*, article 6th; but, if we turn to the claim which is made on behalf of Mr Myles, Ramsay's trustee, I find the claimant adopts articles 1 to 4 inclusive, and also article 9 of the condescendence annexed to the summons, expressly, and I must assume designedly, omitting all reference to the 6th article of the condescendence of the fund *in medio*, which is the only article which throws light on the matter at all; and turning, again, to the pleas of Mr Myles, I find no indication of any point being intended to be raised in regard to it. It is therefore needless to propose that the Court should give this point or question—which was neither raised in the record nor alluded to in the proof, and as to which a good deal of light is required and might have been shed—any consideration at all. And upon that ground, while I agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be adhered to, I expressly refrain from stating any opinion on this third point.

THIS interlocutor was pronounced:—"Having heard counsel on the reclaiming note for the Royal Bank of Scotland against Lord Rutherford Clark's interlocutor of 20th January 1881, adhere to

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the interlocutor, and refuse the reclaiming note : Find the claimants Rhind and Panton entitled to additional expenses, but under the declaration that the claimants, Royal Bank and Commercial Bank, are to be liable in the expenses of the proof; and remit to the Auditor to tax the amount of expenses, and to report."

DUNDAS & WILSON, C.S.—MELVILLE & LINDERAY, W.S.—J. SMITH CLARK, S.S.C.—
MORTON, NEILSON, & SMART, W.S.—Agents.

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June 22, 1881.
Tennents v.
Romanes.

JAMES LOGAN, Real Raiser and Pursuer.

MRS HAMILTON DUNBAR TENNENT AND CHARLES WELCH TENNENT,
Claimants and Appellants.—*Rhind.*

CHARLES SIMON ROMANES (Trustee upon William Carmichael's
Sequestrated Estate), Claimant and Respondent.—*Baxter.*

Process—Appeal—Competency—Sheriff Courts Act, 1876 (39 and 40 Vict. cap. 70), sec. 32.—An interlocutor disposing of the whole merits of an action and awarding expenses was pronounced by a Sheriff-substitute on 10th March and adhered to by the Sheriff on the 31st, the unsuccessful party being found liable in the expenses of the appeal, "to be taxed and decerned for along with the other expenses." The decree was extracted on 21st April. Subsequently, on 2d May, another interlocutor was pronounced, giving decree for the taxed amount of expenses. Against this interlocutor an appeal was taken to the Court of Session, with the view of bringing up the previous interlocutors in the case. Appeal *refused*, on the grounds (1) that, under the 32d section of the Court of Session Act, 1876, after extract no appeal is competent, and (2) that an interlocutor which merely awards expenses is not subject to review.

1st DIVISION.
Sheriff of
Lanarkshire.
M.

IN a multiplepointing before the Sheriff Court of Lanarkshire the Sheriff-substitute (Birnie), upon 10th March 1881, pronounced this interlocutor:—" . . . Finds in law that the claimants, Mr and Mrs Tennent, are not entitled to be ranked . . . in terms of their claim; repels said claim, and ranks and prefers the claimant, Charles Simon Romanes, to the whole fund *in medio*: Grants warrant to the Clerk of Court to pay over to him the consigned money, with all interest thereon: Finds the claimants, Mr and Mrs Tennent, liable to the claimant, Charles Simon Romanes, in expenses: Remits the account to the Auditor to tax and report, and decerns."

On appeal, the Sheriff (Clark), upon 31st March, adhered. He further found Mr and Mrs Tennent liable "in the expenses of this appeal, to be taxed and decerned for along with the other expenses." This interlocutor was extracted upon 21st April 1881, and the consigned money was paid the next day.

Upon 2d May "the Sheriff-substitute, on the craving of the procurator for the claimant, Charles Simon Romanes, approves of the Auditor's report on his account of expenses, and decerns against the claimants, Mrs Hamilton Dunbar Tennent and Charles Welch Tennent, to make payment to the said claimant of the said taxed expenses of process, to which he has been found entitled, besides the dues of extract, and decerns."

On 16th May Mr and Mrs Tennent appealed to the Court of Session.

The respondent objected to the competency of the appeal, and argued;—The interlocutor of 31st March disposed of the whole merits of the cause, and awarded expenses. It was therefore a "final judgment," which had been extracted in terms of the 32d section of the Sheriff Courts Act, 1876,* and could not now be reviewed. It was no answer that the Sheriff had sub-

* Quoted in the Lord President's opinion, *infra*.

sequently given decree for expenses. An award of expenses was not No. 150.
appealable.¹

The appellants answered, that the interlocutor of 2d May, giving decree for expenses, vitiated the extract, proceedings not being at an end when it was obtained. The appeal against that interlocutor brought all previous interlocutors under review.²

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At advising,—

LORD PRESIDENT.—I have no doubt that the Sheriff's judgment of 31st March was a "final judgment" within the meaning of the Acts of Parliament. It was extracted on 21st April, and the consigned money was paid upon the 22d.

The Sheriff-substitute subsequently, upon 2d May, pronounced an interlocutor approving of the taxed account of expenses, and giving decree for them, and against that interlocutor it is now sought to appeal, with the view of having all the previous interlocutors brought under review.

Objection has been taken to the competency. It is said, in the first place, that a final judgment having been extracted and implemented by payment, it can no longer be reviewed; and, in the second place, that an appeal against a decree for expenses is incompetent and unwarranted.

The appellant says that as he has brought his appeal within fourteen days of the decree for expenses, it is quite competent, and brings all previous interlocutors under review.

I am not for sustaining this appeal to any effect. Mr Rhind contended that the extract was incompetent, because the proceedings in the case were not terminated, as was shewn by the fact that expenses were decerned for afterwards. If he is right in that view there is a great deal to be said for the competency of the appeal. But it appears to me that that question has been settled by section 32 of the Sheriff Courts Act of 1876, which provides,—“Notwithstanding anything contained in section 68 of the Court of Session Act, 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against, and no extract of any such judgment, decree, interlocutor, or order shall be issued before the expiration of fourteen days from the date thereof, unless the Sheriff or Sheriff-substitute who pronounced the same shall allow the extract to be sooner issued.”

That is a very unqualified provision; and if fourteen days have elapsed from the date of any extractable judgment, then, I think, extract of it is competent. That was the case here, because the extract was on 21st April, and the Sheriff's interlocutor was dated on 31st March. It follows, therefore, that this appeal is incompetent, because there can be no appeal against an extracted judgment.

The interlocutor on the merits, therefore, not being subject to appeal, the question comes to be, whether there is any appeal at all. To bring up to this Court a decree for expenses, to the effect of letting the appellant get into a review of the interlocutors upon the merits, would be, by a mere evasion, to set at nought the provisions of the statute. I think, therefore, that it is impossible

¹ Cruickshank v. Smart, Feb. 5, 1870, 8 Macph. 512; A. S., 10th July 1839, sec. 109; Sheriff Courts Act, 1876, secs. 3, 32, 33; Williamson v. M'Lachlan, July 19, 1866, 4 Macph. 1091; Court of Session Act, 1868, secs. 68 and 69.

² M'Glashan's Sheriff Court Practice (Barclay's edn.), 327, 349; A. S., 10th July 1839, secs. 113 and 114; Badger v. Lord Blantyre, Nov. 16, 1844, 17 J. 53.

No. 150. to sustain the competency of this appeal to that effect. But, besides, an interlocutor giving decree for expenses is not subject to appeal. In the case of *Cruikshank v. Smart* Lord Deas expressed an opinion to that effect, in which I concurred, though perhaps I did not enter so fully into the question.

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LORD DEAS.—I am of the same opinion. I think this extract was competent and proper; and I have always had the opinion that a mere decree for expenses is not subject to appeal.

LORD MURE.—I concur. I think the provision of the Act of 1876, taken in connection with former practice, is conclusive. The Act of Sederunt of 10th July 1839 does not appear to me to affect the question at all.

LORD SHAND.—I am of the same opinion. By the statute which regulated these matters before the Act of 1876 an appellant had twenty days from the date of a final interlocutor within which no extract could be issued. The Act of 1876 abridged this period, and parties may now obtain extract within fourteen days. The result is that if the successful party chooses to take extract he excludes appeal, and I think this case is important as pointing that out. Practitioners in the Sheriff Courts should take notice that if they desire to appeal they must do so within fourteen days from the date of a final interlocutor, though expenses have not been decerned for in the Court below, unless, indeed, they have secured themselves by arrangement or otherwise against an extract of the judgment being obtained.

APPEAL dismissed as incompetent.

HAGART & BURN MURDOCH, W.S.—W. BLACK, S.S.C.—Agents.

No. 151. WILLIAM STUART STIRLING CRAWFURD, Complainer.—*D.-F. Kinnear—Dundas.*

June 22, 1881.
Stirling Crawford v. Clyde Navigation Trustees.

THE TRUSTEES OF THE CLYDE NAVIGATION, Respondents.—*Trayner—J. C. Lorimer.*

Property—Trespass—Ferry—Road—Public right of way—Interdict.—The Clyde Navigation Trustees having obtained from a riparian proprietor a strip of ground on the bank of the river to be used solely for the purposes of widening and straightening the river, and having thereafter obtained by statute an existing right of ferry over part of the river extending above and below the said strip of ground, established a ferry service, and embarked and discharged passengers at a part of the bank so acquired, which was separated from any public place by the lands of the said proprietor. The proprietor sought to have the trustees interdicted from embarking and discharging passengers at the point in question.

Held that the action was wrongly directed against the trustees, and that the proprietor's proper remedy was an interdict against persons actually trespassing on his lands (*dis. Lord Justice-Clerk*), who held (1) that the establishment by the trustees of this ferry was contrary to the *bona fides* of their feu-contract with the complainant, and (2) that they had no right by statute or otherwise to establish a ferry except where they could communicate directly with some public place.

2D DIVISION.
Lord Ruthers-
furd Clark.
M.

By feu-contract dated in 1851 Mr W. S. Stirling Crawford of Milton, by his factor, and on the narrative of his powers under a private Act of Parliament in his favour, and of the powers conferred on the Clyde Navigation Trustees by their Act 9 Vict. c. xxiii., conveyed to them two contiguous strips of his lands of Merklands, lying immediately to the north of the river Clyde, as particularly described in said contract, and delineated on a plan indorsed thereon. The northern boundary of the

ground conveyed was as follows :—“ On the north by the other parts of No. 151. the lands of Merklands belonging to the said William Stuart Stirling June 22, 1881. Crawfurd, along which it extends from C to E on said plan 2035 feet or Stirling Craw- thereby on the line to be occupied by the summit of the inclined front of furd v. Clyde the retaining wall to be erected along the new north margin of the river.” Navigation Trustees. The feu-contract further contained this clause,—“ But this feu-disposition is granted always with and under the following provisions, declarations, and others, viz., that the said second parties and their foresaids shall be bound to appropriate the said two pieces of ground wholly and exclusively to the widening and straightening of the river Clyde, and also shall be bound to erect a substantial embanking or retaining wall along the new brink of the river as delineated on said plan, and uphold and maintain the same at their expense, and shall form and maintain two watering-places, one at the east and another at the west end of said ground disposed in the second place, besides steps at convenient distances in said embanking wall for access to the river, and shall also plant a thorn hedge in lieu of the one partly taken away by the second parties' operations and partly still remaining, and that at such a distance from and parallel with the said retaining wall as may be pointed out by the said first party or his managers, and shall protect said hedge by stob and rail in the usual manner; also declaring that the foresaid ground is hereby disposed to the said second parties for the sole purposes contained in the foresaid Act, 9th Victoria, chapter 23d, and the Acts therein recited, and that no buildings shall be erected thereon of the nature of public works, stores, warehouses, or dwelling-houses.”

By the “ Clyde Navigation Consolidation Act, 1858 ” (21 and 22 Vict. c. cxlix.), the undertaking of the trustees is defined to consist, *inter alia*, of “ the forming and erecting on both sides of the river of such jetties, banks, walls, sluices, and works, and such fences for making, securing, confining, and maintaining the channel of the river within proper bounds as the trustees shall think necessary . . . the erection, construction, and mooring of such beacons and buoys as may be necessary or expedient for the use and guidance of vessels in the harbour and in the river.”

Section 113 of said Act confirms a feu-contract dated in 1856 by which the trustees acquired from Mrs Jane Graham Gilbert of Yorkhill, with consent of her husband, a piece of ground therein described, with the ferry-house adjoining the Govan Ferry, and also the right of ferry across the river between the following boundaries, viz., the Milebridge or Kinninghouse Burn on the east, and Marlinford on the west, with the whole rights, servitudes, and privileges thereto belonging, for a feu-duty of £800 per annum.

Section 114 provides that the trustees “ shall be entitled to provide one or more ferry-boats for the convenience of persons passing from one side of the river to another to the east of Marlinford, and to levy such reasonable rates for the use of such boats, and the tear and wear of the works of the trustees as they shall consider reasonable, not exceeding one halfpenny for each passenger.”

In September 1880 the Clyde Trustees established a ferry across the river Clyde to and from a point *ex adverso* of the said lands of Merklands. The said ferry was east of Marlinford. Mr Stirling Crawfurd presented a note of suspension and interdict against the Clyde Trustees, praying the Court to “ interdict, prohibit, and discharge the said respondents, and all others acting under their orders or authority, from ferrying passengers on the river Clyde to and from the complainer's lands of Merklands, on the north bank of the said river, and landing passengers thereon, or embarking them therefrom, and from establishing or using a ferry on the said river

No. 151. at any point *ex adverso* of the said lands, and from erecting any landing-stage, ferry steps, or other accessories for the above purposes upon or *ex adverso* of said lands; and to ordain the said respondents to remove any such landing-stage or others which they may have already erected on or *ex adverso* of the said lands.”

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The complainer averred that the said ferry had been established without his knowledge or consent; that part of the ferry steps and a gas lamp, posts, &c. were erected on his land and beyond the boundary of the lands conveyed by him to the respondents; and that the respondents by this ferry, illegally and to his damage, daily brought crowds of persons upon his lands, over which there was no public right of way whatever.

The respondents denied that any part of their works was on the property of the complainer. They founded on the sections of their Act of 1858, above quoted, in support of their right to convey passengers across the river at points within the statutory limits of their right of ferry. They further averred that “there is a footpath, measuring in some parts about twenty feet wide, in daily uninterrupted use by the public along the whole extent of the complainer’s lands fronting the river.”

The complainer pleaded;—(1) The complainer being proprietor of the said lands, and the respondents having no right to ferry passengers to or from said lands, or to land passengers thereon, or embark them therefrom, or to establish or use a ferry at any point *ex adverso* thereof, the complainer is entitled to interdict as craved. (2) The complainer is entitled to have the respondents prohibited from erecting on or *ex adverso* of his said lands any ferry steps or other accessories for the purpose of ferrying and landing or embarking passengers, and to have them ordained to remove any such works which they may already have erected. (3) The public not having any right of way upon the complainer’s lands, the respondents are not entitled to maintain a ferry for their convenience at the place in question.

The respondents pleaded;—(2) The respondents have by their titles and statutes right to maintain a ferry across the Clyde at the place in question. (3) No part of the ferry works on the north side of the river being erected on the complainer’s property, but only on the river wall, which is vested in the respondents, the complainer is not entitled to interdict. (4) The public being, in point of fact, in the use and enjoyment of the footpath along the river bank, the respondents are entitled to maintain a ferry for their convenience at the place in question.

Proof was led before the Lord Ordinary, from which it appeared that large numbers of the public, consisting chiefly of workmen from the neighbouring shipbuilders’ yards, daily used the ferry in question, and reached a public way by crossing over a portion of the lands of Merklands. It was further proved that the numbers of persons in use to walk upon the said lands by the river bank had greatly increased during the last ten or fifteen years, owing to the larger number of shipbuilding yards in the neighbourhood, and the erection by the respondents of the ferry now complained of, and of previous ferries, now removed. There was some conflict of evidence as to how far back any use of the lands by the public could be traced.

The Lord Ordinary repelled the reasons of suspension, and refused the note.*

* “NOTE.—In 1851 the respondents acquired in feu from the complainer a strip of ground on the north side of the Clyde, being a part of lands of Merklands. The purpose of this acquisition was to enable them to widen the river. This was done, and a retaining wall was erected on the north margin. On the

The complainer reclaimed, and argued;—The question whether the respondents' ferry works were erected entirely *in suo* was not material. Even assuming they were so, these strips of land having been acquired by the trustees from the complainer for the special purpose of "widening and straightening the river Clyde," the right of fee conveyed was a qualified one, and the trustees could not lawfully use the land for any other purpose. They were violating the *bona fides* of the feu-contract by using it for a purpose prejudicial to their author.¹ Their statutory right of ferry did not warrant them in landing passengers except where their ferry steps adjoined a public place. Here they could only reach a public road by crossing a strip of the complainer's private ground.² The action was properly and competently directed against the trustees. They were the most substantial, though not the only invaders of the complainer's rights. The public, as such, could suffer no prejudice by any decree pronounced in this action.

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The Clyde Trustees replied;—The public were, in point of fact, in the daily habit of walking along the complainer's lands, and the trustees could not be called upon, in a question with him, to decide their right to do so, or the reverse. The complainer's remedy was against the public;

top of this retaining wall the respondents have erected a gas lamp and certain posts, &c., in connection with a ferry which they have recently established at that point over the Clyde. The first question is whether these things have been erected on their own property, or on the property of the complainer?

"For the complainer it is contended that the boundary of the respondents is the line occupied by the summit of the inclined front of the retaining wall, and it follows from this contention that the retaining wall belongs partly to the respondents and partly to the complainer. The Lord Ordinary cannot adopt this view of the feu-contract. The ground given off is defined by a plan annexed to the feu-contract, and is described as amounting to a certain number of square yards. The north boundary is thus given in the feu-contract:—'On the north by the other parts of the lands of Merklands belonging to the said William Stuart Stirling Crawford, along which it extends from C to E on said plan 2035 feet on the line to be occupied by the summit of the inclined front of the retaining wall to be erected along the new north margin of the river.' This line is not given as a boundary; but as the line along which the measurement is to be made, and having regard to the fact the north boundary is the lands of Merklands, the Lord Ordinary cannot hold that any part of the retaining wall erected by the respondents is beyond the limits of their feu.

"The respondents adduced evidence from certain plans to shew that they had not encroached on the complainer's property. The Lord Ordinary has doubts whether this evidence is legitimate, and he does not proceed upon it.

"A more important question is whether the respondents are entitled to maintain their ferry. Apart from the consideration which the Lord Ordinary has already noticed, the complainer contends that the use of the ferry brings on his lands a great number of persons who have no right to be there, inasmuch as there is no public road on the north side of the river, and therefore no access to or from the ferry. But it was proved that for a number of years past the public have been in use to use the north side of the Clyde as a public road. It seems to the Lord Ordinary that the respondents cannot be required to try with the complainer whether this right does or does not exist; and that so long as the public use continues the respondents cannot be prohibited from continuing their ferry. They do not directly invade any right of the complainer, inasmuch as all the passengers are taken and landed on ground belonging to them."

¹ *Bostock v. North Staffordshire Railway Company*, May 25, 1852, 5 De G. & S. 584; *Norton v. London and North-Western Railway Company*, July 15, 1878, L. R. 9 Chan. Div. 623.

² *Colquhoun v. Paton and Others*, June 7, 1859, 21 D. 996, 31 Scot. Jur. 550; *Duke of Montrose v. M'Intyre*, March 10, 1848, 10 D. 896, 20 Scot. Jur. 317.

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the Clyde Trustees committed no trespass; they merely, in the exercise of their duty as statutory ferrymen, conveyed passengers across the river within the limits of their ferry right, receiving and discharging them at lawful places, and were not concerned to inquire further whence they had come, or whither they were going.

LORD YOUNG.—In this case Mr Stirling Crawford seeks to interdict the Clyde Trustees from landing or embarking passengers at a certain place *ex adverso*, as he describes it, of his property.

He states as one and the material ground for his application for interdict—the ground which the Lord Ordinary deals with first—that to a certain extent the landing appliances are erected upon his own property. He says that a gas-lamp and also certain posts erected by the respondents are still within the southern boundary line of the complainer's lands; and he also avers that the topmost step of the stair, leading up from the river level, encroaches to the extent of a few inches upon his ground.

To dispose of that matter first, I may say I am of opinion, with the Lord Ordinary, that this ground fails upon the fact, for I am of opinion that, in point of fact, the lamp-post and the step in question are wholly upon the property of the Clyde Trustees. But it was observed in the course of the discussion—and I repeat it, because I think it a sound observation—that the case substantially, and so far as it is really of any interest or importance, would be the same although these erections had, to the extent alleged, been encroachments upon the pursuer's property. No doubt it would have been necessary to take them down, but the question of landing or embarking there would have remained all the same.

Now, the next ground upon which he asks to interdict the respondents is, that by landing or embarking passengers on their own property there they are violating the condition of the title upon which they hold the subjects that had been disposed to them some years ago. That title was granted under certain provisions and declarations, one of which was—"The said second parties and their forebears shall be bound to appropriate the said two pieces of ground wholly and exclusively to the widening and straightening of the river Clyde, and also shall be bound to erect a substantial embanking or retaining wall along the new brink of the river as delineated on said plan, and uphold and maintain the same at their expense; and shall form and maintain two watering-places, one at the east and another at the west end of said ground disposed in the second place, besides steps at convenient distances in said embanking wall for access to the river; and shall also plant a thorn hedge in lieu of the one partly taken away by the second parties' operations and partly still remaining, and that at such a distance from and parallel with the said retaining wall as may be pointed out by the said first party or his managers, and shall protect said hedge by stob and rail in the usual manner."

The only other declaration of any importance is that which follows immediately thereafter—"Declaring that the foresaid ground is hereby disposed to the said second parties for the sole purposes contained in the foresaid Act 9th Victoria, chapter 23d, and the Acts therein recited, and that no buildings shall be erected thereon of the nature of public works, stores, warehouses, or dwelling-houses."

Now, the Clyde Trustees are the conservators of the navigation of the Clyde, it being their duty to take such measures as may be necessary for deepening and widening the river, and to act generally as the guardians of the navigation, and

they purchased the little bit of ground to which these clauses refer from the complainer in that character. It is provided by a subsequent statute, no doubt —and that may be kept in view—that they shall be entitled to acquire rights of ferry across the river, not for any purpose of profit, of course—for the Trustees are not a body instituted for the purpose of making profit; they exist to promote and guard the interests of navigation in the Clyde, and all the dues they collect are to be expended upon these purposes. But the authority granted to them, possibly *ob majorem cautelam*, by Parliament, to acquire rights of ferry, is clearly in their character of river guardians. It is not that they may carry on the business of ferrying to profit, but that they may have the command of this great water highway, and that others having proprietary rights of ferry may not interfere—that is to say, use their rights so that they might interfere—with the purposes of navigation.

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Therefore I regard their position as having rights of ferry as altogether cognate to their position as trustees of the river, and, as such, guardians of the navigation.

Now, the place where they so land and embark, as the complainer alleges, is within the limits of the ferry which was acquired, and acquired after the acquisition of this piece of ground of the complainer's. It was not a ferry station, so to speak. The subject of ferry-right was naturally introduced into the argument here, and has been frequently referred to, although, in my view of the matter, it really does not materially affect the question which we have to consider. A ferry, as it naturally exists, is a right and a duty to convey passengers across a river or narrow estuary between two places, and the right is generally exercised and the duty performed between two stated places, commonly thus continuing a highway which ends on each side of the river or estuary. That, I think, is the common illustration of a ferry. It is that which most frequently occurs, and with which, therefore, we are most familiar; but that, although the most common illustration of what a ferry is, does not exhaust the notion of a right of ferry. The right which is thus exercised, with the corresponding duty, has very extensive limits. The ferry here has considerable limits up and down the river where it exists, and nobody else is entitled to convey passengers for hire across the water within these limits but the ferryman—not that he is entitled to encroach upon private ground anywhere, but that his right of ferry to carry across the river exists within these limits. If he proposes to exercise that right or perform that duty anyhow, in a manner that will invade the legal rights of others existing within the limits of his ferry, he will be stopped. But his right of ferry exists within the limits of the ferry for all that, with this only restraint upon the use of it—a restraint of a character joined to the exercise or use of all rights—that you must so use the right as not to invade the rights of others; and, of course, if a ferryman use his right so as to invade private property anywhere within the limits of his property he must be stopped.

Now, the particular *species facti* here, beyond what I have already stated, is this:—The banks of the river at this place, like the river itself, have gone very extensively into business of recent years. There are large shipbuilding yards on both sides of the river, and some of the workmen in the shipbuilding yards on the north side require accommodation on the other side of the river—the other side from where they work—where I suppose they can get it more cheaply and more conveniently. Accordingly, they pass from the north side, where their work is, in the case of some of those shipbuilding yards, to the south side, where their houses are, for the night, and I suppose also for their meals. They have been doing that in

No. 151. increasing numbers for years, just as the business on the banks of the river was increasing. The trade on the banks of this great river is increasing very much ; and it has been admitted on both sides that in point of fact workmen to the number of hundreds, and latterly of thousands, have gone upon the banks of the Clyde here, and embarked where they could get a boat to take them to their houses upon the south side of the river for meals and for the night. The Clyde Trustees had the sole right to carry them across for hire, although, if consistent with the interests of the navigation, of which they were the guardians, they might have allowed others to carry passengers across. Possibly that was done to a large extent. But the trustees in any case had the matter in their own hands, being the proprietors of the right of ferry. That was the very purpose of their being in that position—as I have already pointed out—the purpose, namely, of controlling and regulating the passage of the river. And thus, when the workmen came and presented themselves on the bank here (where they had a strip of property of their own) in hundreds, and latterly in thousands, they considered it to be according to their right, if not according to their duty, to afford those large numbers of the public the accommodation of their ferryboat across the river, and they did so within the limits of their ferry.

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The question is, whether they could afford that accommodation to those hundreds and thousands without invading any private right.

Now, they took the people on board their boats where they presented themselves on the banks of the river—upon the property of the Clyde Trustees themselves—and they landed them there again when they were returning to or from work. But the pursuer says,—“The strip of ground immediately beyond that, and between them and their workplaces, is my private property, which they had no right to cross, and which they could not cross without trespassing.” In reply to that the trustees say,—“Well, that is not our affair. The public present themselves in great numbers upon the river bank, demanding to be carried across, and we carry them across ; whether they were trespassing before they came there or not is not our affair. If they were upon your ground you should stop them. But don’t come to us about that, or ask to interdict us from taking them across the river upon the assumption that they were trespassing. We are not the parties to try that question with you. These workmen have been doing what they are doing now for the last eleven years,—only they have very much increased in numbers of recent years. Formerly, and before we accommodated them as we have been doing at this point, they only trespassed more, as you say, along the bank which is your property. We are taking them up at a point nearer to their work—within a few yards of their work. But if they are trespassing over these few yards, pray establish that in a question with them, and stop them ; and if they don’t come there to demand passage across the river we won’t take them. We have no desire to do so. We cannot assume that they are trespassing, because you are permitting them to come, and it is not to the purpose to say that you will incur some obloquy if you raise the question and try to stop them. They are the proper parties—the proper contradictors—in such a question as you mean to raise ; and you are not to stop me upon an assumption against me in a question in which I am not the natural contradictor. I am not the proper party to try that question with. You are not to stop me, on an assumption adverse to the public, from carrying the public across the river when they present themselves there.”

Now, I have stated the position of the respondents in the way it presents

itself to me. That is the view which the Lord Ordinary has taken, and I think it is the right view. No. 151.

Now, I have already given this illustration of my view, that the right of ferry here was a mere accidental circumstance in the case, and not materially involved in the consideration of it. Suppose the river Clyde instead of being a water-way had been a landway or highway, which, instead of being traversed by boats, had been traversed by tramways and omnibuses—a number of the public present themselves on the highway (for this river bank, so far as the property of the Clyde Trustees is concerned, is part of their highway—it may be put under water by them when and how they please; it is the margin of it), I say the public present themselves on this part of the highway—they may or may not have trespassed in getting there; but they present themselves there. Are they not to be taken into the tramway cars or into the omnibuses; or is the proprietor who alleges they have trespassed over this ground to come and say, “You are not to take these people across, because they have trespassed over my ground; and if you dispute that, the presumption in the meantime is against you that they were trespassing, for it is my private property, and it is not established that they had a right. To be sure, you are not the proper party to try the question whether they had a right or not, and I will not incur the obloquy of trying it with them; but it shall be assumed against you that they have not the right, and therefore you shall be interdicted from taking them into the car or omnibus.”

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I cannot assent to that. I think the action is directed against the wrong party. If the pursuer means to try the question, whether he is entitled to stop the public from doing what they have been doing, without any interference or interruption on his part, for years past, he must bring his action against them—against those who are committing the trespass—and establish his proposition against them, and stop them from doing what admittedly they have been doing for many years. It is not the embarkation into a boat on the river that is the point at this stage of the controversy. They did embark from the bank. And I should say that anybody who is entitled to be on the bank without trespass is entitled to go into a boat from the bank, or out of a boat on to the bank. And if the pursuer means to establish, or thinks he can establish, this proposition, about the right of people to go on that ground which has been so long used by the public, and is not hindered by considerations of prudence, or otherwise, from bringing an action for that purpose, he must bring his action against those who, according to his allegation, commit the trespass. Whether the boat belongs to a person having a right of ferry, or belongs to anybody having a right to ply it upon the river Clyde, I think the boatowner is entitled to say—“I take up that passenger on the margin of the river, where he is not trespassing, and I put him down again upon the place where he commits no trespass by having his foot there. He assures me that he will find his own way from that place where I put him down or take him up to the place of his work; and he will maintain his right to find his way from it against anybody who disputes it. I am not to be interdicted and told, ‘Oh, but I don’t like to try the question with him, I would rather try it with you,’ for in a process of that sort I am not the natural party to try the question with.”

I do not think that is the correct position to put such a matter into. The complainant begins his interdict at the very point where all attempt at trespass

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on his property ceases, or at the place where it does not begin. I am not going to assume that there was a trespass before, and I am not going to assume that there will be a trespass after—before in the case of embarking passengers, or after in the case of landing passengers. I say I am not going to assume that. The question is not here, and is not to be tried in this process. The public have been trespassing, as Mr Crawford calls it, in hundreds and in thousands for some considerable time. I do not say it is too late to stop them if they have been invading any right, but, as I have indicated, it is not for those who have been doing no wrong in carrying people across the Clyde to try such a question with the aggrieved party. It is for the aggressors or trespassers.

Upon these grounds, and without determining anything in favour of or against the public, I am of opinion that the Lord Ordinary is right in holding that the question is not one for the Clyde Trustees to try, and that they are entitled to take these passengers across the Clyde. I do not know that the case would have been very materially different—that is to say, I am not sure that I would not have arrived at the same conclusion, although there might have been other considerations to be taken into account, had the Clyde Trustees not possessed any property here, or had the owner of the boat which took the people across not possessed any property at all. I have not yet heard any satisfactory answer to the question which I ventured to put yesterday. Suppose a private property, or private grounds, descending to the banks of a river such as the Thames, with a private ornamental stair leading down to the river: The proprietor of these grounds can certainly prevent any trespass upon them. He could prevent anybody using his steps, upon the assumption that I am now making. But if a crowd of people presented themselves there, with whom he was not interfering, and I took them into my boat, which was lawfully upon the river Thames, or upon the river which passed the property, I would not invade his right in any way—I would commit no trespass upon him. I do not deny his right, or violate his right, or do anything actionable against him. The trustees commit nothing actionable against this complainer—give him no ground for an action for damages or otherwise—by carrying people across the river Clyde. People who trespass over his ground are committing an actionable wrong, assuming that there is a trespass. But there is no wrong done by the man who carries these same people on the river—I mean no wrong done to the complainer. The right of ferry is really not in question, for that is a mere franchise—a right to prohibit other people from carrying passengers for hire there. There would be no actionable wrong committed by the proprietor of a boat who took up people from the private stair I have supposed, or who landed people on the private stair—no such wrong on the grounds I am stating. They may be the party's own servants out without leave. But whoever they may be, you must take your remedy against those who are doing you the injury, withholding your right, or denying your right, or disobeying your authority. But you have nothing to do with those who may carry them, after they get on to a public road or a public river.

In every view, therefore, and without determining that Mr Crawford is not in a position to exclude all the world from this ground behind the river bank at the point in question, and still less indicating an opinion that he is in a position to do that, I am of opinion that the judgment of the Lord Ordinary is right, and that upon the grounds which he has stated in his note, and which I have only, perhaps unnecessarily, amplified and illustrated.

LORD CRAIGHILL.—I am of the same opinion as that which has been expressed No. 151.
by Lord Young and by the Lord Ordinary.

The question which has been decided by the Lord Ordinary, and which we have now to determine, is one undoubtedly of very great interest. I have listened to the argument with great attention, and confess the question is one of some nicety. But in the end, and on grounds that have appeared to me to be perfectly satisfactory, and without very much hesitation, I have arrived at the conclusion that the judgment of the Lord Ordinary is right.

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In dealing with this matter it is necessary to keep in view two portions of the prayer for interdict. The first part of it asks that the Clyde Trustees, "and all others acting under their orders or authority," be interdicted "from ferrying passengers on the river Clyde to and from the complainer's lands of Merklands, on the north bank of the said river." The second part of the prayer asks that they be interdicted "from landing passengers thereon, or embarking them therefrom, and from establishing or using a ferry on the said river at any point *ex adverso* of the said lands, and from erecting any landing stage, ferry steps, or other accessories for the above purposes upon or *ex adverso* of the said lands," &c.

Now, I think the decision in regard to the one part of the prayer need not necessarily be the decision as regards the other. If the trustees are not able, without going on the complainer's lands, to take in and put out passengers, it may quite well be the complainer has an enforceable right against them. But it is an entirely different affair to say that if the Clyde Trustees have a landing place of their own not on the complainer's lands of Merklands, not even touching them, and they are taking passengers there in virtue of the right to ferry them which they possess, yet the complainer, for the grounds he has set forth, is to be entitled to an interdict by which the use of this ferry would be stopped.

Upon this last question it appears to me that it must be determined pretty much on the terms of the statute of 1858, and I think the complainer in insisting on his remedy against the Clyde Trustees has overlooked entirely, or at least to a very large extent, the provisions of that statute, which are set forth upon the record.

In the first place, and with reference to the first point which the Lord Ordinary has decided, I am clearly of opinion that all to the south of the north edge of the coping is the property of the Clyde Trustees, and that everything that is part and parcel of their landing place is upon their own ground. In taking in passengers from the shore, or landing them again, they do not use one bit of ground which belongs to anybody else.

That being so, what is the other consideration upon which it is said that interdict ought to be granted? It is, that to allow a ferry to be established here would be contrary to the good faith of the contract by which in 1851 the ground in question was acquired by the Clyde Trustees from the complainer.

Now, it is perfectly possible that the Clyde Trustees might have sought to put the ground to a purpose inconsistent with the good faith of the contract, and if that had been shewn to have been the case very probably Mr Crawford would have had a good cause of complaint, and the trustees might have been prevented from making such a misappropriation or misuse of the ground acquired by them for certain purposes.

But what was the purpose it was acquired for? The purpose was that it

No. 151. should all be used for the purpose of widening and straightening the river Clyde, which then was and long had been an important navigable river. Is it not the case that all the ground embraced in lot No. 1, as well as in lot No. 2, has been used for this purpose by the absorption of this ground, so to speak, into the *alveus* of the river? The river has certainly been widened, and it has also been straightened; and these two purposes of widening and straightening having been served, if ground at the foot of the wall or if the face of the wall can consistently with anything to be found in the feu-contract be used as an access to or from the river, it does not appear to me that such use involves any contravention of any condition, express or implied, in the contract.

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But the fact of the matter is, as I have already said, that all that is done in the way of embarking or landing passengers is done within the boundaries of the trust. The steps themselves are part and parcel of the wall. The erection of these steps is not contrary to anything that is to be found in the contract. On the contrary, the complainer, if he had been so minded, might have caused the erection of these steps for his own convenience. But the steps were erected by the respondents without any necessity being imposed upon them to do so; and after having been constructed for a purpose which was obviously one of the purposes for which such steps or cope was to be put up they are only using them now for a perfectly legitimate purpose.

All that being so, the question comes to be, on what ground is it that the complainer is to be granted interdict? It must be upon this ground, that there being no right of public way over the lands of Merklands, of which he is proprietor, all who reach the landing station at the ferry going across these lands must be held to be persons who are not within the purview of the Act of Parliament of 1858, by which authority was granted to the Clyde Trustees to place a ferryboat or ferry at any point where the public might be conveniently served to the east of the lands of Marlinford. Now, it humbly appears to me that that is not a matter with reference to which the trustees are entitled to interfere. It is not a matter certainly upon which they are bound to interfere. The thing the Act of Parliament provides is this, that the Clyde Trustees are to be "entitled to provide one or more ferry-boats for the convenience of persons passing from one side of the river to another to the east of Marlinford, and to levy such reasonable rates for the use of such boats, and the tear and wear of the works of the trustees, as they shall consider reasonable, not exceeding one halfpenny for each passenger." This is their right, and who are the persons to be served? They are persons who may desire to pass from one side to the other. But these persons are landed on ground belonging to the Clyde Trustees. The Clyde Trustees' ferry-boats land them upon their own ground; and in the use of the ferry-boat there is no encroachment whatever on the right of property belonging to the complainer.

But it is said that the persons seeking to cross must be divided into two classes. One class are supposed to be, or must be presumed to be, trespassers. Another class are those who in one way or another have come to the landing place, and have a right, or are supposed to have a right, which may be exercised, and which therefore involves no trespass on the property of anybody. But this is not a matter for the trustees to take up and deal with. Their duty in regard to the matter is this: If they establish a ferry at any place for the convenience of the public, the public may resort to the ferry station, which is their own, and the use of which involves no encroachment on the property of

another. Having put a boat there, I think they are entitled to take these persons, without inquiring where they came from or what rights they had exercised in reaching the station, and ferry them across. It would be a very extraordinary thing were it otherwise. The trustees are not the persons themselves by whom the encroachment was made. They only take those who come to them and desire that they shall be ferried across. If there has been a wrong done, it has been a wrong done before the passengers reached the ground from which they embark. Is this complainer to be heard when he complains that the Clyde Trustees take passengers across who come to them desiring to be ferried to the other side, when he is doing nothing meanwhile to prevent the use of his ground by the people who come? Surely not. It is by the use of his ground that they are enabled to present themselves. Surely the first thing to be done is to prevent these people using his ground. If he can prevent them using his ground he ought to do so, and then the annoyance will, so far at least, be put a stop to also. If he has made the attempt to prevent them, and has not succeeded because of the violence of those who desire to be the passengers in the ferry-boat, it might be—I do not say it would be—that the trustees in taking up, so to speak, those who are guilty of the violence by which an illegal trespass was constituted, might be held as having participated in the wrongdoing. Whether that would be the case, looking to the terms of the Act of Parliament, or indeed apart from the Act altogether, it is not necessary to inquire. But when the fact is not only that the complainer does nothing to prevent persons, who he says are trespassers, reaching the landing or embarking place, but, on the contrary, permits them to reach that spot, he cannot be heard to say that the Clyde Trustees, in the exercise of a lawful right, shall not ferry passengers from one side of the river to the other, because somehow or other those whom they carry reach the ferry in consequence of a trespass. Trespass or no trespass is not a question with which the Clyde Trustees have anything to do. They only look at the persons who are at their landing place seeking to go from one side to the other; and according to my view, however these persons have reached that place, so far as appears from the terms of the Act of Parliament, the Clyde Trustees are entitled to carry them across. That being their right, they cannot be subjected to the interdict craved.

Upon these general grounds I am of opinion that the Lord Ordinary is right.

LORD JUSTICE-CLERK.—It is my misfortune, and I consider it a great misfortune, to differ from your Lordships as to the result of this case. Being conscious that the Lord Ordinary's view has been adopted by your Lordships, it is perhaps not desirable that I should express much in the way of dissent. Nor do I desire to do so. At the same time, it is only fair to the parties, that entertaining as I do a very clear opinion in the opposite direction, I should express the grounds of it. And I should express my opinion with more modification and reluctance were it not that I am not surprised at our differing, seeing that we differ mainly upon the question we have to try. I do not imagine the question we have to try is, who has to prove the right or non-existence of a right of way on the part of the public over this ground on the top of the embankment? I do not think that question is in the case at all.

The proprietor of the ground here (Mr Stirling Crawford) complains that, contrary to the good faith of an express contract with him, the Clyde Trustees have established a ferry station at the margin of the river upon ground that he

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No. 151. conveyed to them by express disposition, and that without the means of connecting it with any public road or way except what they acquire by trespass. The trustees say, it is none of our business whether these persons who come to us seeking to be ferried across have trespassed or not. And I should in some circumstances have thought there was great weight in that contention. But the Lord Ordinary seems to think that the real ground on which the action should be dismissed is, that it is directed against the wrong person. It is clearly directed against the right parties, if there is a good ground of action, and no other parties could possibly have been the defenders in this case. And I shall state very shortly my impression on the whole of this matter.

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The ground in question belonged to the complainer, Mr Crawford. The public had no right to the ground that was disposed of by him. It is not said that they had; but it appeared for the public interest that an embankment, and a widening of the stream should take place at that point, and it being private property, the Clyde Navigation Trustees made a specific bargain with Mr Crawford for the acquisition of the ground, but on certain terms, which I imagine to be as clearly enforceable now as when they were originally granted. It is expressly set out—and this truly is the foundation of the whole of this matter, and excludes, therefore, nine-tenths at least of the matters that were argued from the bar—that the feu-disposition was granted with and under the following provisions—that the said second parties and their foresaids shall be bound to appropriate the said two pieces of ground wholly and exclusively to the widening and the straightening of the river Clyde, and shall be liable to maintain a substantial embankment. They are not entitled to do anything else with the ground, and the question is, whether they have not done something else with it.

But that is not all. There is a provision about planting a thorn hedge in lieu of the one taken away, and protecting it by stobs and rails, which means nothing but this, that the ground on the other side of the hedge was the private property of the disponer. It can mean nothing else, and does mean nothing else. And then the deed says—"Also declaring that the foresaid ground is hereby disposed to the said second parties for the sole purposes contained in the foresaid Act 9th Victoria, chapter 23d, and the Acts therein recited, and that no buildings shall be erected thereon of the nature of public works, stores, warehouses, or dwelling-houses." It seems to be thought by my brother Lord Craighill that that is modified or over-ridden by the Act of 1858. I am entirely of a different opinion. At the date of this disposition to the Clyde Trustees they had no right of ferry whatever. They acquired a right of ferry in 1858, and had previously acquired a right of specific ferry from the opposite side, to a point not far from the place in question, and they propose now, and did propose three years ago, to put down a ferry station at the foot of the embankment which they made under this conveyance. The question which the complainer has to try is, whether they could do that under the terms of their conveyance and looking to the nature of the rights of parties in that ground? How anybody else but the trustees could be defender in such an action I cannot conceive; nor how it can be imagined for a moment that the Clyde Trustees could enter into a proof to establish a public right of way with other parties with whom they had no concern I am unable to understand. In short, I think a false issue has been presented by the respondents here from the very first, and that that question has really nothing to do with the true matter we have to solve. And my solution of it may be given on two grounds. In the first place, I am

of opinion that after having this conveyance granted to them, if they had acquired a right of ferry, and had proposed to set a ferry station down there, it was a direct violation of the provisions of this contract. It is in vain to say it is for the accommodation of the public. They acquired the ground under conditions that they are bound to fulfil. No doubt the stations which the Act of 1858 authorised them to put down were stations along the banks, but that that Act authorised them to violate the conditions on which for the public good they had obtained this piece of ground is to my mind a position that is wholly untenable. Even as regards stations put down under the authority of the Act of Parliament, they required, in the first place, to have acquired a private right to the landing-place, and, in the second place, to connect it with some public road or way.

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Therefore the ground on which the Lord Ordinary has gone wrong is this, that this putting down of a station at such a point as that in question is a use of the ground acquired that is prohibited by the very terms of the disposition itself.

But observe what the effect of it is. This staircase that was to be made for the benefit of the complainer is now to be handed over to the public. It becomes a public way, and nothing else. Those who communicate to this place a right of ferry induce people to come to it, and they acquire a right over it—at all events, if they use it for the prescriptive period; and certainly the proprietor never intended to grant any such right as that. Nor did he ever contemplate that the staircase—a bargain made for his own convenience—was to be altered in such a way by this Act.

But the second view I take—and I hold it very strongly—is, that they were not entitled to put down any station here under their right of ferry unless they could communicate directly with some public way. They admit and cannot deny that the ground upon which they discharge their passengers from their ferry, or right of ferry, is private ground; but they also say that the public are allowed to come here. Well, if the ground had been acquired in the ordinary way without limitation there might be a question as to how far there was a presumption that the people who came there were entitled to be there; but when I find that the ground was given for a totally different purpose, and that the trustees unquestionably induced the people to come by putting down this ferry station contrary to their title, that I think raises an entirely different question. I am of opinion that they were not entitled to do that. And I may say further, that I think all illustrations taken from persons unconnected with the proprietor of the ground, who derive no title from him, are wholly apart from and outside of the real merits of this question.

I have said enough to indicate the view I take. Your Lordships adhere to the interlocutor.

THE COURT adhered, and found the respondents entitled to additional expenses.

DUNDAS & WILSON, C.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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ALEXANDER ROSS YEOMAN (Officer of Excise), Appellant.—

*Sol.-Gen. Balfour—Rutherford.*M'INTOSH BROTHERS, Respondents.—*Mackintosh—McKechnie.*

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Yeoman v.
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Revenue—Excise—Spirits Act 1860 (23 and 24 Vict. cap. 114), secs. 170-188—Entries in dealer's stock-book (1) where spirits obtained by "grogging," and (2) where "samples."—Held, upon a construction of the 170th to the 188th sections of the Spirits Act, 1860, that, alike with spirits obtained by "grogging" as with those received in the ordinary way, an omission by the dealer or retailer to insert in his stock-book the number of the permit or certificate, the Christian and surname of the person, or the name of the firm, from whom, and of the place from which the spirits were received, will entitle the Commissioners of Excise to disregard those entries, and will involve the statutory penalty if the amount of spirits in possession exceeds the amount duly entered.

Held that a dealer in spirits, whom the Commissioners of Excise had allowed to take samples of spirits out of bond, free from duty, and without a permit or certificate, was entitled, after using them for the purposes of his business, to put the surplus into stock, and that the Commissioners in balancing his stock-book were bound to take into account the entries therein of such spirits.

1ST DIVISION. THE Commissioners of Inland Revenue claimed certain penalties from
Exchequer Messrs Mackintosh Brothers, dealers in and retailers of spirits, Leith,
Cause. in respect of alleged contravention of the Spirits Act, 1860.

B.

The information was originally brought before the Petty Sessions for the county of Edinburgh, who found the respondents not guilty of any of the offences charged.

An appeal was taken to the Quarter Sessions, who, before pronouncing judgment, stated this case for the opinion and direction of the Court of Exchequer.

The following were the facts:—" (1) The respondents before, and at the date of the offence alleged, . . . were licensed dealers in and retailers of spirits, and traded in both capacities on the same premises, all the spirits in their possession, whether as dealers or retailers, forming one stock. (2) On 8th and 9th December 1879 certain officers of excise took an account of all the spirits in the stock and possession of the respondents, and balanced their stock-book. By disregarding the entries of 'grog,' and of samples of spirits after mentioned, the officers found an excess in the stock or possession of the respondents of 680·8 gallons of proof spirits. . . . (3) The total number of entries of 'grog' and samples made by the respondents, and disregarded by the officers in balancing the stock-book, was 2220; and if these entries had been taken into account by the officers no excess, but a deficiency, would have been found in the stock in possession of the respondents. These entries, as made by the respondents in the stock-book, did not contain the number of any permit or certificate, nor the Christian name and surname of the person, or the name of the firm from whom, and of what place the 'grog' and samples were received. The respondents did not deliver to the officers any permit or certificate received by them along with the 'grog' and samples appearing under such entries. In the calculation of the stock on hand, and in the balancing of the stock-book, all spirits were computed at proof strength. In calculating the stock on hand, the officers took into account all spirits, including grog, found in the stock or possession, and within the entered premises, of the respondents. In balancing the stock-book, the officers gave effect to all entries therein, containing the particulars required by the statute, of spirits received with permit or certificate, and of spirits sent out accompanied by certificate, including spirits denominated P.S. (plain spirits), while, on the other hand, they

disregarded the 2220 entries aforesaid. The following extracts from the stock-book of the respondents shew the pattern of said book, and contain specimens of the said entries of 'grog' and samples, as also of the said plain spirits:—

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"AN ACCOUNT OF SPIRITS RECEIVED INTO STOCK.

Date when the Spirits were received.	Number of the Permit or Certificate.	Christian and Sur-name of the Person, or the Name of the Firm, from whom the Spirits were received.	Of what Place.	Gallons of Spirits received.	Kind or Quality of the Spirits.	Strength of the Spirits.	Gallons at Proof.
1879.							
Oct. 31.		Cask No. 5		06	Grog.	83·2 u.p.	1·0
" "		" 597		06	"	89·1 u.p.	·6
" "		" 395		06	"	90·3 u.p.	·5
" "		" 5		06	"	92·5 u.p.	·4
" "		" 181		06	"	85·7 u.p.	·8
" "		" 5		06	"	89·7 u.p.	·6
* *	*	* *	*	*	*	* *	*
Oct. 22.		Nos. 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121 — 15 Samples of British Plain Spirits, containing 3 gills each.		01½	P. S.	23·4 o.p.	
* *	*	* *	*	*	*	* *	*

"The entries of 'grog' relate to spirits derived by a process known under the name of 'grogging.'

"'Grogging' is the process by which spirits absorbed by the wood of casks are extracted. When a cask is filled with spirits, part of the spirits is absorbed by the wood. After the cask has been emptied water is put into it, and is allowed to remain for a month or thereby, the cask being rolled about at intervals. By these means the absorbed spirits are extracted, there being a chemical affinity between the water and the alcohol by which the extraction of the latter from the wood is effected, and the spirits so extracted are called 'grog.' (4) Four of the witnesses stated that in their opinion, if a dealer in or retailer of spirits grogs only casks which he receives with spirits brought into his stock with permit or certificate, and adds the grog so obtained to his stock, no excess will be found in the stock arising from such grogging, and that the addition of such grog to the stock would be more than counterbalanced by the loss arising from waste, absorption, or evaporation. The respondents have been in the habit of buying from cask-dealers old spirit casks which they grogged, and added the grog so recovered to their stock, as well as the grog recovered from casks received by them with spirits brought in with permit or certificate; but it did not appear from which set of casks, or in what proportions the alleged excess had been derived. The revenue regulation for charging duty on spirits warehoused is, that on delivery from any customs or excise warehouse of a cask of spirits warehoused

No. 152. therein without payment of duty, duty is charged and paid on the liquid quantity of spirits contained in the cask at the time of delivery. —
 June 22, 1881. It was proved that it is the practice of the revenue, in charging duty on spirits, to make an allowance varying from six to twelve per cent for leakage, evaporation, and absorption, according to the time during which the spirits have been in warehouse. . . . As regards samples, the revenue practice is to allow traders to take from every cask of spirits they have in bonded warehouse, two duty-free samples of spirits of three gills each. Duty is charged and paid on any samples drawn in excess of that number. Samples, whether duty-free or duty paid, are allowed to traders to enable them to dispose of the spirits in bulk. No permit or certificate is given with samples. The practice of the respondents was to add to their stock all samples of spirits received by them, so far as not required by them for sampling purposes. To what extent, beyond what is after mentioned, the samples appearing under the entries thereof disregarded by the officers in balancing the stock-book, were added to stock, did not appear. . . . The question put was,—“Whether the aforesaid 2220 entries were rightly disregarded by the excise officers in balancing the respondents’ stock-book on 8th and 9th December 1879.”

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The case of *M’Intosh v. Wilson*, Dec. 21, 1878, *ante*, vol. vi. 443, 16 S. L. R. 477, was referred to.

At advising,—

LORD PRESIDENT.—The decision of the question submitted to us by the Quarter Sessions of Edinburgh depends upon a consideration of the facts stated in this case in connection with certain clauses of the Spirits Act (23 and 24 Vict., c. 114). We had occasion to construe some of those clauses in the case of *M’Intosh Brothers v. The Inland Revenue*, on the 20th of March 1879, and we there held, upon the construction of sec. 170, that a failure to enter in the book provided by the dealer all spirits received into his stock or sent out constituted an offence against that section, and subjected him to a penalty, and that that offence might be committed more than once in the course of the same day. Upon the construction of the 176th section we held that he was liable in the penalty imposed by that section, if there was, in point of fact, an excess of spirits in his stock beyond that which was entered in the book, no matter from what source that excess of spirits came. In point of fact, we were informed, in the case before us at that time, that the excess was brought about by the operation of grogging.

Now, we have again before us the same question in a somewhat different form and upon different conditions. There is a quantity of spirits in the stock of these dealers which is confessedly produced by the operation of grogging. It is in evidence—and I understand the Quarter Sessions to represent to us that the only evidence in the case is to the effect—that if grogging is carried no further than to extract from the wood of the casks which belong to the dealer himself, and which have come into his stock as full casks, what remains in the wood after the cask has been emptied, that will not raise any practical question, because it will not produce such an excess of stock as to create any offence under the 176th section of the statute. But the parties before us are in the habit of performing this operation of grogging upon a much more extensive scale. They buy casks—empty casks, which had contained spirits—and they extract from the wood of those casks, by the operation which is explained in this case and in the former one, a quantity of spirits, which is added to their

stock, and increases their stock beyond what it ought to be if spirits were not obtained by them except in the ordinary way from a distillery or a dealer in spirits.

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The precise state of the facts in the present case is this, that on the 8th and 9th of December 1879 the officers of Excise took an account of the spirits in the stock or possession of the respondents, and balanced their stock-books, but in doing so they disregarded certain entries of spirits received in the stock-book, and the question before us is, whether they were right in disregarding those entries. Those entries are 2220 in number, and if they are disregarded then there is an excess over what is properly entered in the stock-book to the extent of 680 gallons. If, on the other hand, those entries are taken into account, then there is no excess of stock, and there can be no penalty.

Now, the way in which the entries are made as regards the spirits obtained by grogging—apart from the question as to samples, with which I shall deal separately—is this : The dates when the spirits have been received are entered in one column. The second column, which ought to contain the number of the permit or certificate accompanying the spirits received, is blank, for a very obvious reason, because there could be neither permit nor certificate accompanying spirits which are obtained by grogging on the premises of the dealer himself. Under the head of “ Christian and surname of the person, or the name of the firm, from whom the spirits were received,” there is no name, either Christian or surname, but there is a reference to a cask by its number, from which it is represented of course that the spirits have been obtained by the grogging process. In the column “ Of what place,” there is a blank. The quantity in gallons, or fractions of gallons, is stated rightly in the next column ; and in the column for “ kind or quality of the spirits,” the entry is “ grog ; ” in the next column the “ strength of the spirits ” is quite rightly given ; and in the next the “ gallons at proof ” are given. Now, it is contended upon the part of the Inland Revenue that the officers of Excise properly disregarded these entries, because they are not made in terms of the statute. The statute describes what particulars shall enter this book, and if these particulars are not entered then they contend that the book is not kept in terms of the Act of Parliament, and the entries so made, being disconform to the Act of Parliament, must be disregarded. The question which the Quarter Sessions have put to us in order to enable them to decide this case is, whether these entries were rightly disregarded by the Excise officers in balancing the respondents’ stock-book on the 8th and 9th of December 1879.

Now, the clauses of the Act of Parliament with which we are concerned are those which come under the general title as to “ certificates and permits for the removal of spirits,” which begin with section 170 and end with section 188. That is the division of the statute in which all the sections occur that we require to construe. The 170th section provides that “ every rectifier, dealer, and retailer respectively shall provide himself with a book, prepared according to a pattern to be given to him, on his application to the proper officer, and shall, on the same day on which he receives any spirits into his stock, custody, or possession, and at such time on that day as he may be requested to do so by any officer, and if not so requested, then, at latest, before the expiration of that day, write and enter in such book, and in the proper columns respectively prepared for the purpose, the date when, and the Christian and surname of the person or the name of the firm from whom and of what place the spirits were received,

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the number of gallons, and the kind or quality of the spirits, and the strength thereof." And then there is a provision for entering also the spirits sent out of stock in a corresponding part of the book. Now, here it will be observed that there are certain entries imperatively required to be made—the date of receiving the spirits, the Christian and surname of the person from whom they are received, the place from which they come, the number of gallons, the kind or quality of the spirits, and the strength—and if any of these particulars are disregarded it is quite obvious that some one or more of the securities provided by the law for the collection of the revenue will be lost to the Excise officers. Now, in the present case, as I have already mentioned, there is no entry of the Christian and surname of the person, or the name of the firm, from whom the spirits were received, nor of the place from which the spirits came. To that extent, therefore, the entries are disconform to the statute. It was contended also that there was a defect, in respect that the number of the permit or certificate was not entered in the proper column. That is not expressly required by the 170th section of the statute, but it is also a very important particular of defect in the register kept in this case by the dealer, as will be seen when I proceed a little further with the clauses of the statute.

The next section which requires to be specially noticed is the 174th, which provides that "no rectifier, dealer, or retailer shall receive any spirits not accompanied by a true and lawful permit or certificate, as the same are respectively required by law"—that is, a permit in the case of spirits coming from a distiller, or a certificate in the case of spirits coming from a dealer—"and every rectifier, dealer, and retailer respectively shall immediately on receiving a permit or certificate cancel the same by writing in large letters in ink across such permit or certificate, or in the space prepared for that purpose, the word 'received,' and the day and hour when received, or shall otherwise permanently cancel such permit or certificate by lines drawn in ink across the same, so as to prevent it from being again used for the removal of spirits, and every rectifier, dealer, or retailer who shall receive any spirits without the same being accompanied by a true and lawful permit or certificate as by law required shall forfeit the sum of one hundred pounds; and all such spirits, or an equal quantity of spirits of a like kind, to be taken out of any part of his stock, shall also be forfeited; and every rectifier, dealer, or retailer receiving any permit or certificate, who shall not cancel the same as aforesaid, shall forfeit the sum of fifty pounds." Then section 175 provides that "all permits and certificates received with spirits by a rectifier, dealer, or retailer shall be preserved after being cancelled as aforesaid, and shall be delivered by him to the officer who shall first inspect his premises after the receipt thereof; and for any neglect or default in this respect the rectifier, dealer, or retailer shall forfeit the sum of fifty pounds for every such permit or certificate; but the penalty shall not be incurred if the permit or certificate has been lost or destroyed after the expiry of three months from the date thereof." Now, in connection with this I read section 183, or at least a part of it, which provides that "no rectifier or compounder or dealer shall have (except as after-mentioned) credit in stock for any greater quantity of spirits received or found therein than for the quantity computed at proof brought in with such permit or certificate as aforesaid delivered to the officer." The words within parenthesis—"except as after-mentioned"—have not been shewn to introduce any exception which can apply to the present case; and therefore we have here a distinct provision that a dealer is not to have credit in

stock for any greater quantity of spirits received or found therein than for the quantity brought in with the permit or certificate which has been delivered to the officer in terms of section 175, which I have just read.

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This section brings into the present case the want of a permit or certificate as a very important part of the consideration upon which we are to determine whether the entries in question were properly disregarded by the Excise officers. According to section 183 the Excise officers are expressly debarred from giving credit in computing the stock for any spirits that are not brought in with the permit or certificate which has been received along with them and duly cancelled, and thereafter handed to the officers of Excise. Then, by section 176 (to go back again), which is the one that more especially relates to the prosecution in this case, it is provided—"Any officer may at any time take an account of the quantity of all spirits in the stock or possession of a dealer or retailer, and if it be found that the quantity of spirits remaining in the stock or possession of such dealer or retailer exceeds the quantity which ought to be therein, as appears on balancing the book by this Act directed to be kept by him of spirits received into and sent out of his stock or possession (all spirits being for that purpose computed at proof), the excess shall be deemed to be spirits illegally received; and a quantity of spirits equal to such excess shall be forfeited, and may be seized by any officer out of any part of the stock of such dealer or retailer, who shall also forfeit the sum of twenty shillings for every gallon of such excess; and it shall also be lawful for any officer to enter into the premises of a dealer or retailer, and to examine and take samples of any spirits in his stock or possession, paying for such samples the usual price thereof." Now, the officers of Excise in this case found entries of spirits in this book with no particulars as to the party from whom they were received, or the place from which they came, and without any permit or certificate applicable to those spirits, and it appears to me therefore that under the provisions of these various clauses they had no alternative but to disregard the entries of those spirits in the stock-book, and that being so, of course the excess is brought out as stated in the case.

But there remains for consideration the point regarding the samples, which stands in a different position from the spirits recovered by grogging. There is nothing at all in the Excise Statutes about samples, so far as I can see. There are no statutory provisions or regulations as to samples. But the Commissioners of Excise authorise the giving to dealers of samples of spirits in bond, and they give samples of certain amounts, generally samples of three gills, which certainly is not a very great amount, but apparently a dealer is entitled to have two samples of such amount from each cask of spirits which he has in bond. These samples do not pay duty, and they go into the dealer's possession without a permit or certificate. Now, there is no authority for that in the statute, and the Commissioners of Excise, therefore, in dealing with this matter, are going beyond the statute. They are giving to dealers spirits which do not pay duty—taking spirits out of bond and delivering them to him without exacting duty—and they are also allowing him to obtain possession of those spirits without permit or certificate. I do not see how, in these circumstances, the Commissioners of Excise can fall back upon the statutes, and say, in regard to these quantities of spirits—"You shall not take these into your stock." The dealer is just following the example of the Commissioners in violating or disregarding the statute. The

No. 152. Commissioners of Excise say—"These spirits are delivered to you as a matter of indulgence and for a special purpose, and you have no right to put them into your stock." Well, if that is so, they certainly ought to have made some very express or special provision in the regulations about giving out samples, and about the disposal of the samples if they are not used or consumed as samples. But they do not appear to have done that; and certainly one would suppose that the most natural course for a dealer, if he has got samples to a greater extent than he finds he has use for in dealing with his customers, is just to put them into his general stock. I cannot say I think it possible to allow the Commissioners of Inland Revenue to recover penalties, or in any way to prosecute in respect of these spirits being found in the possession, or, in other words, in the stock, of the dealer, in excess of what is brought there under a lawful permit or certificate, and in compliance with all the regulations of the statute, when the fact that they are there under these conditions is attributable to the action of the Commissioners of Inland Revenue themselves.

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Therefore, while I am for answering the question put to us in the affirmative as regards the spirits obtained by means of grogging, I think we must answer the other part of it as regards the samples in the negative.

LORD DEAS.—This question of grogging arose before us on a previous occasion in a somewhat different form. I was then disposed to think that the officers of Excise were bound to recognise the entries which were made of such spirits; but the very lucid statement made by the counsel for the Commissioners of Inland Revenue upon this case satisfied me that if that were the sound construction of the statute the Revenue would be exposed to dangers in not getting the proper duty—so very great that it is very difficult to think that that is the right construction of the statute. I am now satisfied—while I retain my opinion that grogging is a perfectly lawful process—that the regulations as to the entries in the books are all necessary for the fair protection of the Government in recovering the duties, and that as such they are imperative upon the dealer. I now think further that, when they are not observed, the officers of the Revenue are entitled to disregard the entries. On that point, therefore, I agree with the explanation of the rule of law given by your Lordship. Upon the matter of samples, I have had no hesitation in agreeing with your Lordship.

LORD MURE.—The question here put is as to the competency of the officers of Excise disregarding certain entries which they found in the stock-book of the respondents when they were checking that book in terms of the 176th section of the statute; and whether they were at their own hand entitled to refuse to give effect to the entries of certain quantities of spirits that were there entered. These entries related to different things, and are made under different names, viz., as "Casks" with "Grog" in them, or as "Samples" of spirits. Your Lordship has pointed out that the permit column is blank, and that in the column for the name of the person or firm from whom the spirits were received there are entries of a certain number of casks by number, and that a certain number of samples of spirits are entered; and that there is brought out in another column what the quantity is in each of the casks. But there is, on the other hand, no entry of the name or surname of the firm from whom the spirits were received. Now, in these circumstances, it is not necessary, in my view of the

case, to enter into any question as to the legality of this process of grogging. No. 152. It is conceded on the part of the Excise that if the trader simply puts water into a cask which had been for some time in his own premises, and for the spirits on which he had paid duty, and extracts by that process a quantity of spirit from the wood—and there is a letter from Mr Young, the secretary, to this effect—they would not challenge such a proceeding. But with reference to casks purchased by a trader—and, for anything we can see, all the casks here entered may have been so obtained—the Excise say that the trader is not entitled to make use of this process of grogging so as to get spirits out of the wood of those casks. I do not, however, think it necessary to express any opinion on that matter. The case we are called upon to deal with is under the 170th section, and is that of a book in which certain casks are entered which are said to contain grog, but there is no entry of the name or surname of the person or firm from whom the cask has been obtained, and where the express enactment of the Act of Parliament to that effect is not complied with. In this state of matters, the officers of Excise disregarded all those entries, and the question is whether that was within their power. And having regard to the fact (which is admitted) that there was no permit or certificate sent or received with these casks, I am of opinion that the officers were entitled to deal with those casks as cases where the statute had been violated, in respect that they were taken into possession without a permit or certificate, and that it was the duty of the officers to disregard the entries. On that ground, and apart from the question raised as to the effect of an omission to enter the names of the firm, I agree with your Lordships; and I also agree with your Lordships in regard to the samples, which I think are not struck at by the statute, as it makes no provision with regard to them.

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LORD SHAND.—In the former case before this Court the question arose in these circumstances: There had been a quantity of spirits received in the wood of casks and extracted from the wood, but no entries relating to these spirits had been made in the book of the retailer or dealer, and, in consequence, on balancing the stock, there was an excess found on the premises beyond what the book shewed. I was of opinion, with your Lordship, that the excess was clearly stock which might have been forfeited, and in respect of each gallon of which the Crown was entitled to penalties, and for the simple reason that there was no record of that stock in the book as required by the Act of Parliament.

The question in this case arises in a somewhat different way, as your Lordship has pointed out. The dealer has made certain entries in his book of the stock which was received by him in the wood of casks and extracted or recovered, and the question is, whether, having made the entries in the way in which he has thought fit to do, he is now in a position to maintain successfully that he is not liable in any penalties. I have come to the conclusion, with your Lordships, that the case is one in which the Crown is entitled to the penalty. In the first place, it is clear that the retailer or dealer is bound, in compliance with the provisions of section 170 of the statute, to record in the book which is given to him for the purpose by the officers of Excise the Christian and surname of the person or firm from whom he receives the spirits, and the place from which such spirits are received. In regard to all of the spirits with which we have here to do we find that these particulars are entirely omitted, and it appears to me that

No. 152. as in this way certain of the statutory requisites provided as a safeguard and a means of checking the transit of spirits from one dealer to another were omitted in the book the officers were entitled to disregard the entries. The case is not one in which an accidental omission here and there of a date or of particulars as to a person or place occurs. It is a case in regard to which this provision of the statute is systematically disregarded, and intentionally so; and that being so, it appears to me the officers were entitled to say—"We cannot take those entries as entries in compliance with the statute, and we disregard them, and we balance your book without them."

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In the next place, there is a view which has been adverted to by your Lordship, and which I am of opinion leads to the same result—I mean the provision rendering permits or certificates necessary. The statute does not prescribe that in the book a record of each permit or certificate shall be kept, but it certainly provides, taking section 174 with sections 183 and 184, that no dealer or retailer shall receive spirits into his premises, at least exceeding one gallon at a time in quantity, without a permit or certificate with such spirits. Now, on turning to the entries which are here recorded under 31st October and 17th November, it appears that upon each of those dates casks containing much more than one gallon of spirits were received into stock at one and the same time. That being so, it appears to me that the concluding words of the 183d section apply to this case,—in short, that a permit or certificate is essential, at least where the quantity of spirits received exceeds one gallon, before the dealer can obtain credit for it in his stock.

In regard to the samples, I agree in the result at which your Lordships have arrived. I am not satisfied, however, that the Commissioners of Excise or the officers of Excise go beyond what they are entitled to do in giving out these samples. But then, because quantities of less than one gallon are received, that is no reason why they should not be entered in the dealer's book. The trader, if he gets a number of samples, is bound to enter the spirits he receives. I see no exception in the case of samples or anything else. They go into his premises and into his stock, and he is bound to put them into his book, and if they are in his book he is entitled to get credit for them. I am therefore of opinion that the officers of Excise were bound to credit those samples, which were properly entered, and upon that ground I think they were not entitled to disregard the entries.

THE COURT gave answer that they "are of opinion that of the 2220 entries disregarded by the Excise officers in balancing the respondents' books on 8th and 9th December 1879, those which apply to spirits obtained by the operation of grogging were rightly disregarded, but that those entries which apply to spirits delivered by the Excise officers to the respondents as samples were not rightly disregarded, and direct the said Justices in Quarter Sessions accordingly."

DAVID CROLE, Solicitor of Inland Revenue—W. G. ROY, S.S.C.—Agents.

JOHN LINN, Pursuer.—*Rhind—Millie.*
G. D. CASADINOS, Defender.—*Kennedy.*

No. 153.

June 24, 1881.

Linn v.
Casadinos.

Jurisdiction—Forum of person who has no domicile.—A travelling merchant informed a person in Scarborough, from whom he ordered goods, that he had no fixed residence, but travelled, in pursuance of his business, all over the United Kingdom. The goods were delivered, some in England, some in Scotland. The purchaser having failed to pay the purchase-money, the seller brought an action against him in Scotland, where he happened to be on business. He had not been forty days in Scotland when the summons was served. *Held* that, in the circumstances, the Scotch Courts had jurisdiction, the defender's forum being wherever he might chance to be for the time.

IN November 1880 John Linn, carver and gilder, Scarborough, raised an action against G. D. Casadinos, "picture-dealer, Edinburgh and Aberdeen," concluding for payment of £102, 9s., being the amount alleged to be due by him for picture frames, drawings, &c., supplied to him by the pursuer.

2^d DIVISION.
Ld. Curriehill.
I.

The pursuer stated,—(Cond. 1) "The defender is a travelling dealer going from town to town in the United Kingdom, and at the raising of the action was carrying on business in Edinburgh and Aberdeen, and not at Manchester as stated originally in his defences. It is believed and averred that he was at least forty days in Scotland previously, and was, on that ground (apart from others), subject to the jurisdiction of the Court of Session when the present action was raised and served."

The defender answered,—“Admitted that the pursuer is a carver and gilder in Scarborough, and that the defender is a dealer in pictures. Explained that the defender is erroneously designed in the summons as ‘picture-dealer in Edinburgh and Aberdeen.’ He is a domiciled Englishman, resident at Mr Tallent’s, North Road, Clayton, Manchester, to which address all business letters to him are sent. Till 20th October last he had a place of business at Scarborough, No. 36 Westborough. He has no office or place of business in Scotland. The contracts of sale and employment on which this action is raised were entered into, as explained below, in England. The defender was personally cited at Aberdeen on November 29, 1880, while there on a transient visit. Denied that the defender had been forty days in Scotland when the present action was served on him. No arrestments to found jurisdiction had been used against him, and, in these circumstances, he is not subject to the jurisdiction of the Court.”

The pursuer pleaded, *inter alia* ;—(2) The defender being a travelling merchant, representing himself to have no fixed residence, and having been personally cited in Scotland, is liable to the jurisdiction of its Courts. (4) In the whole circumstances of the case the defender is subject to the jurisdiction of the Court of Session, and decree against him should be pronounced as concluded for.

The defender pleaded ;—(1) The domicile of the defender, and the *locus contractus*, being in England, the Court of Session is not the competent or convenient forum for trial of the present action, and the action should therefore be dismissed, with expenses.

The Lord Ordinary allowed parties a proof before answer on the question of jurisdiction and on the merits.

Proof having been led, the Lord Ordinary (Lord Curriehill), on 25th May 1881, repelled the defender's plea of want of jurisdiction.*

* “NOTE.— . . . In these circumstances it appears to me to be hopeless for the defender to maintain that, owing to his non-residence in Scotland for forty

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The evidence on that question was summed up in the Lord Ordinary's note as follows:—“(1) That the defender, who is a Greek by birth, but has resided in Great Britain for fifteen years, came to Scarborough on 20th August 1880, and became tenant of business premises there, which he occupied till 23d October; (2) that in September and October, while still occupying these premises, he ordered from the pursuer the picture frames which form the subject of this action, viz., thirty-six in September and twelve in October; (3) that most of the frames were delivered to the defender in Scarborough, the remainder having been at his request forwarded to him by railway to Glasgow in the end of October or beginning of November; (4) that while the defender alleges in the record, and repeated in the witness-box, that his residence was, at the date of the action, at Mr Tallent's, North Road, Clayton, Manchester, he has failed to prove that statement by any evidence other than his own statement. He has not called any witnesses to prove that he ever resided in Manchester, or that they sent letters to him there as his headquarters. His name does not appear to be in any directory; and what is still more remarkable is the fact that although Mr Tallent's son is the defender's assistant in his business, and was examined by him as a witness at the proof, the defender carefully abstained from putting any question as to the alleged residence in Manchester; (5) that, on the other hand, it is proved by the evidence of the pursuer, and William Brown Serman, that when in Scarborough the defender gave out to both of these persons that he had no fixed abode, but travelled about the country on business, and that his address was the place wherever he happened to be for the time; (6) that the defender, after receiving the pursuer's frames, put pictures in them, and exposed them to sale by auction in various towns in the month of November 1880, and, *inter alia*, in Glasgow, Edinburgh, and Aberdeen, and that when he reached Aberdeen he had still in his possession nearly all of the said frames; (7) that he advertised the whole of said frames then in his possession for sale in Aberdeen by public auction, and that

days before citation, this Court has no jurisdiction to try the action. The defender is a foreigner by birth, not naturalised, and he has not, and is not proved to have ever had any known domicile, residence, or place of business, in any part of the United Kingdom. He is just a travelling merchant, and he goes to the pursuer in Scarborough and holds himself out as having no fixed place of abode, and indeed as having no house but the place where he may happen to be for the time. He then buys frames from the pursuer for the purpose of taking them about the country and selling them by auction along with the pictures which they are to hold; he gets some of them before he leaves Scarborough, and directs the rest to be sent to Scotland, and finally he takes the whole, or nearly the whole, to Aberdeen, where he is proceeding to sell them when this action for the price is raised against him. If not in Aberdeen, I fail to see where the pursuer could have sued him, unless at some other place of sale where he might have the chance to find him; and it would be most unjust to hold that, in circumstances like the present, the Courts of Scotland have no jurisdiction over the defender in respect he had not resided in Scotland for forty days before citation. If authority be required it will be found in Ersk. (I. ii. sec. 16), who says,—‘and if, on the other hand, one be engaged in such a way of life as to have no fixed residence, *ex gr.* a soldier or a travelling merchant, a personal citation against him is sufficient to establish jurisdiction over him in the Judge of that territory where he was cited.’—*Lees*, 12th November 1709, M. 4791. See also the case *M'Niven*, 14th February 1834, 12 Sh. 453. That doctrine is consistent alike with common justice and with common sense, and I am therefore of opinion that the plea of ‘*forum non competens*’ must be repelled, and I can see no ground for holding this Court to be ‘*forum non conveniens*.’”

while in Aberdeen, in connection with said sale, the summons in this action was personally served upon him; and (8) that at the date of that citation he had not resided forty days in Scotland."

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The case was then ordered to the roll that parties might be heard on the merits, and on 28th May the Lord Ordinary repelled the defences, and decerned against the defender for £98.

The defender reclaimed, and argued;—There were only three ways in which jurisdiction could be founded—*ratione domicilii*, *rei sitæ*, and *loci contractus*. None of these elements was present in this case. Under the provisions of the Judicature Act (sec. 175) and relative rules, the defender might have been sued in England, where the contract was made,¹ and not only in Aberdeen, as stated by the Lord Ordinary. This case was not ruled by that of *Lees v. Parlane*, 1709, M. 4791, cited by the Lord Ordinary, as that was decided on the ground that every soldier had a necessary domicile—*i.e.*, the headquarters of his regiment. In the case of *M'Niven*, also cited by the Lord Ordinary, the defender was sued in the place where the contract was entered into.²

Counsel for the pursuer were not called on.

LORD JUSTICE-CLERK.—We have had a long argument on the jurisdiction, but, in the particular circumstances, I have no doubt upon the matter. I do not think that the facts even raise the general question, for I agree with the Lord Ordinary, and indeed it is hardly denied, that when these goods were ordered at Scarborough the defender told the pursuer that he had no fixed residence, and that his residence was just where he might be for the time. The defender did not say then, and he has not now proved, that he had any residence in Manchester. In these circumstances, where was the creditor to look for his money? He simply had to follow his debtor; he could do nothing else. I am of opinion that where such a debtor, one who has no domicile and no fixed residence, resides for the time, there is his forum. There is no mention on record about the law of England; but even if it had been pleaded, I do not think it would have applied. The creditor was obliged to come to the temporary residence of his debtor to get his money. On these grounds I think the objection to jurisdiction should be repelled.

(On the merits his Lordship concurred with the Lord Ordinary.)

LORD YOUNG and LORD CRAIGHILL concurred.

THE COURT adhered.

WILLIAM SPINK, S.S.C.—JOHN MACPHERSON, W.S.—Agents.

ROBERT SCOTT, Pursuer (Respondent).—*R. V. Campbell—Baxter*.

No. 154.

AGNES SCOTT, Defender (Appellant).—*Mackintosh—Dickson*.

June 28, 1881.

Scott v. Scott.

Property—River—Nuisance—Interdict.—Where A feued part of his ground for the erection of dwelling-houses, and gave the feuars right to send sewage through a drain passing through the remainder of his ground into an ordinary field drain which communicated with an open ditch on an adjoining property belonging to B, *held* that B was entitled to interdict against A discharging the sewage into the said ditch.

¹ Westlake's Private International Law, p. 206.

² *Kermick v. Watson*, July 7, 1871, 9 Macph. 984, 43 Scot. Jur. 542.

No. 154. ROBERT SCOTT, the pursuer of this action, was proprietor of parts of the lands of Wester Daldowie and Boghall, situated on the south side of the turnpike road from Glasgow to Hamilton.

June 28, 1881.
Scott v. Scott.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

Mrs Agnes Scott, the defender, was proprietrix of certain other parts of the same lands, situated on the opposite or north side of the turnpike road, and also on the south side of the said road adjacent to and to the east of the pursuer's property.

The defender had laid out her ground on the north side of the road for feuing on a general plan, and in connection therewith had formed a common drain, to the use of which her feuars had right by their titles. This drain was led across the turnpike road, and into the defender's ground on the south side of the road, where it discharged into an existing closed field drain, also on her ground, but the continuation of which was an open ditch, partly on the pursuer's property and partly the march between his property and adjacent property belonging to Wallace's trustees.

In this open ditch there was no continuous run of water. It was made for the purpose of draining the adjoining fields, but contained water sufficient for watering cattle, for which purpose it had been used by the pursuer and his tenants till a period within ten years of the defender's operations complained of. Its disuse was accounted for by the introduction of a gravitation water supply from the Airdrie water-works, but there was evidence to the effect that a certain amount of pollution, though not from water-closet sewage, was allowed to enter the ditch within the pursuer's own property.

The natural lie of the ground did not lead the surface water of the defender's property on the north side of the turnpike road in the line of the above-mentioned drain and ditch. A considerable cutting had to be made in order to carry the drain in question under the road into the defender's ground on the south side.

The pursuer, complaining that a nuisance would be occasioned to him, raised this action in the Sheriff Court at Airdrie to interdict the defender discharging sewage from any houses erected on her ground into any drain or drains situated wholly or partly on his property.

Notwithstanding interim interdict being granted the defender completed her operations, after which the water in the ditch within the pursuer's ground was sensibly polluted with water-closet sewage, and rendered unfit for any use whatever.

In defence the defender pleaded;—(2) Said ditch, which is the natural receptacle and vehicle of the defender's sewage, has from time immemorial been used by the pursuer and others as a common sewer. (3) Any sewage from the defender's lands would not appreciably affect the ditch or change its character.

The Sheriff-substitute (Mair) after proof, the import of which is given above, and in the note to the Sheriff-substitute's interlocutor, declared the interim interdict formerly granted perpetual.*

* "NOTE.— . . . The question therefore arises whether the defender is entitled to discharge the sewage from the houses erected or to be erected on her lands into or through any drain wholly or partly on the pursuer's lands. I have no difficulty in answering this question in the negative, and in doing so I may state at once that I can see no distinction in principle between this case and the cases of *Montgomery and Fleming v. Findlay*, 9th July 1853, 15 D. 853, and *The Caledonian Railway Company v. Baird*, 14th June 1876, 3 Rettie, 839. The rubric in the first of these cases is as follows:—'A proprietor erected upon his lands dwelling-houses, into which he introduced water by pipes from a water company's works, and by means of drains conveyed the sewage water into a streamlet which passed through a subjacent property. Held that whatever right the proprietor

The defender appealed to the Court of Session.¹

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After hearing counsel, the Court continued the case for some weeks to allow of an arrangement being come to between the parties, but this having failed, it was again put to the roll.

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LORD YOUNG.—We have allowed this case to stand over, not from any doubt as to the facts, or the law applicable to them, but to enable the parties to effect an arrangement for the drainage of their properties which would be to their common advantage, and of which there seemed to be a reasonable prospect. The attempts which have been made have failed, and we must now decide the case as it is presented to us.

The facts are within narrow compass. The appellant feued certain portions of her property for building, and four dwelling-houses have been erected on them. To accommodate the feuers she has constructed on her property, outside the limits of the feu, a common sewer or drain, into which they are authorised and invited by their titles to convey the sewage from their houses. This sewer or drain is made to open and discharge itself into an open ditch or water-run, running for some distance between the properties of the appellant and respondent, and there-

might have to lead into the streamlet the ordinary surface water arising from his lands, he had no right to discharge therein sewage water, and interdict granted against his discharging or permitting to be discharged such sewage or waste water upon the lands of the subjacent proprietor.'

"It is not and cannot be disputed in the present case that the sewage from the houses erected and to be erected on the defender's lands will be discharged into drains wholly or partly on the pursuer's lands, but it was attempted to be proved by the defender that these drains were in themselves common sewers, and that the pursuer would not suffer in any way by the sewage from her lands being discharged into them; and it was contended for her that she was so entitled to discharge the sewage, she being in the position of an upper, and the pursuer being in the position of a lower, heritor. . . .

"I am not satisfied, therefore, that the pursuer is in the position of a lower heritor to the defender, at least so far as the houses already erected on the defender's lands are concerned. If the pursuer is not in that position the defender has no rights whatever affecting the pursuer's lands.

"But even assuming that the pursuer is in the position of a lower heritor to the defender he is only bound to receive the surface water from the lands of the latter; if, however, it had been proved that the drains, wholly or partly on the pursuer's lands, were, in fact, common sewers, he would probably not have been entitled to complain of the defender making use of them in the same way. So far, however, from that being proved, I am of opinion that the contrary has been established. The only evidence led by the defender was, that the water in the drains on the pursuer's lands was occasionally polluted in consequence of soap suds and dirty water having been sent into them from some miners' houses and the Boghall farm-house, all situated on the north side of the turnpike road. No water-closet sewage, however, was discharged into them. The evidence for the pursuer, on the other hand, shews clearly that the water in these drains or ditches on his lands was used by man and beast for drinking purposes till a period within the last ten years. Even although the water in these ditches or drains was occasionally dirty or polluted the defender was not entitled to make it worse, and there can be no doubt that the discharge of sewage from inhabited houses would have this effect. That the water in these ditches or drains is now unfit for primary purposes, and is a nuisance, in consequence of the defender's operations, has, in my opinion, been established."

¹ *Authorities*.—Cases referred to by the Sheriff-substitute, and Attorney-General v. Colney Hatch Lunatic Asylum, Dec. 22, 1868, L. R., 4 Ch. App., 146.

No. 154. after between the property of the respondent and Wallace's trustees, who are not here represented. It is not disputed, or at least is, in our opinion, not doubtful, that the respondent has a proprietary interest in this ditch or water-run, and is entitled to the use of it for watering his cattle, and that it has, in fact, been so used by him and his predecessors in title. The appellant's feuars have used, and are now using, the common sewer for the purpose for which it was intended, and, in fact, constructed by the appellant, and the consequence is that the sewage from their houses is thereby discharged into the ditch or water-run, which, we agree with the Sheriff in thinking, is thereby polluted to such an extent as to render the water in it unfit for use as formerly, and to create a nuisance. The appellant is not responsible for what is done by the feuars within their own property, or even on her's, without her aid or authority. But, having given them permission to discharge their sewage on to her property outside their feus, she is not entitled to convey it therefrom into the water-run in question to the nuisance of her neighbour, the respondent, and, having done so, we are of opinion that the respondent's complaint is well founded, and that he is entitled to have the continuance of the nuisance restrained by interdict. It is, we think, immaterial from whence the sewage reached the appellant's property. She voluntarily, and apparently by contract, receives it there, and from thence, by a work of her own construction, discharges it, illegally as we think, into the water-run in which the respondent is interested. The findings in fact in the Sheriff's interlocutor seem to us to be supported by the evidence, and the interdict thereby granted is within the respondent's right, for, as already observed, the appellant is not entitled to create a nuisance to the respondent by discharging sewage from her lands where-soever the original source of it may be.

LORD CRAIGHILL.—This question appears to me to be foreclosed by the decisions of the Court in the cases of *Montgomery and Fleming v. Findlay*, 9th July 1853, 15 D., 853; and *The Caledonian Railway Company v. Baird & Co.*, 14th June 1876, 3 Rettie, 839. In the former the facts were that the proprietor had erected upon his lands dwelling-houses, into which he introduced water-pipes from the water company's works, and by means of the drains conveyed sewage water into a streamlet which passed through a subjacent property; and on these facts the Court held that whatever right the proprietor might have to lead into the streamlet the ordinary surface water arising from his lands, he had no right to discharge drainage and sewage water; and interdict against such discharge was consequently granted. The only distinction attempted to be made betwixt that case and the present was, that in the former the place into which the sewage was discharged was a streamlet, whereas here, according to the contention of the appellant, the place into which the drainage is to be discharged is only a dry ditch. Such a distinction appears to me to be no warrant for a difference in the judgment that ought to be pronounced. If anything, the present case appears to me to be worse than the case with which the Court had to deal in *Montgomery and Fleming v. Findlay*. The nuisance created by the discharge of sewage into a dry ditch must, as regards the lands of the respondent, be even a greater nuisance than it would have been if the discharge had been made into a streamlet, greater or less, by which, in whole or in part, the sewage constituting the nuisance would have been carried sooner or later away from the respondent's property. I entertain no doubt of the applicability of the cases referred to as

precedents on the present occasion, and therefore concur in thinking that the No. 154 interlocutor appealed against ought to be affirmed.

June 28, 1881.
Scott v. Scott.

The LORD JUSTICE-CLERK concurred.

THE COURT refused the appeal.

ALEXANDER WYLIE, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

JAMES MURDOCH, Pursuer (Respondent).—*Keir*.

No. 155.

SAMUEL WALLACE, Defender (Appellant).—*Macdonald—Jameson*.

June 28, 1881.
Murdoch v. Wallace.

River—Burn—Alteration of course—Mora.—The tenant of a farm at the commencement of a nineteen years lease diverted for drainage purposes the water of a small burn which followed a circuitous course through his farm into a straight channel which joined the original watercourse at right angles to it just before it entered B, an adjoining property. The tenant raised an embankment opposite the junction to prevent the water overflowing upon the lower part of his farm. The effect of his operations was, in time of flood, to throw gravel on two acres of pasture ground on B.

The proprietor of B objected to the operations when executed, but took no proceedings until the last year of the lease, when he raised an action concluding to have the tenant ordained to restore the burn to its former course, and for damages. *Held* that, in the circumstances, the defender was entitled to absolvitor.

SAMUEL WALLACE became tenant of the farm of Nether Monybuie, in 2^d DIVISION. the stewartry of Kirkcudbright, at the term of Whitsunday 1861, under Sheriff of Dumfriesshire. a nineteen years' lease. The farm was bounded on the south-east and partly on the south by the lands of Drumwhirn, the property of James Murdoch, Esq. Part of these lands were on a lower level than Wallace's farm. M.

When Wallace entered on the farm the Monybuie Burn ran in a circuitous course through part of his land; it then crossed into the lands of Drumwhirn, where it continued its windings. The natural drainage of the upper part of Drumwhirn flowed into this burn before it reached Monybuie.

In 1862, Wallace, finding that, owing to its windings, the bed of the stream was not large enough to carry off the water in times of flood, and therefore flooded parts of his lands, constructed an artificial cut from a point on his own lands, and carried it in a straight line to the place where the stream crossed the march to Drumwhirn. The new channel joined the original watercourse at right angles to it, and Wallace constructed on the opposite side of the stream, in his own lands, an embankment to prevent the water overflowing on to his meadows.

After these operations were carried out Wallace wrote to Mr Murdoch in these terms:—"May 6, 1862. Sir,—I had a message from you through John Henderson last night that I cannot well understand, concerning the main drain that I made, which comes out of Minnybuie into your land. I made an offer to you through Henderson some time ago to continue that cut down through your property, so far as would have prevented the sanding up of your land, which you refused. But I still wish to do so, and trust you will now grant me permission; it will be a great advantage to your property, and likewise to Monybuie."

To this the following answer was returned by Mr Murdoch's factor:—"17th June 1862. Sir,—I saw Mr Murdoch of Drumwhirn yesterday, whose lands have been materially injured by some of your late operations, and he is wishful that the damages he has sustained should be settled, and he desires me to say that he is ready to submit their amount to

No. 155. arbiters mutually chosen, or to an oversman to be named by them in case they disagree in opinion."

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Mr Wallace refused to enter into an arbitration, and on 30th June 1862 Mr Murdoch intimated to him by letter that unless he consented to a reference an action for damages would be raised against him. On 30th July 1862 Mr Murdoch intimated by letter that he had had the damage done to his land valued, and had put the matter into the hands of his man of business.

No action was at that time raised, and no further communications about the matter took place between the parties till 11th September 1877, when the pursuer wrote a letter to the defender about it.

In December 1879, when Wallace's lease was coming to an end, Mr Murdoch presented a petition against Wallace in the Sheriff Court at Kirkcudbright, praying the Court—" *First*, to interdict the defender, and all others having his authority, from interfering with the channel of the original burn or watercourse running near to the march fence between the said lands of Nether Minnybuie and Drumwhirn, and near to where said burn or watercourse enters the said lands of Drumwhirn at the point C, as shewn on the sketch herewith produced and referred to. *Second*, to ordain the defender forthwith to remove or fill up a new burn or watercourse made near to said original burn or watercourse, and nearer to the said march fence, whereby the water is diverted from the channel of the original burn or watercourse, and also to remove an embankment made by him at the end of the said new burn or watercourse at the said point C on said sketch where the same enters the said lands of Drumwhirn, and to clear out the said original channel, the said new burn or watercourse and embankment having been improperly and illegally made by the defender in or about the beginning of the year 1862; and failing his doing so within eight days, to ordain the same to be done at the sight of a person to be appointed by the Court, and to ordain the defender to pay the expenses thereby incurred. *Third*, to grant decree against the defender, ordaining him to pay to the pursuer the sum of £137, or such sum as may be found due, as the injury and damage done to the lands of Drumwhirn, the property of the pursuer, by the overflow of water and sand upon the said lands by in consequence of the said improper and illegal operations of the defender."

The defender pleaded, *inter alia*;—3. The pursuer is barred by acquiescence and *mora* from insisting in the present action. 4. Interdict ought to be refused, in respect that the operations complained of having been completed and in use for seventeen years, an action of interdict is inappropriate and incompetent. 5. The whole prayer of the petition ought to be refused, with expenses, in respect (1) that the operations complained of have been carried out on lands not belonging to the pursuer; (2) that the said operations have been carried out by the defender in the legitimate exercise of his own and his landlord's rights, for the agricultural improvement of his farm, and not *in emulationem vicini*; (3) that the natural outfall of the water on to the pursuer's lands has not been altered, and the defender is entitled to send down to the lands of the pursuer, as inferior proprietor, all natural surface water set free in the course of legitimate agricultural improvements.

A proof was led.*

* The nature of the defender's operations may be gathered from the evidence of the following witnesses:—

" ROBERT WAUGH, shepherd, Drumquhurn, a witness for the pursuer, deponed— I am about sixty years of age, and have been here as shepherd about fourteen years.

On 29th January the Sheriff-substitute (Nicholson) pronounced the No. 155. following interlocutor:—"Finds that the Minnybuie burn, which flows

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I have known Minnybuie and Drumquhirn for more than forty years. The boundary between them in my first recollection was a weat bit ruckle dyke, but it's made a new dyke since. There was a burn running between the two lands. I remember the channel being changed, but not the year. It was changed by defender. Before that change was made we used to have hay on the Drumquhirn side. I mind our having some years eight, some years ten ricks. After the channel was changed there was no more hay mown there, because it got all spoiled with glaur and stones. Each of these ricks of hay would be worth about 10s. I suppose. There was undoubtedly a loss of hay there every year to the amount of about £4. As shepherd on Drumquhirn I have to keep the sheep from feeding there, because the sand mixed with the grass rots them. About two acres are totally spoiled in that way, at least I would rather want it as hae't. The cows pasture on the remainder. These two acres yielded capital good hay formerly. I wasn't here when the present march-dyke was made. The water of the burn flows through that dyke in a flood on to Drumquhirn, and even when it's no great flood. The embankment raised by the defender is the main thing that spoils our side. If it hadn't been made the overflow would go on Minnybuie side. *Cross-examined.*—I remember Macmillan being tenant of Minnybuie; defender succeeded him. The Drumquhirn land was sometimes flooded then where there was a big flood. The hay was some years got off without any flooding. There was no embankment in Macmillan's time. If defender hadn't made the embankment his lower meadow would sometimes get flooded. If that embankment were not there a new channel cut from that point on the Drumquhirn side would prevent flooding, but the embankment sends the water in the direction of the Drumquhirn meadow. The old burn course didn't throw the shingle on to Drumquhirn that I can recollect. I saw the new channel soon after it was made. It was in a good state, six or eight feet wide, and three or four feet deep, but it soon got filled with sand. If it had been kept aye clear the burn wouldn't have spoiled the land above the bridge so much. The new channel was wider than the old one.

"ALEXANDER M'MICHAEL, land-surveyor, Castle-Douglas, a witness for the pursuer, deponed, In June 1879 I visited the lands of Drumquhirn. The new channel was silted up three-fourths with gravel. I also examined the embankment shewn on the plan at C—(on plan prepared by this witness). The old water slap was at C, and the burn coming in its old course flowed straight on into Drumquhirn lands at that point. The water coming down the new channel drives against the embankment, and then passes into Drumquhirn. It does not flow so directly into Drumquhirn as it did before. I examined the march-dyke and the lands on Drumquhirn side from B to C. The channel being so largely filled up with gravel is insufficient to hold the whole water of the burn, which in case of flood flows through the march-dyke on to Drumquhirn. I found land on the Drumquhirn side to the extent of 2 acres 1 rood and 20 poles injured by the flooding and gravel. . . . I estimated the yearly loss sustained from these causes by the pursuer, in company with Mr M'Cormick, at £1, 10s. per acre. We estimated the damage caused by the risk of injury to the pursuer's sheep from the grass growing on these lands at £5 a-year. In my opinion that damage will increase so long as the burn is allowed to run in the channel in its present state. *Cross-examined.*—The cause of the overflow on the Drumquhirn lands is the want of a sufficient outlet for the water from the present state of the channel, which is worse than if there were none. If the new channel had been kept clear I think it would have sufficed for the purpose for which it was made. . . . The old channel of the burn on the Drumquhirn side below C has been filled up with the gravel from the Minnybuie side. The embankment tended to send the gravel on to that side.

"JAMES BARBOUR, engineer, Dumfries, a witness for defender, deponed,—I examined that ground about the end of last year. The channel of the burn made by defender is marked red, A and B (on a plan prepared by the witness, B being the lower end). It extends about 300 yards. The average width is

No. 155. partly through the defender's and partly through the pursuer's lands, had frequently done damage by overflowing on both sides, for want of a suffi-

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ten feet. It appeared to me a channel that would be sufficient to carry away all the ordinary flow of the burn. I examined the old channel. It was to a large extent silted up. I examined the Drumquhurn lands from the point where the burn enters from the new channel down to the bridge. The channel of the burn on that side is very crooked, and about half the breadth of the upper channel. The mouth of that lower portion of the burn was silted up, and its channel would, in my opinion, be too small to carry away the water of the burn in case of flood. I examined the upper portion of the burn on the Drumquhurn side" (the plan shewed that above the point A, the opening of the new channel, the burn flowed partly over the lands of Drumquhurn), "and found that above the point A there are steep banks without any protection, from which shingle is carried down into the burn, and deposited on the lands between A and B, which are nearly level. The quantity of shingle is considerably increased by drainage on both sides, the under strata being in a great measure shingle. The old channel on the Minnybuie side could not have been sufficient to carry away that shingle in times of flood. The want of sufficient outlet for the water from the new channel is one of the causes of the deposit of shingle on the Drumquhurn side. The shingle will always be deposited more or less by floods on level ground, but the curves and windings of the channel on the Drumquhurn side tend to increase that deposit. There is a small stream marked C on the Drumquhurn side. The effect of the new channel is to carry away the water of that stream, or rather, it has tended to prevent the flooding of that stream. . . . *Cross-examined.*—I examined the lands on the Drumquhurn side, and found a deposit of gravel at the point B. It came from the higher reaches of the burn. I suppose that deposit would injure the Drumquhurn land. I can form no estimate of the damage.

"DEFENDER deponed,—On my entry I carried on extensive drainage operations on the farm. A considerable portion of that drainage goes into the Minnybuie burn. The land was very wet on both sides of the part where the new channel runs when I entered the farm. The old channel of the burn was not fit to carry away the flow of water into it. I could not get the use of that land unless the channel were deepened or a new one made. I had meetings with the pursuer, and with one of the Messrs Dickson" (the proprietors of the defender's farm), "in regard to the carrying away of the water below the bridge. They and I agreed to cut a new channel for the burn below the bridge. John Henderson acted at that time for the Messrs Dickson. He was the medium of communication between them and the pursuer. He is now dead. After the new channel below the bridge was made I made the new one on my own side above that. I believe that was done in 1862. I understood from Henderson that it was expected each proprietor would continue the making of the channel on his own side above the bridge. The pursuer was aware that I made the new channel on my side above the bridge. He sent Henderson to me to complain of it, and of the shingle being sent on his land after flood. . . . At that time I offered to cart away the shingle from pursuer's side, and I intimated that by writing to him. I also offered to cut the channel on the Drumquhurn side at my own expense when the gravel was removed. That was to prevent the possibility of injury to the pursuer from my operations, and also to diminish injury on my own side. The pursuer made no answer to that offer, and took no notice of it. The new channel silted up after a time, and I got it cleaned out frequently. I ultimately found that it was no use cleaning it out till a new outlet was made for it below the point B on the plan. If the new channel had been kept clear it would have been of great service to both parties. It was a much better channel than the old one. There is an embankment at B, which was made by me. There was high ground there before that embankment was made. The object of making that embankment was to prevent the outlet of the stream from being filled up by the silting of the sand at that point, and to prevent the flooding of the lower meadow land."

cient channel and outfall : Finds that shortly after the defender's entry, No. 155. meetings took place between him and one of his landlords, Messrs June 28, 1881. Dickson, and the pursuer, when it was agreed that a new channel for the burn should be cut below the bridge, where the high road crosses, for the purpose of securing a better outfall, and that this was done at the joint expense of the parties : Finds that it was part of this agreement that the pursuer should improve the channel of the burn from the bridge upwards to the point where it entered his land ; and the defender do the same from that point upwards to the point where it diverged into his meadow : Finds that the defender altered the course of the burn within his own lands, by cutting a new and straight channel for it, of sufficient breadth and depth, for about 300 yards, so that instead of winding tortuously in a narrow sheugh through his meadow, as it had formerly done, it flowed straight on his own side of the march-dyke, to that point where it entered the pursuer's land : Finds that at that point the defender erected an embankment to prevent the stream from overflowing into his own lower meadow, and diverge it at a slight angle into its old channel on the pursuer's side : Finds that the pursuer did nothing to improve the channel of the burn from that point to the bridge ; that he made no reply to an offer by the defender to do it for him ; and that to a letter on the subject from Mr George Dickson, dated 30th July 1862, he replied that he had had the damage done to his land by the defender valued, and had put the matter into the hands of his man of business : Finds that no proceedings were taken by or for the pursuer to vindicate his claim, and that no further communication on the subject was made by him to the defender till 11th September 1877 : Finds in law that the pursuer is barred by personal exceptions and *mora* from insisting in his present claim : Sustains the defender's 3d, 4th, 5th, 6th, 7th, and 8th pleas, and assolizies him from the conclusions of the action."

On appeal, the Sheriff (Macpherson), on 7th March 1881, " Finds that the Minnybuie burn, after flowing through the defender's farm, flowed through the lands of the pursuer, passing across the march between said farm and the pursuer's lands in a direction, for some distance on each side of the said march, nearly at right angles thereto, and flowed through the pursuer's lands till it reached a bridge some 200 or 300 yards lower down, after which it became the march between the two estates : Finds that in the early part of 1862 the defender altered the course of the burn, within the lands of which he is tenant, by cutting a new and straight channel for it for about 300 yards, so that, instead of winding through meadow land, it flowed close to a march-dyke between the estates, to the point where it previously entered the pursuer's lands, and as near thereto as the march-dyke permitted : Finds that at that point the defender erected an embankment to prevent the stream from overflowing the lower meadow of his own farm, and to divert it at a slight angle into its old channel on the pursuer's side : Finds that by reason of the defender's said operations the pursuer's land, near and adjacent to the point where the burn enters it, has suffered damage, mainly from having cast upon it gravel and sand brought down the new cut above described : Finds that the defender is liable to the pursuer for the said damage ; assesses the same at the sum of £25 : Therefore decerns against the defender for payment to the pursuer of the said sum of £25 : *Quoad ultra* refuses the prayer of the petition."

The defender appealed to the Court of Session.

Argued for the defender ;—The operations carried on by the defender were proper and reasonable improvements on his own lands, and were within

No. 155. his legal rights.¹ They were not made in disregard of the lower heritor's rights, as he had offered to continue the cut at his own expense through the pursuer's lands, which would have obviated all the damage complained of. As a general rule proprietors were entitled to straighten the course of a meandering burn if they delivered it to the lower heritors at the same place as formerly, and did not decrease the volume of the water.² The pursuer was barred by his own delay from now insisting in the action, as he had allowed these operations to go unchallenged from 1862 to 1877, at the earliest. Evidence had been lost to the defender owing to this *mora*.

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Argued for the pursuer;—The defender by his operations, especially by the embankment, had done damage to the pursuer's lands by deflecting the stream into his lands at an unnatural angle, instead of allowing it to flow into it in a straight line, as it did formerly. Though the embankment was erected on the defender's land it was *ex adverso* of the pursuer's, which had been held to be an illegal act. The pursuer was not entitled to put up an embankment which would have the effect of damaging the lands of a lower heritor.³ The defender had not suffered any damage in loss of evidence by the delay on the part of the pursuer.

LORD JUSTICE-CLERK.—In this case, which has been very ably stated on both sides, I cannot say that I have felt much difficulty. It is an action for alleged damage which was not challenged when it first began, but has been allowed to continue for twenty years, and now the claim is made against an outgoing tenant. I never saw an action raised in such circumstances before. Of the two parties to the cause the pursuer is the proprietor of certain lands, and the defender tenant of certain other lands on either side of one of these brawling streams so common in Highland districts. Of course this burn overflowed its banks during the winter floods, and did damage to the bordering lands. This burn is sometimes the boundary between the pursuer's and defender's lands, and sometimes flows exclusively in one of them. Through the ground occupied by the defender it flowed in a circuitous channel. Below that it entered the lands of the pursuer, and there, again, begins to meander in an eccentric line. The defender, finding that the land would be bettered if an open cast was made to carry the burn in a straight line through his farm, performed the necessary operation, and this, I assume, he did without entering into any agreement with the pursuer. Having done that he built an embankment on his own side of the stream which would have undoubtedly the effect of altering the current. He then proposed to the pursuer to make a similar alteration in the course of the burn as it ran through his ground, and actually proposed to make the alteration at his own expense. He evidently had no intention or design to injure his neighbour. The pursuer, however, refused to make any change, and wrote one or two letters to the defender threatening damages. After writing those letters he thought better of it, and, from 1862 to 1877, at soonest, he never made any complaint. He now raises an action concluding for all manner of things, interdict and damages amongst others. I am of opinion that the action is excluded by the

¹ Campbell v. Bryson, Dec. 16, 1864, 3 Macph. 254, 37 Scot. Jur. 121.

² Ersk. Inst. ii. 9, 2.

³ Jackson v. Marshall, July 4, 1872, 10 Macph. 913, 44 Scot. 506; Bell's Prin. 971; Menzies v. Earl of Breadalbane, July 4, 1828, 3 W. and S., 235.

circumstances, and I do not think that the case raises any general or abstract principle of law. No. 155.

So long as an agriculturist is merely performing operations on his own side of a stream for the benefit of his own farm it will require a very substantial amount of damage to be made out before the law will interfere with him. Now, in this case I am quite satisfied that there was not really any substantial damage done. On the contrary, I am rather inclined to think that what was done was beneficial and not injurious to the pursuer.

I might have felt some difficulty on the subject of the embankment if the case had been raised *de recenti*. The case of *Jackson v. Marshall* is very close to this one, though there the damage was greater. Though I concurred in the judgment pronounced in that case I thought it very narrow, and further reflection has induced me to doubt whether there we allowed sufficient modification of the general rule, and I should not be sorry to see the general rule we there laid down receive some modification. It is, however, not necessary to say anything about that just now, because I am of opinion that the defender was, in doing what he did, improving both his own and the pursuer's agriculture, and that if any damage was done it was so inconsiderable as not to be worth mentioning. The very length of time that elapsed before this action was raised proves that the damage was not substantial. On the whole case, I think the Sheriff's interlocutor should be altered, and the defender assoilzied.

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LORD YOUNG.—I entirely concur with your Lordship, and that without reference to the alleged *mora*, which is a mere topic in this or any other case, though it may be very important to their decision. I am prepared to agree with your Lordship in giving effect to two and a half lines of the defender's fifth plea in law, and they are more important than all the rest put together. They are these,—“that the said operations have been carried out by the defender in the legitimate exercise of his own and his landlord's rights, for the agricultural improvement of his farm, and not *in æmulationem vicini*.” I think that is so, and that is also the opinion of the Sheriff-substitute; and the importance of the *mora* is to aid us in coming to that conclusion. The tenant made this improvement nearly twenty years ago, and it is hard to say now that he was not at the time he made it acting in a legitimate course of farm cultivation. I do not think that cases of riparian proprietors on rivers need perplex us, as this is not a river; it is one of those little streams which flow down the hills, and it is not until several of them are collected together that they are called even a burn. The stream wanders about in a circuitous course in passing through the defender's land, and to say that he is not entitled to straighten its course so as to make it more available is extravagant. Such a thing is done in every part of the country, and agriculture would be very different to what it is if it were not. All that the defender did twenty years ago was done for a quite legitimate purpose within his own farm. The pursuer, however, says that by building the embankment the defender is sending down to him the water which would otherwise spread itself over his meadow, and that he is not entitled to do so. But I think there is nothing more legitimate. He is not interfering with the alveus by that embankment, he is simply protecting his own land from inundation, and thereby making his land more valuable. I think that the law is in accordance with the familiar practice of the country, viz., that an upper heritor is entitled to do anything to make a stream passing through his land as beneficial

No. 155. and also as little hurtful as possible to his own property ; and if he sends down all the water he gets in as pure a condition as he got it to the lower heritor the latter has nothing to complain of. On the ground pleaded by the defender in his fifth plea I think he is entitled to be assoilzied.

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LORD CRAIGHILL.—I concur, and have very little to add. I grant that as far as drainage operations are concerned a lower heritor is not entitled to complain of what the upper heritor does, but I am not prepared to say that if the course of a burn is for any reason changed, and if injury is thereby done to the lower heritor, there will not be a good claim for damages against what may in some views be a wrong. It does not follow from the general rule that an upper heritor may do anything he pleases irrespective of the interests of a lower. If substantial damage is done I should be disposed to give a measure of redress, such as is given by the Sheriff, but, looking at the circumstances, I am driven to conclude that the operations done were such as the defender could reasonably carry through. The silence of the pursuer in reference to the damage for so long a time satisfies me that he would have been more wise if he had never made any complaint, and now that he has made one that we cannot sustain it.

THE COURT pronounced the following interlocutor:—"The Lords, having heard counsel for the parties on the appeal, find that the respondent (pursuer) has failed to establish that the operations complained of were to his injury, or beyond the legitimate rights of the appellant (defender): Therefore sustain the appeal, recall the judgment of the Sheriff complained of, assoilzie the appellant from the conclusions of the action, and decern."

DAVID MILNE, S.S.C.—THOMSON, DICKSON, & SHAW, W.S.—Agents.

No. 156. DUKE OF ROXBURGHE, Petitioner.—*D.-F. Kinnear—Mure.*
A. J. RUSSELL, C.S. (Lady Charlotte I. Russell's Curator *ad litem*),
Respondent.—*J. P. B. Robertson—Low.*

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Duke of Rox-
burghe v.
Russell.

Entail—Disentail—Provisions to children under Aberdeen Act where subjects disentailed and new entail executed.—An heir of entail, who in his marriage-contract had burdened the estate to the extent of three years' free rents as at the date of his death, with provisions to his younger children, obtained from them discharges therefor in their respective marriage-contracts in consideration of provisions therein made, amounting together to £90,000, which he secured on the estate. Subsequently he disentailed his estate, and executed a new entail embracing additional lands, but subject to debts which reduced the free rental below that of the original estate. In the deed he declared that the whole estates should be subject to the real burden of the provisions in his own contract of marriage in favour of his younger children. By his settlement he appointed two of the younger children to the surplus above £90,000.

In a question between the next heir of entail and the younger children, held (1) that though the younger children had granted discharges of the provisions in their father's contract of marriage their father had effectually released them therefrom ; and (2) (in conformity with *Irving v. Irving*, 9 Macph. 539) that the provisions were to be measured by the free rental of the original estate as if it had not been disentailed at the date of their father's death.

1ST DIVISION. THE DUKE OF ROXBURGHE, the petitioner, was heir of entail in possession of the Roxburghe estates under a deed of entail executed by his father, the late Duke, dated in 1870. He succeeded on his father's death on 23d April 1879, and was duly infeft in the said estates.

Lord Fraser.
B.

By his antenuptial contract of marriage, dated in 1836, the petitioner's father, the late Duke, in exercise of the powers conferred upon him by the Aberdeen Act, bound himself, and the succeeding heirs of entail in the lands above mentioned, "to make payment out of the rents or proceeds of the said lands and estates of the provisions following to the child or children to be procreated of the said intended marriage, . . . viz., to one such child one year's free rent or value of the whole of the said entailed lands and estates, to two children, two years' free rent or value of the said whole lands and estates, and to three or more children three years' free rent or value of the foresaid whole lands and estates," as the amount of the free rent should be ascertained at the date of his death; "and declaring also that the said provisions shall be divisible among the said children, if more than one, and the representatives or assignees of those who shall predecease, claiming as aforesaid, in such proportions as the said noble Duke shall appoint by a writing under his hand at any time of his life, and, failing such appointment, the same shall be divided among such children and their representatives or assignees of children equally."

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Besides the petitioner, the said heir of entail, there were three younger children born of the marriage, a son and two daughters.

In 1857 Lady Susan Harriet Innes Ker, the elder daughter, was married. By her antenuptial marriage-contract the Duke, her father, became bound to pay to the marriage-contract trustees £25,000 in name of tocher at the first term after his death. Of this the daughter, with consent of her future husband, then Mr James Grant Suttie, declared her acceptance "as in full satisfaction to them, and both of them, of the patrimony of the said Lady S. H. Innes Ker, and of all that they might ask, crave, or demand of or from the said James Henry Robert Duke of Roxburghe, or his representatives through his death, in name of legitim or on any other account whatever, his goodwill only excepted."

In 1862 Lady Charlotte Isabella Innes Ker was married to Mr George Russell. By her antenuptial marriage-contract the Duke, her father, bound himself, and his heirs, executors, successors, and representatives whomsoever, and likewise the heirs of entail succeeding to him in the said entailed estates, to provide, content, and pay to the trustees therein named, and to the survivors or survivor of them, out of the three years' rents of the said estates provided as aforesaid to his younger children, the sum of £25,000 in name of tocher to the said Lady Charlotte Isabella Russell, and that at and against the first term after his death, the spouses declaring their acceptance of this provision "as in full satisfaction to them and both of them of the patrimony of the said Lady Charlotte Isabella Innes Ker, and of all share of the provisions in favour of his younger children contained in the said Duke's contract of marriage, and of all that they might ask, claim, or demand of or from the said James Henry Robert Duke of Roxburghe, or his representatives, through his death, in name of legitim, executry, or on any other account whatever, his goodwill only excepted."

In 1866 the Duke's younger son, Lord Charles Innes Ker, was married. By his antenuptial contract the Duke, his father, made a provision of £40,000 in similar terms to that in the last mentioned marriage-contract, the spouses declaring their acceptance of the provision in similar terms.

In 1867 the Duke entered into an arrangement (which was subsequently embodied in a deed of agreement) with the three next heirs of entail to disentail his Roxburghe estates, and to resettle them, along with others which he possessed, in fee-simple upon the same series of heirs, under burden of the debts and provisions affecting the lands at the date of the disentail. In particular, he bound himself "to charge upon the fee of

No. 156. the lands to be so entailed the provisions for the younger children of his marriage, for which he and his heirs of entail are liable" under his contract of marriage. The Duke was further authorised, before executing the new entail, to borrow a sum not exceeding £175,000 upon the security of the entailed lands, and to charge it upon the fee of the lands to be entailed. There was this reservation in the agreement,—“And if the fore-said power to borrow shall not have been exercised wholly prior to the execution of the said new deed of entail, a power to that effect shall be reserved to the said Duke in the said deed of entail, but which reserved power, in so far as not exercised at the date of the death of the said Duke, shall be available to his successors to the extent of affecting a charge of a sum not exceeding in whole £120,000 of the said sum of £175,000, including in said sum of £120,000 any sums which may in virtue of said reserved power have been made by the said Duke to affect the said lands, but exclusive always of the provisions under the said Duke's contract of marriage.” The power to borrow £120,000 of the £175,000 was agreed to as an equivalent for the fee-simple lands to be included in the new entail, the gross rental of which was £4625, 14s. 5d., and the power to borrow the remaining £55,000 was agreed to in respect of an obligation to assign certain policies of insurance, value £55,000, upon the life of the Duke.

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In furtherance of these arrangements the Duke granted bonds of corroboration and dispositions in security over the estates contained in the original entails for securing the sums contained as above in the marriage-contracts of his younger children. Each of these deeds contained a declaration “that the principal sum therein contained is and shall be the share or proportion belonging to the said of the foresaid provision of three years' free rents of my said entailed lands and estates in favour of my younger children” contained in my contract of marriage.

These bonds were dated 17th and recorded in the Register of Sasines 20th December 1867.

The instrument of disentail was dated 11th June 1867, but was not recorded in the Register of Entails until 27th February 1868, and in the Register of Sasines until 18th March 1868. The new deed of entail, dated 18th June 1870, bore to be granted under the express burden of the granter's marriage-contract, and particularly of the provisions therein contained in favour of his younger children, “and for portions of which provisions I have granted bonds of corroboration and dispositions in security to the extent of the sum of £90,000 sterling over the earldom of Roxburghe and other lands and heritages in the first place hereinbefore disposed as under, which several bonds of corroboration and dispositions in security, and sums of money therein contained, are hereby declared to be real and express burdens on the said earldom and other lands hereinbefore conveyed.”

The Duke, who died as above stated upon 23d April 1879, left a trust-disposition and settlement dated 17th June 1874, in which, after narrating his own contract of marriage and those of his children, he proceeded,—“And whereas since the dates of the said several contracts of marriage I executed an instrument of disentail of the said entailed lands and estates of Roxburghe, . . . previous to the recording of which instrument of disentail I executed bonds of corroboration and dispositions in security in favour of the trustees under the contract of marriage of my said daughters and son for the said respective sums of £25,000, £25,000, and £40,000, being the shares of the said three years' rents of the said entailed lands and estates thereby and by the said contracts of marriage, apportioned to my said children . . . And whereas the said whole

lands and estates contained in the said instrument of disentail, and also No. 156.
 certain other lands previously held by me in fee-simple, have since been
 entailed by me under burden of the foresaid contract of marriage and June 28, 1881.
 bonds of corroboration and dispositions in security, therefore I do hereby Duke of Rox-
 declare that, in the event of the said three years' rents provided as afore- burgh v.
 said of the foresaid lands and estates exceeding the sum of £90,000 Russell.
 sterling (being the total amount of the said two sums of £25,000 and the
 sum of £40,000, which have been secured over the said lands and estates
 as aforesaid), and of a farther sum falling to the younger children of my
 said marriage in excess of the sums provided and secured as aforesaid,
 then and in that event the excess or surplus of the said provision of three
 years' rents beyond the said sum of £90,000 shall be and is hereby
 appointed to my said two daughters in the following proportions, that is
 to say, two-fifth equal parts or shares thereof to the said Lady Susan
 Harriet Innes Ker or Grant Suttie, and the remaining three-fifth parts
 or shares thereof to the said Lady Charlotte Isabella Innes Ker or
 Russell, and shall be paid to the trustees under their respective contracts
 of marriage in said proportions, to be held and disposed of by the said
 trustees upon and for the like trusts as and upon which the said two
 sums of £25,000 are directed to be held and disposed of."

At the time of the Duke's death the whole estates included in the new
 entail were burdened with the sum of £175,000. Their free yearly rental,
 after allowing for public burdens, the interest on the foresaid sum of
 £175,000 and other deductions, amounted to £34,700, 1s. 2d. Three
 years' free rental thus amounted to £104,100, 3s. 6d. Taking from that
 the sum of £90,000, being the two sums of £25,000 and the £40,000
 already charged upon the subjects as above stated, there remained a
 balance of £14,100, 3s. 6d. which fell to be paid in terms of the trust-
 disposition and settlement above narrated, to the trustees under the
 marriage-contracts of the two daughters.

The petitioner brought this petition under the Entail Amendment Act,
 1848 (Rutherford Act), praying the Court "to find that the amount of
 provisions falling to the younger children of the said late Duke of Rox-
 burgh who have not succeeded to the said entailed lands and estates, in
 terms of the said late Duke of Roxburgh's contract of marriage set forth
 in the petition, and statute 5 Geo. IV. cap. 87, is £104,100, 3s. 6d., or
 such other sum as your Lordships may ascertain to have been the amount
 of three years' free rent or value of the said entailed lands and estates,
 called the Roxburgh estates, as at the death of the said late Duke of
 Roxburgh; and that, after deducting therefrom the sum of £90,000,
 settled by the said late Duke of Roxburgh upon his three younger children
 before named under their respective contracts of marriage mentioned in
 the petition, and already charged as a burden on the said entailed lands
 and estates, there remains a balance of the said three years' free rent or
 value available for said provisions, amounting to £14,100, 3s. 6d., or such
 other sum as your Lordships may ascertain to be the balance of three
 years' free rent or value as aforesaid, which balance, in terms of the said
 late Duke of Roxburgh's trust-disposition and settlement is payable to"
 [naming the trustees under the said two contracts of marriage] "in the
 proportion of three-fifths thereof."

The petitioner further asked authority to execute bonds and disposi-
 tions in security over the lands for the said sum in terms thereof.

The petition was served upon the three nearest heirs of entail, who did
 not appear. A remit was thereafter made to Mr H. H. Inglis, W.S., to
 "examine whether the provisions of the statutes and Acts of Sederunt
 have been complied with, and also to inquire into the facts and circum-
 stances set forth in the petition."

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Mr Inglis in his report suggested a doubt whether the marriage-contract provisions in favour of the younger children had been rightly estimated at three years' rents of the whole lands embraced in the new entail under burden of the interest of the debt, and indicated his opinion, in accordance with the case of *Irving v. Irving*, 9 Macph. 539, that the rental of the lands embraced in the original entail should be taken subject to such deductions only as would have been allowed had they remained under the original entail, and reported that giving effect to this view the provisions to younger children would amount to the larger sum of £109,401, leaving a balance to be charged on the estates of £19,401.

Upon the report, dated January 25, 1881, being lodged, the Lord Ordinary (Lee), in respect of it, appointed Mr A. J. Russell, C.S., to be curator *ad litem* to Lady Charlotte I. Russell.

Mr Russell lodged a minute, stating that he considered it "his duty to adopt to a certain extent the views taken by the reporter," and therefore to oppose the petition.

Thereafter the Lord Ordinary (Fraser) found, upon 19th March 1881, that the amount of the provisions falling to the younger children was £104,100, 3s. 6d., "being the amount of three years' free rent or value of the said entailed lands and estates called the Roxburghe estates as at the death of the said late Duke of Roxburghe, and that after deducting therefrom the sum of £90,000 settled by the said late Duke of Roxburghe upon his three younger children, Lady Susan Harriet Grant Suttie, Lady Charlotte Isabella Russell, and Lord Charles John Innes Ker, under their respective contracts of marriage mentioned in the petition, and already charged as a burden on the said entailed lands and estates, there remains a balance of the said three years' free rent or value available for said provisions amounting to £14,100, 3s. 6d., which balance, in terms of the said late Duke of Roxburghe's trust-disposition and settlement, is payable to" [the trustees under the marriage-settlements of his two daughters in the proportions of two-fifths and three-fifths respectively]; "and for that purpose grants warrant and authorises the petitioner to make and execute the following bonds and dispositions in security, ranking *pari passu* with each other over the whole of the said entailed lands and estates other than the mansion-houses, offices, and policies thereof, for the said sum of £14,100, 3s. 6d., being the balance of free rents as aforesaid, viz." [specifying the bonds for the sums proportioned as above], "such bonds and dispositions in security containing a power of sale, and all clauses usual in bonds and dispositions in security over estates in Scotland held in fee-simple, and decerns: Remits to Mr Inglis to adjust and revise the drafts of said deeds, and to see the same extended, executed, and put upon record, and to report." *

* "NOTE.—The Lord Ordinary is of opinion that the rental which ought to be taken is not the rental of the estates at the time when the late Duke of Roxburghe executed his marriage-contract, but the rental of the estates as entailed at his death. By the marriage-contracts of the three younger children they accepted the sums of £25,000, £25,000, and £40,000 as in full of all that they could claim under the obligation in their father's marriage-contract in their favour; and if the Duke had not by his deed of settlement given to the two daughters a further right, no claim would have been competent beyond the sums given them at the time of their marriage. This right so conferred by the Duke was entirely voluntary and gratuitous on his part; the obligation in the marriage-contract had been satisfied and fulfilled, and a discharge obtained from the creditors in that obligation. What, then, was the Duke's meaning when he appointed that any money beyond the sums provided to his two daughters required to make up three years' free rental should still be provided to his

The curator *ad litem* reclaimed, and argued ;—By the second deed of entail the obligations to the younger children in the original marriage-contract were revived in so far as not satisfied by the provisions of £90,000 secured by the bonds of corroboration, &c. The Duke had there- by restored them to the position they had occupied prior to the discharges and subsequent disentail.

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Argued for the petitioner ;—The discharges granted by the children extinguished their rights under their father's marriage-contract, so that their rights now depended entirely upon the new entail.

At advising,—

LORD PRESIDENT.—The question before us is how the younger children's provisions made by the late Duke of Roxburghe are to be charged upon the rents of the entailed estate ; and there is a complication of deeds here, to the provisions of which it is necessary very specially to attend in order to answer this question satisfactorily.

The provisions were made by the Duke of Roxburghe in the year 1836 in a marriage-contract between himself and his then intended spouse, in which, in pursuance of powers conferred upon heirs of entail by the Aberdeen Act, he bound himself, and the heirs of entail succeeding to him in the lands and estate of Roxburghe, to make payment out of the rents or proceeds of the said lands and estate of the provisions following to the child or children to be procreated of the intended marriage ; and then the amount of the provisions is more particularly specified. At this time the entail comprehended only what is known under the general name of the Roxburghe estate, but afterwards the Duke entered into an arrangement with the three next heirs of entail for disentailing that estate, and for adding certain fee-simple lands which he possessed to the estate of Roxburghe, and re-entailing the whole, under certain conditions and provisions specified in the agreement which he made with those heirs of entail. And, among other conditions of that agreement, there was one to the effect that he should be entitled to burden the whole entailed lands, including the old Roxburghe estate and the new fee-simple lands, with a debt of £175,000. This arrangement was carried out, and a new deed of entail was accordingly executed.

Now, if there had been no more in the case than what I have just stated, it is quite obvious that the question we have to determine would be regulated by the authority of the case of *Irving*. The younger children, in respect of their provisions, would have neither taken advantage from this new deed of entail, nor could they have been prejudiced by the proceedings for disentail and the re-entailing deed, but they would just have taken their provisions as three years' free rents of the entailed lands of Roxburghe, subject to the deductions which would have been made from those provisions had the original deed stood. But in the present case, in the interval between the making of the provision and the disentail and re-entailing, there occurred a very important transaction, or series of transactions, upon occasion of the marriage of the three younger children. The Duke of Roxburghe was a party to the marriage-contracts of all the three younger

daughters in the proportion of two-fifths to the one and three-fifths to the other ? What rental was in his mind at the time he executed this testamentary deed ? He had executed a new entail, and declared the provisions in favour of his children to be burdens upon the estate contained in that new entail, and there can be no doubt whatever that the rental he was dealing with was that of the estate contained in the then existing entail."

No. 156. children. He gave his younger son a sum of £40,000, and each of his daughters a sum of £25,000, as in full satisfaction of the provisions which had been made in their favour in his original marriage-contract, and he took from each of those younger children a discharge of their provisions. Here, again, if we stop and consider how the matter would stand, it is quite plain that the discharge contained in these marriage-contracts would have prevented the case of *Irring* from applying, and would have settled the whole matter in this way, that each daughter would receive £25,000 as in full of her provision, and the son would receive £40,000, and no question like the present could have arisen.

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But what gives rise to the difficulty and peculiarity of this case is, in the first place, certain clauses which occur in the new deed of entail, and secondly, a clause which occurs in the Duke of Roxburghe's deed of settlement. The new deed of entail was executed in 1870. Prior to that the Duke had granted bonds of corroboration and dispositions in security over the original estate for each of the sums of £25,000 provided to each daughter, and for the sum of £40,000 provided to the younger son. It is necessary to mention that merely historically, because it really does not much affect the judgment. But after all that had been done, when the Duke came to execute his new deed of entail in 1870, he inserted a clause declaring his marriage-contract, and the provisions to younger children therein contained, to be real burdens upon the whole lands and estate thereby entailed—that is, the enlarged and new entailed estate. Now, this is plainly inconsistent with the notion of those provisions having been discharged as they were in the marriage-contracts, and inconsistent also with the bonds of corroboration and dispositions in security which he had granted for those sums, and as the deed goes on it becomes more clear that he does not intend to avail himself of the discharges contained in these marriage-contracts, but, on the contrary, intends that his younger children shall have the full benefit of the provisions settled in his own marriage-contract. The £90,000 which is the aggregate of the sums provided in the children's marriage-contracts, and for which they granted a discharge of their provisions, falls short, in his opinion, and has been found in fact to fall short, of what they would have been entitled to under the original arrangement in his marriage-contract. What he does, in the words I have just read, is to make the whole provisions, the full sum provided in his own marriage-contract, a real burden upon the whole lands and estates of new entailed by the new deed of entail. But while he makes these provisions a real burden upon that estate, it must be observed that he does not reconstitute these provisions. There is no constitution of a provision under the Aberdeen Act in this new entail. It is the keeping up of a provision already made and constituted. The Aberdeen Act provides a particular way in which an heir of entail in possession is entitled to constitute a provision upon an entailed estate. He is to grant a bond or obligation, by the 4th section, "binding the succeeding heirs of entail in payment out of the rents or proceeds of the same to the lawful child or lawful children of the person granting such bonds or obligations who shall not succeed to such entailed estate, of such sum or sums of money, bearing interest from the granter's death," as to him shall seem fit, and so on. So that the only mode in which a provision can be constituted against an entailed estate is by granting a bond or obligation binding the heir in possession and the succeeding heirs of entail to pay the amount of the provision out of the rents of the entailed estate.

Now, the provision, therefore, which is kept up by the clause which I have

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read and made a real burden upon the new and enlarged entailed estate, is a bond or obligation upon himself and the heirs succeeding to him under the old entail of Roxburghe to pay out of the rents of that entailed estate of Roxburghe three years' rents of that entailed estate of Roxburghe. There is no other subsisting provision in favour of the younger children but that. Then the deed proceeds to dispoise the lands with and under the burdens, conditions, prohibitions, reservations, and so forth, and, first, with and under the real and express burden of a contract of marriage dated in 1836, entered into between him and his then intended spouse—(that is his own contract of marriage, in which the provision of which I have been speaking is contained)—“and particularly, without prejudice to the said generality, of the provision therein contained, whereby I, with consent of my said curators, and in exercise of the powers vested in me by the statute 5 Geo. IV., cap. 87, as heir of entail in possession of the then entailed lands and estate of Roxburghe, bound and obliged myself, and the whole heirs of entail and provision succeeding to me in the said entailed lands and estates, to make payment out of the rents or proceeds of the said lands and estates of the provisions following to the child or children to be procreated of the then intended marriage who should be alive at my death, and should not succeed to the said entailed lands and estates, and to the representatives or assignees of those children who should predecease me, claiming right in virtue of special settlement by marriage-contract;” and then follows a specification of the provisions. Then he adds these words at the end—“And for portions of which provisions I have granted bonds of corroboration and dispositions in security to the extent of the sum of £90,000 sterling over the earldom of Roxburghe, and other lands and heritages in the first place hereinbefore disposed as under, which several bonds of corroboration and dispositions in security, and sums of money therein contained, are hereby declared to be real and express burdens on the said earldom and other lands hereinbefore conveyed.” Now, it appears to me that one of the effects of these clauses of the new deed of entail is that the Duke of Roxburghe thereby entirely renounces all benefit from the discharges which he had taken in the marriage-contracts of the younger children. He reinstates them in the full right of the provisions which were made in his own marriage-contract, and while he declares the amount of those provisions which he very specially describes to be a real and preferable burden over the new entailed estate, he does not in the slightest degree alter the nature of the provision as originally constituted over the old entailed estate of Roxburghe. The making of these provisions a real burden upon the enlarged estate does not in the least degree alter the nature of the thing which is so made a burden. It does not extend the obligation which he created against the heirs of entail succeeding to himself in the old estate of Roxburghe. On the contrary, the thing as it stands under the marriage-contract, freed altogether of the restriction created by the discharges in the younger children's marriage-contracts, is to remain exactly as it stood from the beginning, but to be a real burden upon the new entailed estate. The discharges which were contained in the younger children's marriage-contracts were discharges in favour of the Duke of Roxburghe, their father. Nobody else is entitled to plead upon these discharges, or to take any benefit from them, and if he chooses to renounce the benefit of them he is quite at liberty to do so, and so far as I can see he has most clearly and distinctly shewn his purpose and intention so to do in this clause of the new entail.

Now, that brings us back exactly to the same position as if the discharges in

No. 156. the younger children's marriage-contracts had never been made ; and that brings us back to the position in which the case of *Irving* is directly applicable as an authority. It was the occurrence of these discharges that prevented the application of the doctrine of *Irving's* case ; but the moment the discharges are taken out of the way, the authority of the rule of that case returns, and the younger children are entitled to say—"We cannot be either disadvantaged or prejudiced by this arrangement as to disentailing the estate, and re-entailing it along with other lands. We are no parties to that arrangement. Our consent was not required, and was not asked. The whole thing is carried through between the Duke of Roxburghe and the three next heirs of entail, among whom we are not ; and therefore we are entitled to stand exactly in the same position as if the entail of Roxburghe had never been destroyed or put an end to, but still subsisted."

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Then, finally, there is the trust-settlement of the Duke of Roxburghe, which also throws a good deal of light upon this subject. I think the matter stands very clearly indeed upon the clause of the new entail which I have just adverted to ; but the provision which I am about to call attention to in the Duke's trust-settlement is strongly corroborative of that view. The clause is a single clause ; there is no other clause in the deed apparently making any reference to these provisions at all, and it is not unimportant to observe that although this clause is a pretty long one, and has a good deal of recital in it, the operative part of it is extremely simple. It is simply the making of an apportionment ; that is the only operative part of it. The younger son had got £40,000 settled upon him by his marriage-contract ; and the Duke did not think fit to give him any greater share of the provisions contained in his own marriage-contract. He intended to divide the balance over the £90,000 between his two daughters ; and that is the operative effect of this clause. The whole of it is important, keeping in view that that is the sole purpose for which it is introduced into the deed of settlement. He says—"Whereas since the dates of the said several contracts of marriage I executed an instrument of disentail of the said entailed lands and estates of Roxburghe"—(that is the old estate)—"which was recorded in the Register of Entails under the authority of the Court of Session on the 24th day of February 1868, previous to the recording of which instrument of disentail I executed bonds of corroboration and dispositions in security in favour of the trustees under the contracts of marriage of my said daughters and son for the said respective sums of £25,000, £25,000, and £40,000 being the shares of the said three years' rents of the said entailed lands and estates thereby, and by the said contracts of marriage, apportioned to my said children, which bonds and dispositions in security are all dated the 17th, and recorded in the General Register of Sasines the 20th days of December 1867 ; and whereas the said whole lands and estates contained in the said instrument of disentail"—now that is the old estate of Roxburghe—"and also certain other lands previously held by me in fee-simple, have since been entailed by me under burden of the foresaid contract of marriage and bonds of corroboration and dispositions in security, therefore I do hereby declare that in the event of the said three years' rents provided as aforesaid of the foresaid lands and estates"—now, observe, the only provision of three years' rents of any lands and estates that ever was made by the Duke of Roxburghe was the provision contained in his own marriage-contract—"exceeding the sum of £90,000 sterling (being the total amount of the said two sums of

£25,000 and the sum of £40,000 which have been secured over the said lands and estates as aforesaid)"—that is, secured over the new entailed estate—"and of a further sum falling to the younger children of my said marriage in excess of the sums provided and secured as aforesaid, then and in that event the excess or surplus of the said provision of three years' rents beyond the said sum of £90,000 shall be and is hereby appointed to my said two daughters in the following proportions," and so on. The whole of these deeds, taken together, I think, make it perfectly clear, in the first place, that the only provision under the Aberdeen Act that was ever made by the Duke of Roxburghe was the provision contained in his own marriage-contract of 1836, and that that provision, as regards its essential character and effect, was never altered.

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Now, that provision consists of three years' rents of the old entailed estate of Roxburghe, and is in the form of an obligation under the 4th section of the Aberdeen Act, binding the Duke and the succeeding heirs of entail in the old estate of Roxburghe to pay that sum out of the rents of that estate. That provision, however, has been dealt with in various ways by the Duke, but never altered as to its character or its extent except in so far as it was to a certain extent discharged in the marriage-contracts of the younger children. He bought off the provision at one time in these marriage-contracts by payment of a sum of £90,000 in all—that is to say, by a prospective payment of £90,000 in all—but then he went back upon that, and he expresses very clearly his intention of not standing upon those discharges, but of giving effect to the full provision contained in his own marriage-contract, and in order to make that provision more certainly effectual to the younger children he made it a burden upon the whole lands included in the new deed of entail, very clearly expressing at the same time that it was not his intention to alter the nature of that provision, but, on the contrary, to maintain it exactly as it stood in his marriage-contract of 1836.

Now, in these circumstances, I am quite unable to agree with the view that has been taken by the Lord Ordinary. I think that the alternative which is presented by the reporter of a balance calculated upon the footing of taking the estate in the old deed of entail as it stood at the time when the provision was made, and taking three years' rents of that estate as they would have stood at the death of the granter supposing no disentail had ever been made, is the true measure of the provisions now to be settled.

LORD DEAS concurred.

LORD MURE.—I have also come to the same conclusion. The sum, as I understand the case, which under the marriage-contract of the late Duke of Roxburghe was to be charged under the Aberdeen Act, amounted to three years' free rent of the entailed estates as they then stood, and as the same should be ascertained at the date of the death of the Duke of Roxburghe. That is quite distinct from the terms of the marriage-contract. Of the sum so to be charged, £25,000 was settled upon each of the Duke's daughters at their marriage as their share of those three years' free rents, and £40,000 was settled upon his younger son; and from each of those children a discharge was taken of their respective provisions under the marriage-contracts. So the matter stood till proceedings were taken in 1867 with a view to a new entail, which have been fully explained by your Lordship; and those appear to me substan-

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 June 23, 1881. Roxburghe were to be added to the entailed estate, and that a power was
 Duke of Rox- taken to burden the whole estates to the extent of the value of the fee-
 burghe v. simple lands which were added to the entail. The gross sum with which
 Russell. power was taken to burden the whole estates under the new entail was £175,000.
 But of this under the same arrangement £55,000 was to be paid off by insur-
 urances, so that £120,000, being a sum about equal to the value of the fee-
 simple lands which were to be added to the entailed estate, was all that actually
 required to be charged against the estates under the new entail and relative
 arrangements. This, I think, is clear from the facts set out in the various parts
 of the reports which have been laid before us. In particular, we have a distinct
 statement of the nature of the agreement which was entered into amongst the
 family, the younger children of the present Duke being represented in that agree-
 ment; and it will be seen that an arrangement was made by which insurances were
 to be effected on the life of the Duke to the amount of £55,000 for the benefit
 of the estate; and the statement goes on to mention that—"By the said deed of
 agreement the late Duke of Roxburghe also bound himself 'to assign and convey
 the several policies mentioned in the schedule number two hereto annexed, and
 signed by the parties as relative hereto, and the sums that may become due
 under the same, to John Brown Innes and Charles Bowman Logan, both of the
 city of Edinburgh, Writers to the Signet, as trustees for the purposes after
 mentioned, with power to receive the sums that may fall due under the
 same, and which policies, and the sums to be received by the said trustees,
 shall be held and applied by them in payment of the said sum of £55,000, part
 of the said sum of £175,000, which the said Duke is to have power to charge on
 the said entailed estate as aforesaid,' " and that any surplus of the sums received
 under the policies which remained over after payment of the said £55,000 is to
 be settled in a certain way. That being the nature of the arrangement, which was
 carried out in the manner and under the reservations mentioned in the report, it
 is then stated—"This reserved power was afterwards fully exercised by him, and
 at the time of his death the whole estates included in the new entail stood bur-
 dened with the sum of £175,000. After his death, which happened on or about
 this date, the policies of assurance on his life above referred to became payable,
 and the proceeds thereof to the extent of £55,000 were, in terms of the before-men-
 tioned arrangement, applied in extinction *pro tanto* of the said debts of £175,000
 secured upon the entailed estates, thus reducing these debts to £120,000, at
 which amount they still remain." Now, that being the nature of the arrange-
 ment which was gone into, and the provisions being discharged, the younger
 children, as your Lordship has remarked, could have no claim against the Duke
 beyond the sum of £90,000 which was charged against the old estate. But by
 the trust-deed that discharge is set aside apparently—that is to say, the late
 Duke's intention is apparent not to act upon it with regard to his daughters.
 For it is distinctly provided by the trust-deed that any sum of the free rents
 beyond the £90,000 should be divided in certain proportions amongst his two
 daughters. The question therefore is raised at the Duke's death, whether those
 free rents are to be taken as the free rents of the estate which existed at the time
 of the marriage-contract, or the free rents of the new entailed estate, which
 included the fee-simple lands over which the entail was extended. Now, look-
 ing to the words and expressions used in the whole of these transactions, where
 the Duke speaks of the marriage-contract provisions, I think he has in view the

provisions made upon the old entailed estates ; for it was with reference to those estates that the marriage-contract proceeded, and it was upon them also that the burden was to be laid with reference to which the discharge was obtained, and when those discharges were waived by the Duke it appears to me that his intention was to give his daughters the difference between the £90,000 and the three years' free rent of the old estates. That is the construction which I am disposed to put upon the language used in the deeds. But even if that were doubtful, I think that the case to which our attention has been called by the reporter—the case of *Irving*—lays down a rule which we must act upon here to the extent of not allowing any further charge to be made upon the new than was done upon the old entailed estate. Upon the whole matter, therefore, I have come to the same conclusion as your Lordship, that as between the two views we should take the suggestion of the reporter, by which the rental of the old entailed estates will be taken as at the date of the Duke's death, for it was with reference to it that the marriage-contract was originally settled.

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LORD SHAND.—I have come to the same conclusion as your Lordships in this case. The Lord Ordinary has held that the provisions of the younger children are to be taken as being three years' free rents of the whole estates contained in the new entail of 1870. It appears to me that there is an insuperable objection to that view being taken, which is this, that there has been no bond or other deed of provision executed by the Duke of Roxburghe affecting the lands which were for the first time entailed in 1870. A new entail having then been created by which lands of considerable rental were added to the old estates, in order to create a good provision upon these new lands, it was necessary that the Duke of Roxburghe should execute a deed of obligation applicable to those new lands—in short, should create a provision with reference to those new lands which would bind the heirs of entail succeeding to them. No such deed has been executed. There has never been a deed of provision granted to affect those lands or the heirs of entail succeeding to them, and therefore we cannot, I think, hold this to be a provision affecting the whole of the entailed estates. There are subsisting deeds of provisions affecting the old entailed estates, and these are the only effectual deeds.

Now, that being so, reading the disposition and deed of settlement by the Duke of Roxburghe in the light of the whole circumstances, and having regard to the various considerations pointed out by your Lordship, I have come to be clearly of opinion that the three years' free rents referred to in his Grace's deed of settlement are rents of the old estates, and of the old estates only.

But though that be so, the question remains, What burdens are to be deducted from those rents? The deeds of provision declare that the amount of the free rents shall be ascertained as at the date of the death of the Duke of Roxburghe, and when the late Duke died he had a considerable amount of debts, imposed no doubt under the new arrangement with the heirs of entail, but still he had added a considerable amount of debt to the lands contained in the old entail, and that debt subsisted at his death. I confess I have felt it a question attended with considerable difficulty, whether, with reference to the question of taking the amount of the free rents at the death of the Duke, it was not necessary to look at all the debts as they subsisted at his death, and make a deduction on account of these, including the debt that was added when the new entail was executed. If that course had to be followed I have no doubt

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this would have involved an apportionment of the debt—that is to say, that while you take the three years' free rents of the old estate as the provision given, subject to the debt affecting it, it would not do to take the debt affecting the whole estates and deduct the whole amount from those three years' free rents, but it would have been right to make an allocation of the debt, so much of it applicable to the old estates, and so much to the new, in proportion to their respective rentals. I have, however, come to the conclusion with your Lordships that that is not a sound view to be taken of this matter. The case of *Irving* seems to be an authority which we ought to follow in this case. As Lord Cowan puts it,—“The solution of this question will be found by allowing these deductions only which could competently have been made had the entail still subsisted :” and accepting the authority of the case of *Irving*, I have come to the conclusion that that is the course which ought to be adopted in this case. The result is, I think, that the amount of the provisions has been correctly brought out by the reporter, because I observe he has laid aside entirely the new debt created in 1870, and then laid upon the estate, and has deducted only the public burdens affecting the lands in question.

I think it right, however, to say, that even if the alternative view had been adopted in this case—the view of taking the rental of the whole estates and giving effect to the interest of the debt laid on in 1870—I do not think the difference would have been so large in the result as the reporter has brought out. I find that in bringing out the rental of the whole lands, with the deductions to be made from that rental, he says that from the certified rental it appears that the free yearly rents or values of these estates amounted to £34,700, after deducting public burdens, “the interest on the foresaid sum of £175,000” then standing secured over the estates, and an annuity to the Duchess. Now, it appears to me, looking to these deeds as a whole, that the interest which really affected these estates, in a question with the heirs of entail, was not £175,000, but only £120,000, because it was made a clear stipulation of the arrangement for the re-entail, and made a stipulation by the succeeding heirs themselves, that £120,000 only should be the debt permanently laid on that estate. There was to be £175,000 temporarily laid on the estate, but the Duke undertook, as matter of agreement, that out of his personal estate, and by means of policies of insurance upon his life, the sum of £175,000 should be cut down to £120,000 the moment he died. It appears to me, therefore, that in estimating the rents as at the date of his death, even if the other alternative had received effect, the interest to be deducted would not have been the interest upon £175,000 but upon £120,000, and the result, I think, would have been to raise the amount brought out by the reporter of £14,100 as the sum to which these ladies were entitled for their provisions, by the sum of between £2000 and £3000—I do not know precisely how much—so as to bring it up to something near £17,000 altogether. I make that observation only for the purpose of saying that, after all, the difference between the two views is not so great as it appears on this report.

THE COURT pronounced this interlocutor :—“Having considered the reclaiming note for Mr A. J. Russell, C.S., curator *ad litem* to the Right Hon. Lady Charlotte Isabella Innes Ker or Russell, wife of George Russell, Esq., and now insisted in by his Grace the Duke of Roxburghe and others, the trustees under the antenuptial contract of marriage between the said George Russell and the said

Right Hon. Lady Charlotte Isabella Innes Ker or Russell, who were sisted as parties to the process by interlocutor of 19th May last, and heard counsel, Recall the interlocutor of the Lord Ordinary of 19th March last: Find that the provision which is sought to be charged on the entailed estate is constituted in terms of sec. 4 of the Act 5 Geo. IV. cap. 87, by the marriage-contract of the late Duke of Roxburghe in 1836, whereby he bound himself and the heirs succeeding to him in the lands and estate of Roxburghe, under the then existing entail of the said estate, to pay to the younger children out of the rents of said entailed estate certain sums, not exceeding three years' free rents of the said estate as the amount of the same shall be ascertained at the death of the said Duke: Find that the provision so constituted still subsists, and is the provision proposed to be made a charge under the petition: Find that the amount of the said provision consists of three years' free rents of the said lands and estate of Roxburghe comprehended in the entail subsisting at the date of the marriage-contract of 1836, as the same would have stood and would have been ascertained at the death of the said Duke, granter of the said provisions, if the estate of Roxburghe had not been disentailed and re-entailed along with other lands: Remit to the Lord Ordinary to proceed as shall be just and consistent with the above findings," &c.

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MACKENZIE, INNES, & LOGAN, W.S.—RUSSELL & NICOLSON, C.S.—Agents.

JANET WINGATE MITCHELL, Appellant.—*Trayner—Pearson.* No. 157.
EBENEZER ERSKINE SCOTT (Moir's Trustee), Respondent.—*Mackay—Low.*
Diligence—Bankruptcy—Arrestment on dependence of an action.—Arrestments used on the dependence of an action confer a preference although the defender be sequestrated before decree is obtained in the action, provided they be followed up without undue delay.

June 29, 1881.
Mitchell v. Scott.

Diligence—Arrestment—Judicial Factor—Factor loco absentis.—It is competent to arrest in the hands of a factor *loco absentis* funds belonging to his ward's estate.

On 3d November 1879 Miss Janet Wingate Mitchell, Alloa, raised an action for payment in the Court of Session against James Moir, who was abroad, and against George Dalziel, W.S., who had been appointed factor *loco absentis* on Mr Moir's estate.

Bill-Chamber.
1st Division.
Lord Fraser.
M.

On 5th November 1879 Miss Mitchell caused arrestments on the dependence of this action to be used in the hands of Mr George Dalziel.

On 23d April 1880 the estates of James Moir were sequestrated, and thereafter Mr E. E. Scott, C.A., was appointed trustee, and received from Mr Dalziel the whole funds which he held as factor *loco absentis*.

On 18th December 1880 Miss Mitchell obtained decree against Mr Moir, and the trustee in his sequestration, who had been sisted as a party to the action, for payment of £2274, 2s. 2d., with interest and expenses.

Miss Mitchell lodged a claim in the hands of Mr Scott, as trustee, for the amount decerned for, and maintained that she was entitled to be ranked preferably in virtue of her arrestment of the funds of Moir in the hands of his factor *loco absentis*.

The trustee rejected the claim to a preference on the following grounds:—"1. That no funds or moveable estate have been uplifted or received by him from said arrestees, other than from the said George Dalziel as

No. 157. factor *loco absentis* foresaid. 2. That the arrestment in the hands of the said George Dalziel, as factor foresaid, was incompetent and invalid, in respect that he was a defender in the action, and not a third party. 3. That the arrestments, even if competent and valid, being used upon the dependence of an action in which decree was not obtained until long after the date of the sequestration, were cut down and rendered ineffectual to create any preference in favour of the claimant by the sequestration of the effects of the said James Moir."

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Miss Mitchell appealed to the Lord Ordinary on the Bills, who pronounced this interlocutor:—"Sustains the appeal, recalls the deliverance of the trustee, and remits to him to rank the appellant preferably on the funds arrested on 5th November 1879 in the hands of George Dalziel, formerly factor *loco absentis* on the bankrupt's estate: Finds the trustee liable in expenses to the appellant: Allows an account of said expenses to be given in, and remits," &c.*

* "NOTE.—In this case the question to be determined comes out very clearly upon the note of appeal and the deliverance of the trustee, and further written pleading is unnecessary.

"The appellant is a creditor of the bankrupt, James Moir, who left Scotland for Jamaica, or other foreign parts, and upon whose estate a factor *loco absentis* was appointed by the Court in the person of Mr George Dalziel. While Mr Dalziel was in the administration of the absent man's property the appellant raised, on 3d November 1879, an action against Moir and Dalziel to recover payment of the debt due to her. Upon the 5th November 1879 the appellant used arrestments on the dependence in Dalziel's hands as against Moir. On the 25th of April 1880 the estates of Moir were sequestrated, and the factory in favour of Dalziel thereby in consequence came to an end. The pending action was in usual course intimated to the trustee, who sided himself as a party to it; and decree therein was obtained by the appellant on 18th December 1880 against both Moir and the trustee in the sequestration.

"The appellant claims, in virtue of her arrestment, to be ranked preferably on the estate of Moir, and this claim has been rejected as a preferable claim but admitted to an ordinary ranking, the deliverance of the trustee being placed upon two grounds—1st, that the arrestment was inept in consequence of it being laid on in the hands of a person who was a party to the action; and 2dly, because an arrestment upon the dependence not followed up by decree till long after the date of the sequestration could not compete with the statutory rights of the trustee. And to these two grounds another was added at the debate before the Lord Ordinary, viz., that an arrestment in the hands of a factor *loco absentis* was incompetent.

"The Lord Ordinary is of opinion that all these grounds are untenable in law. In regard to the first, the debtor was James Moir, and it was against him and his estate that decree was sought. Whether it was necessary to have made Dalziel a defender in the action may be doubted; but the fact that he was formally made so will not alter the rights of the creditor of Moir to attach moneys in the factor's hands belonging to Moir. The latter having left the country, and his estates being thus unprotected, the Court appointed an officer of their own for its protection, and for the administration of any moneys which the factor might collect. Such moneys Moir could at any time call upon the factor to account for; and such being the case, there can be no doubt that the fund was arrestable at the instance of his creditors. If the factor be a trustee, then the very point was decided in *Kyle's Trustees v. White* (14th November 1827, 6 S. 40), the rubric of which is, 'Competent to arrest in the hands of a trustee on the dependence of an action against the truster personally and the trustee himself *qua* trustee.' The office of factor *loco absentis* is one of trust, although the appointment be made by the Court. This disposes of the new points started at the debate to the effect that an arrestment in such an officer's hands was incompetent, because, it was argued, he and the *absens* were identical, and that it

The trustee reclaimed, and argued;—(1) An arrestment in the hands of a factor *loco absentis* was not competent. The factor was in law the same person as the principal, and it was not competent to arrest in the hands of a debtor for his own debt. (2) In order to obtain an arrestment on the dependence of an action required to be followed up by decree in the action before the date of sequestration of the defender.¹

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was just as idle to lay an arrestment in the factor's hands as it would be in those of Moir himself. This is a misapprehension as to the character of the office. The factor is not identical with the *absens*, although he is accountable for the money he collects to that person. He is an officer of Court, bound to manage the estate according to the rules laid down by the Pupils Protection Act, and he is amenable to the Accountant of Court as well as to the *abeena*.

"The other ground upon which it is contended that no preference was acquired by the arrestment derives some countenance from the doctrine laid down by Erskine (3, 6, 18), where he says, 'If an arrester upon the dependence shall not have got his debt constituted by decree when preference is to be determined between him and the other arresters whose debts are constituted, those other arresters must be preferred to him from the nature of the debt itself; for one who has not yet made it appear that any sum is truly due to him can claim no preference.' Assuming this to be sound law, let us see how it can be applied to the present case. The 108th section of the Bankrupt Act, 1856, no doubt says that 'the sequestration shall as at the date thereof be equivalent to an arrestment in execution and decree of furthcoming;' and the fact is relied upon that the sequestration in this case took place in the month of April 1880, whereas decree was not obtained in the action at the appellant's instance until December of that year. There was thus, it is contended, the very case stated by Erskine, of an arrestment in execution followed by a decree of furthcoming eight months before the appellant had obtained a decree upon which execution could follow. This point arose under the former bankrupt statute in a case of *M'Geachy v. Mellis* (not reported, but stated in 2 Bell, Com., p. 79, note), where the Court found 'that the act of the Court awarding sequestration on the first deliverance on the petition for sequestration cannot be held as an arrestment in the question with arresters whose diligences were used sixty days or more before the sequestration.' It must, however, be kept in mind that the former Bankrupt Act, 33 Geo. III. cap. 74, under which the case of *M'Geachy* arose, did not contain a clause such as section 108 in the Act of 1856, declaring the effect of sequestration to be as above quoted. Still section 108 must be read along with section 102 of the Act of 1856, which enacts that the act and warrant of confirmation in favour of the trustee shall transfer to and vest in him as at the date of the sequestration the property of the debtor to the effect following—'1st, the moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible.' Now, the arrestment used by the appellant was undoubtedly a security which she had at the date of the sequestration, and it was not null and reducible; and section 108 must therefore be read as meaning that the sequestration shall operate as arrestment in execution followed by decree of furthcoming in regard only to property so far as free from preferable securities. If there had been undue delay in following up the action by obtaining decree, which there was not, it might be argued from section 12 that an objection could be stated against the arrestment; but not being open to any such challenge, it must stand as a good security which the trustee was bound to respect and to give effect to.

"It is not intended by this interlocutor to decide any question as to the amount of the appellant's claim. No argument was submitted to the Lord Ordinary on this matter. The only point here determined is, that the appellant is entitled to be ranked preferably and not merely as an ordinary creditor."

¹ *Authorities*.—*Brodie v. M'Lellan*, June 14, 1710, M. 816; *Nairn v. Brown*, Jan. 1724, M. 820; *Watkins v. Wilkie*, Jan. 2, 1728, M. 820; *Campbell v. Hog*,

No. 157. The Court did not require an answer on the competency of arresting in the hands of a factor *loco absentis*.

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Argued for the arrester;—The passage in Erskine relied on did not apply to a case of bankruptcy.¹

At advising,—

LORD PRESIDENT.—In this case the appellant is a creditor of a James Moir, who left Scotland some time ago, and on whose estate a factor *loco absentis* was appointed by the Court. While the estate of the absentee was being administered by the factor, the appellant raised an action against Moir, and also against the factor *loco absentis*, and on 5th November 1879 she used arrestments on the dependence of this action in the hands of the factor *loco absentis*. After this Moir's estate was sequestrated, and of course that put an end to the factory granted by the Court. The action was intimated to the trustee, who sisted himself as a party to it. Thereafter decree was obtained, but not until after the sequestration.

The appellant claims to be ranked preferably in the sequestration in respect of her arrestment in the hands of the factor *loco absentis*, and to this claim the trustee has made two objections. He says, in the first place, "that the arrestment in the hand of the said George Dalziel, as factor aforesaid, was incompetent and invalid, in respect that he was a defender in the action, and not a third party." And the trustee pleads, secondly, "that the arrestments, even if competent and valid, being used upon the dependence of an action in which decree was not obtained until long after the date of the sequestration, were cut down and rendered ineffectual to create any preference in favour of the claimant by the sequestration of the effects of the said James Moir." The Lord Ordinary has refused to give effect to either of these objections, and I agree with him.

As regards the first objection, it is hardly necessary to say anything. It is too plain for argument. There cannot be the least doubt that the factor *loco absentis* was under an obligation to account to the absentee, and that was sufficient to make him liable as arrester. The other objection is more important, but I cannot say that I entertain any doubt as to the fact of a party who has arrested on the dependence of an action, but who has not obtained decree, being entitled to a ranking on a bankrupt estate as a preferable creditor as regards the estate which his arrestment covers, and the only difficulty arises from a passage in Erskine's Institutes, to which the Lord Ordinary has referred. Mr Erskine says—"If an arrester upon a dependence shall not have got his debt constituted by decree when the preference is to be determined between him and the other arresters whose debts are constituted, those other arresters must be preferred to him from the nature of the debt itself; for one who has not made it appear that any sum is truly due to him can claim no preference; and in the same manner, if the term of payment of a debt on which arrestment has been used be not yet come at the time of the competition in the forthcoming, the creditor

Feb. 15, 1729, M. 820; Carmichael v. Mosman, June 22, 1742, M. 2791; Wilson v. Fleming, June 26, 1823, 2 S. 383, 430; Ersk. Inst. iii. 6, 18; Bell's Comm. 5th edn. ii. 68, 72.

¹ Authorities.—Symington v. Symington, Dec. 3, 1875, *ante*, vol. iii. 205; Todd v. Smith, July 16, 1851, 13 D. 1371; Wyper v. Carr & Company, Feb. 2, 1877, *ante*, vol. iv. 444; Globe Insurance Company v. Scott's Trustees, Feb. 16, 1849, 11 D. 618, and August 5, 1850, 7 Bell's App. 296.

in that case can claim no preference; nay, he could not obtain a forthcoming No. 157. though there were no competition, because no creditor is entitled to payment till the term of his payment be come." Now, if this doctrine is intended to apply to a case in which there is no insolvency, and to that case only, I do not know that any exception can be taken to it; but I am afraid that a competition of arrestments where there is no insolvency is hardly a possible case. It is insolvency which gives arrestments their value. Therefore, if Erskine's doctrine is limited to cases in which there is no insolvency, it is one of very little importance. On the other hand, if it is intended to apply to the ranking of creditors on a bankrupt estate, I must say that I think it inconsistent with the fundamental principles of our system of bankruptcy. I am, therefore, prepared to adopt what Mr Bell says—that "if Mr Erskine's opinion be supposed applicable only to the case where there is no insolvency it is unobjectionable, if to the case of insolvency it seems to be unsound" (1 Bell's Comm. 316). And the unsoundness of the doctrine as applicable to the case of insolvency becomes very apparent when we consider those words in the passage from Erskine which I have read, but which are not quoted by the Lord Ordinary, for it is plain that in Erskine's opinion future and contingent creditors would not be entitled to rank in a sequestration; but as we all know, future and contingent creditors are just as much entitled to a ranking as present creditors, in a different way no doubt, and subject to different rules, but they are all entitled to claim in a sequestration. This does not depend on statute, but on the common law—on the fundamental rules of equity which underlie our whole system. If future creditors, *i.e.*, those whose dates of payment have not yet come, and contingent creditors, *i.e.*, those whose debts are not yet payable and may never become payable, were not entitled to claim in the sequestration, their debts would be gone for ever, because the bankrupt's discharge would finally put an end to them. The statute therefore allows future and contingent creditors to claim just as much and no more than justice requires. Future debtors are allowed to rank subject only to a deduction of interest for the period between the date of sequestration and of the payment of their debt. In the case of contingent creditors, a sum is set apart to meet their claim, should the condition upon which it depends become purified. If, therefore, the doctrine of Erskine applies to cases of insolvency, it would exclude this whole class of cases. Indeed, I cannot think that that learned writer refers to competitions in bankruptcy. The whole scope of the Bankruptcy Statutes is opposed to such a view. In particular, I may notice that equalising of diligence which is provided for by the 12th section. Before the process of sequestration was made applicable in the case of all debtors this equalising process was one of great importance. It is dealt with in the whole series of statutes in very much the same way, and the general effect is that all diligences used within sixty days of notour bankruptcy are equalised. We hear little of this now, because almost all estates are wound up by sequestration. But where there is no sequestration, how does the statute deal with this very subject of arrestment on the dependence? The 12th section provides that "arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date, provided that if such arrestments are used on the dependence of an action, or on an illiquid debt, they be followed up without undue delay." Now, therefore, it is clear that the statute here contemplates that arrestment on the dependence is just as

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No. 157. good a diligence as arrestment in execution, provided that there is no undue delay in following out the diligence. This provision seems to me directly in point in the present case. I am, therefore, of opinion that if the arrestment is used sixty days before sequestration, and is followed up without undue delay, and is in other respects unimpeachable, it will entitle the creditor to a preferable ranking, although sequestration of the debtor's estate has been awarded before following out the arrestment. I am for adhering to the Lord Ordinary's judgment.

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LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT adhered.

MACANDREW & WRIGHT, W.S.—ALEXANDER MORISON, S.S.C.—Agents.

No. 158. JOHN THOMAS MAIN (Fleming's Trustee), Pursuer.—*D.-F. Kinnear—Asher—Lorimer.*
ANDREW GALBRAITH AND OTHERS (Fleming's Trustees), Defender.—*Trayner—C. S. Dickson.*

June 30, 1881.
Main v. Flem-
ing's Trustees.

Bankruptcy—Insolvent expending funds in improving estate held in trust for children—Resulting trust.—In an action by the trustee on A's sequestrated estate against his trustees under an antenuptial marriage-contract the pursuer alleged that A, after he was insolvent, and knew that he was insolvent, expended large sums of money on an estate which he had conveyed to the trustees in security of the annuity provided under the contract for his widow and as a provision to his children, and concluded, *inter alia*, for declarator, that so far as the estate was benefited by A's expenditure, after the date when he was alleged to have become insolvent, the marriage-contract trustees held for behoof of the trustee in bankruptcy. *Held* (rev. judgment of Lord Rutherford Clark, *diss.* Lord Deas) that the pursuer's averments were relevant.

Process—Remit to Lord Ordinary to allow a Proof—Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 62.—Section 62 of the Court of Session Act enacts that "when proof shall be ordered by one of the Divisions of the Court it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before one of the Judges of the said Division." *Held* (after consultation with the Judges of the Second Division) that this did not apply to a case where the Court recalled an interlocutor of a Lord Ordinary dismissing an action as irrelevant, and remitted to the Lord Ordinary to allow a proof.

1ST DIVISION.
Lord Rutherford
Clark.
B.

THIS was an action by John T. Main, trustee on the sequestrated estate of James Nicol Fleming, merchant, Glasgow, against Andrew Galbraith and others, trustees under the antenuptial marriage-contract of Mr Fleming.

The conclusions of the summons were "that the defenders, as trustees foresaid, are vested in and hold All and Whole the lands of Keill, in the county of Argyll, in trust, for behoof of the pursuer, as trustee foresaid, to the extent of £10,000 sterling, or such other sum as may be ascertained in the course of the process to follow hereon to be the extent to which the said lands were improved, and the value thereof increased, by expenditure made thereon, by or on behalf of the said James Nicol Fleming, from and since 31st January 1871;" (2) for declarator "that the said sum of £10,000 sterling, or such other sum as may be ascertained as aforesaid, forms a real lien and burden in favour of the pursuer, as trustee foresaid, and his successors in office and assignees, upon All and Whole the twenty-shilling land of Kilcolmkell; . . . (3) or otherwise, in the event of the pursuer not obtaining decree in terms of the second conclusion hereof, the defenders ought and should be decerned and ordained,

by decree foresaid, to make payment to the pursuer of the said sum of £10,000 sterling, or such other sum as may be ascertained as aforesaid, with interest thereon at the rate of five per centum per annum from the date of citation." No. 158.

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The pursuer averred that by his antenuptial marriage-contract Mr Fleming had bound himself, in the event of his predecease, to pay his widow an annuity of £1000 per annum, and to assign to the trustees in security thereof certain shares and other property. The marriage-contract further provided that the balance of the trust-funds, after setting aside sufficient for securing the annuity, was to be held as a provision to the children of the marriage. Mr Fleming subsequently assigned the shares and other property to the trustees. The pursuer further averred that Mr Fleming subsequently bought the estate of Keill for £8698, and took the title in favour of the trustees, who granted him a lease at the rent of £250, but the whole price was repaid to him from the trust-funds.

The pursuer further averred ;—(Cond. 11) "Immediately on obtaining possession of Keill in 1865 Mr Fleming began to lay out large sums in permanently improving the estate. In 1873 he began to build a large mansion-house and to lay out grounds around it. This expenditure continued down to the stoppage of the City of Glasgow Bank in 1878. In 1865, when Mr Fleming began this expenditure, he is believed to have been solvent and possessed of considerable wealth, but extensive speculations led to his insolvency; and in 1871 he was insolvent, as is shewn by a balance of his books made by himself as at 31st January 1871. From that date his insolvent condition became worse, but was not publicly known till the failure of the City of Glasgow Bank on 2d October 1878. Mr Fleming's debit balance with that bank steadily increased from 1870, when it was £433,475, to the stoppage of the bank, when his unsecured debit balance was £1,259,546, 16s. 10d. The securities held by the bank had never, during any part of the said period, approached the amount of the debt. Mr Fleming was sequestered on 13th November 1878. . . . The defenders were well aware and approved of the expenditure made by Mr Fleming." (Cond. 12) "The amount expended by Mr Fleming in permanent improvements on Keill between 1865 and 1871 was about £2288, 10s. 4d. The amount repaid to him by the defenders from the sources mentioned in article 10th, in the same period was £6040, less the sum of £1259, 12s. 3d., mentioned in article 9th, leaving £3917, 19s. 9d. of the price of Keill then unrepaid. At that time (1871) the new mansion-house had not been commenced, but Mr Fleming was in the course of making extensive alterations and improvements on the estate and grounds. The mansion-house, which is large, was commenced in the end of 1872 or beginning of 1873. The value of Keill in January 1871 was about £11,000, and the said value (even assuming that there was liability to repay the said £3917, 19s. 9d.) taken along with the value of the other stocks held by the defenders, was much more than the security stipulated in the marriage-contract, and was amply sufficient to secure the obligations come under by Mr Fleming therein." (Cond. 13) "Between January 1871 and December 1876, as above mentioned, the sum of £3917, 19s. 9d. was paid to Mr Fleming from the income of the trust-funds in repayment of the price of Keill. On the other hand, Mr Fleming expended large sums in carrying out improvements at Keill, and after crediting the income of the trust-estate between 1874 and 1878 (including the rent of Keill), amounting to about £2000, the amount expended by him between 1871 and 1878, during all which time he was and knew himself to be insolvent, was upwards of £28,000, exclusive of interest. The estate of Keill, in the hands of the

No. 158. **defenders, has been increased in value to the extent of £10,000 by reason of the expenditure so made upon it between the years 1871 and 1878.**
 June 30, 1881. **Thereby the security afforded to the defenders, as trustees for Mr**
 Main v. Flem- **Fleming's obligations under the marriage-contract, has been greatly**
 ing's Trustees. **enhanced, and a large addition gratuitously made to the trust property.**
The said payments, amounting to £28,000 and upwards, were made by
Mr Fleming to conjunct and confident persons—viz., to the defenders as
trustees for his wife and children—without just, true, and necessary cause,
and after the contraction of lawful debts from true creditors. . . .
The said payments were in violation of the Statute 1621, cap. 18, and
were also made fraudulently to disappoint the just rights of prior credi-
tors, and they have been prejudiced thereby to the full extent of the
said £10,000."

The pursuer pleaded;—(1) The trust-estate held by the defenders prior to 1871 having been more than sufficient to secure Mr Fleming's obligations under the marriage-contract libelled, the subsequent expenditure by him on the estate of Keill, while to his own knowledge insolvent, is an alienation struck at by the statute 1621, cap. 18, and a fraud against Mr Fleming's creditors at common law. (2) The pursuer, as trustee on Mr Fleming's estate, and representing creditors prior to 1871, is entitled to declarator as libelled, and to decree under one or other of the remaining alternative conclusions of the summons, with expenses.

The defenders, in their answers to the pursuer's averments, stated, *inter alia*,—"The value of Keill has not been enhanced by the expenditure in question to the amount alleged, or to any appreciable extent. The new mansion-house is out of proportion to the size of the estate, and diminishes its marketable value. The estate now in the hands of the defenders is inadequate to meet the purposes of the trust."

The defenders pleaded;—(1) The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. (2) *Separatim*, No action lies, upon the grounds alleged, while the defenders are vested in the estate for the purposes of the trust. (3) The expenditure libelled not having been an alienation, without true, just, or necessary cause in the sense of the Act 1621, cap. 18, the defenders should be assolizied. (4) The expenditure libelled having been for behoof of the bankrupt himself, as tenant foresaid, the action cannot be maintained. (5) The value of the estate of the defenders not having been increased by the said expenditure, the action cannot be maintained. (6) The material averments of the pursuer being unfounded in fact, the defenders should be assolizied.

The Lord Ordinary pronounced this interlocutor:—"Assolizies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses: Allows an account thereof to be lodged, and remits," &c.*

* "NOTE.—The estate of Keill is held by the defenders in trust—first, in security of the provisions in favour of Mrs Fleming and her children, contained in the antenuptial contract of marriage between her and her husband, James Nicol Fleming, the bankrupt; and secondly, for behoof of James Nicol Fleming and his heirs and disponees.

"Keill was bought by Fleming in 1865. He laid out large sums in improving it. He was insolvent, it is said, in 1871, and the pursuers aver that his expenditure on Keill after that date increased its value to the amount of £10,000. That expenditure, it is further averred, was contrary to the Act 1621, as having been made in favour of conjunct and confident persons to the defenders, as trustees for the wife and children of the bankrupt. But it is not said that the

The pursuer reclaimed, and argued;—The pursuer's averments were No. 158. relevant, and the Lord Ordinary should have allowed a proof. It was averred that Fleming had expended money in improving the estate after he knew that he was insolvent. That was the same as if he had paid away money to the marriage-contract trustees. The money did not belong to him, but to his creditors. The trustee was entitled to receive from the trustees the amount expended, so far as it had benefited the estate of the marriage-contract trustees.¹

Argued for the defenders;—There was no relevant averment to go to proof. The only mode in which the pursuer could ascertain how much the estate was improved by the expenditure was by the sale of the estate. The pursuer could not compel the trustees to sell.

At advising,—

LORD PRESIDENT.—The impression of the Lord Ordinary appears to have been that the sole object of the pursuer in this action is to establish a preferable claim over the estate of Keill, in the hands of the defenders, to the extent of £10,000. But the case was not so presented to us under this reclaiming note, and I do not think that that is the only claim made in the summons. It is quite true that if we gave decree in terms of the second declaratory conclusion there would be a preferable right established in the pursuer—preferable to the rights of the parties for whom the defenders' trust was originally constituted; but that is not

trustees, or the wife and children, were in any way parties to the fraud, or knew of Fleming's insolvency.

"The purpose of this action is to have it declared that the defenders hold Keill in trust for the pursuer to the extent of £10,000, being the extent to which it was improved by Fleming's expenditure, and to have that sum declared a real burden in favour of the pursuer. There is a petitory conclusion against the defenders for payment of £10,000, but it was not insisted on.

"The pursuer does not disguise that his object is to establish a preferable claim over Keill to the extent of £10,000. This, indeed, as it seems to the Lord Ordinary, is the true meaning of the summons; for, if the £10,000 were declared to be a burden on Keill, the necessary consequence would be to give it a preference over the purposes of the trust.

"At the same time, the pursuer does not dispute that the trust was validly constituted, so as to secure the provisions in favour of the wife and children. His case is, that the augmented value should form a prior charge.

"To the Lord Ordinary it seems that the case of the pursuer is not well founded. The trust forms the first charge on the estate of Keill, and the bankrupt had a right of reversion only. The trust may not be entitled to the benefit of the increased value, but that is no reason for creating a prior charge in favour of the pursuer. The illegal expenditure which the bankrupt is said to have made cannot destroy the preference which is created by the trust, though it is possible that the defenders cannot take benefit by that expenditure. The right of the pursuer seems to be to prevent his reversion from being unduly encroached on—not to establish a preference.

"It is said by the pursuer that the interests of the children may fluctuate, according to the value of the estate of Keill. This is denied by the defenders. But, whatever be the merits of that question, it seems to the Lord Ordinary that it is not raised for decision in this action. The pursuer may take the necessary proceedings to fix the limit of the marriage-contract provisions. The Lord Ordinary decides nothing more than that he is not entitled to the preference which he claims."

¹ Selby v. Jollie, June 5, 1795, M. 13,438; Buchanan v. Stewart, Nov. 10, 1874, *ante*, vol. ii., p. 78; Watson v. Grant, May 14, 1874, *ante*, vol. i., p. 882; 2 Bell's Com. 189 (M'Laren's ed. 177).

No. 158. so under the first conclusion of the summons, which only asks for a declarator that the defenders, as trustees, are vested in the estate of Keill, "in trust for behoof of the pursuer, as trustee foresaid, to the extent of £10,000, or such other sum as may be ascertained in the course of the process to follow hereon to be the extent to which the said lands were improved, and the value thereof increased, by expenditure made thereon by or on behalf of James Nicol Fleming from and since 31st January 1871," being the date at which his insolvency commenced. Now, in determining whether there are relevant averments to support that conclusion, and whether the conclusion in itself is a competent demand upon the part of the pursuer, it is necessary to attend very particularly to the constitution of the trust which is in the hands of the defenders, and the obligations and purposes of that trust. It is contained in an antenuptial contract of marriage between Mr Fleming and his spouse, Mrs Elizabeth Galbraith; and, in security of a personal obligation undertaken by the husband in that contract to pay an annuity of £1000 to his wife if she should become his widow, there is an obligation upon Mr Fleming, within three months after the date of the contract, to transfer to the trustees fifty shares of the Borneo Company, Limited, now belonging to him, or to which he has acquired right, and a sum of £4000, so far as not already paid—that is, so far as not already paid for these Borneo shares; in the second place, within twelve months he binds himself to effect an insurance on his life to the extent of £500, and to transfer the policy to the trustees, and to pay the premiums. And then there is a declaration that it shall be in the power of Mr Fleming, with consent of the trustees, to sell and dispose of the Borneo shares, and to invest the proceeds thereof in such stock, shares, or other securities as they, the trustees, may think fit; also to allow the policy to drop, and to effect other policies, and so forth. In short, there is a general provision that Mr Fleming and the trustees may alter the investments of the funds in their hands. And with regard to the dividends, bonuses, or annual profits that may be derived from the said Borneo shares or others, the same are to be allowed to accumulate in the hands of the trustees during the life of the said James Nicol Fleming as an additional and further security for the payment of the provisions thereby made in favour of Mrs Fleming, with power to the trustees, if they think proper, to pay Mrs Fleming during her lifetime the proceeds of these securities, or any part of them, exclusive of the *jus mariti* of Mr Fleming. And then, with regard to the application of the sums to be derived from the Borneo shares and others, and of the sums which may be received by them under the policies of insurance, it is declared that the trustees and their foresaids shall apply the same, and the interest, bonuses, and dividends, and annual profits to be derived therefrom and remaining in their hands—first, to securing payment of the annuity of £1000 a-year; and second, the balance, if any, after setting aside a sum sufficient for securing payment of the annuity, shall, at the death of Mr Fleming, survived by his spouse, be paid, assigned, or disposed to the issue of the marriage; and at the death of Mrs Fleming the sums so set aside to secure payment of her annuity shall be paid, assigned, and made over among the issue of the intended marriage; and in the event of Mrs Fleming predeceasing her husband, and there being no child or children of the marriage, or such children predeceasing her, then the trustees are to pay over the same to Mr Fleming and his assignees; and in the event of there being issue of the marriage at the death of Mrs Fleming, survived by her husband, the trustees are to pay to Mr Fleming the interest, dividends,

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and annual profits of the sums in their hands during his life. Now, the effect of this deed is that certain funds are placed in the hands of the trustees, in the first place, as security for the payment of the widow's jointure of £1000 a-year, and the funds which are so used as a security for the payment of that jointure are ultimately to be divided among the children of the marriage. As regards the widow, these funds are a security; as regards the children, the funds become their provision. And, therefore, when the annuity is satisfied and has come to an end, the sums which have been used as security for that annuity are just the divisible fund among the children of the marriage. Of course it might so happen, if the funds became depreciated, that the payment of the annuity to Mrs Fleming might encroach largely on the capital of these funds, and so diminish the amount provided to the children. Now, that being the nature of the trust, let us see what it is alleged occurred after the marriage and before the insolvency of Mr Fleming. It is said that the fifty shares of the Borneo Company were worth about £2500 at the time when the marriage-contract was made, but they yielded large dividends, and from the revenue of the trust the defenders, on 14th May 1863, purchased £1000 Glasgow and South-Western Railway stock, and then again they purchased other stock of the Great Western Railway of Canada worth £1900, and Mr Fleming advanced a certain sum of £1349 to enable them to make up the price of that stock. Then there was an arrangement made between Mr Fleming and the trustees in consequence of his having purchased the estate of Keill, in Argyllshire. He had bought that estate for the sum of £8000 odds, and he wished to make a transaction with the trustees by which in the end they should take the estate of Keill in place of the funds that they then had in their hands, over and above the original Borneo shares. It is needless to go into the details of that arrangement. The estate of Keill was of greater value than the funds in their hands other than the Borneo shares; but an arrangement was made by which they were, out of the revenue of the funds in their hands—which by the trust-deed they were enabled to accumulate—to pay year by year to Mr Fleming so much money until the total price of Keill was repaid to him; and that, we are informed, was finally completed by the year 1876. Then Mr Fleming took a lease—for that was part of the arrangement also—from the trustees of the estate of Keill at a rent of £250 a-year; and having gone to reside there, apparently he proceeded to make very large and important improvements on that estate. That seems to have begun in the year 1865, and therefore there was a good deal of money expended upon the estate before he became insolvent in 1871. But after that date, and when it is alleged he was undoubtedly insolvent, he continued to make large expenditure upon this estate still, and he continued to do so down to the year 1878, when, by the failure of the City of Glasgow Bank, his complete insolvency became apparent, and he left the country. Now, the pursuer contends, upon this state of the facts, that by the expenditure which Mr Fleming made upon the estate of Keill, which belongs in property to the trustees, the value of that estate has been largely increased, and the consequence of that is that the trust-estate, including the estate of Keill, has become much more valuable than the original funds put into the hands of the trustees in virtue of the marriage-contract—the consequence of which is not merely that the security is increased for the payment of the annuity, but that there will be a much larger provision for the children of the marriage than was secured to them by the marriage-contract. Now, that is all quite right and proper in so far as Mr Fleming had power to

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No. 158. do it, and if he had remained solvent nobody could have found any fault with him for increasing the funds in the hands of the trustees, and so increasing the provision in favour of his children. And down to the year 1871 every shilling that he spent on the estate of Keill does go to increase the value of the estate in the hands of these trustees, and to enlarge the children's provisions. But then the pursuer says, Mr Fleming was not entitled to go on expending money in this way after he became insolvent, because that was simply increasing the provision to his children at the expense of his creditors; and it appears to me that that is quite a sound proposition, and that, so far as this expenditure was made after he became insolvent it was at common law an unlawful thing for him to do—a fraud upon his creditors in the technical sense of the term, although I am not at all inclined to suppose that any actual fraud was intended. Still it is what the common law calls a fraud against his creditors, because it is taking the money that ought to have gone to pay them to increase gratuitously the provision in favour of his own children. No doubt, if that money was thrown away—if it did not in point of practical effect increase the value of the estate in the hands of the trustees, and so increase the money value of the provisions for his children—it would be in vain to attempt to charge any part of that against the defenders. But if the defenders as trustees are *lucrati* by that expenditure, or, in other words, if the value of the children's provisions is, in point of fact, enhanced by the expenditure of that money, then I apprehend to that extent the pursuer, upon the part of the creditors, has a perfectly equitable claim to participate in the trust-estate which is held by them—in short, the estate comes to be in their hands held in trust, first, to provide the annuity settled in the marriage-contract, and the amount of the funds provided in the marriage-contract to the children of the marriage, but *quoad ultra* it is a resulting trust in favour of the creditors. And therefore, upon the averments which are before us, which I am not by any means supposing the pursuer will necessarily be able to prove, and which certainly lay upon him a pretty heavy *onus probandi*—but still, upon these averments, I am quite unable to say that there is not a relevant and good claim made for the trustee of the creditors. And if that be so, I confess I do not see any difficulty in declaring his right in terms of the first conclusion of the summons. It may not be precisely in the very terms of that conclusion, but substantially in terms of that conclusion, that to the extent to which the trust-estate is *lucratus* by the expenditure of Mr Fleming after he became insolvent the defenders hold for the creditors and their trustee. And therefore I am for recalling the interlocutor, and remitting to the Lord Ordinary to allow a proof.

LORD DEAR.—Mr Fleming was sequestrated under the Bankrupt Statutes on the 13th of November 1878, and this is an action by the trustee upon his sequestrated estate. I need not narrate the terms of Mr Fleming's contract of marriage, which was entered into a great many years ago, because your Lordship has very distinctly stated what these are. I shall, therefore, begin by noticing the purchase by him of the estate of Keill, which took place in or about May 1865, at a cost, including expenses connected with it, of £8698. It is stated by the pursuer that in 1865 Mr Fleming was a wealthy man, and that he was solvent till the year 1871. It is also stated that Mr Fleming had begun to lay out money upon the estate at a time when he was perfectly solvent, but it seems to be alleged that he continued that expenditure less or more after he became

insolvent in 1871. The summons contains three conclusions, but before entering upon these I may state that I understand the ground upon which the Lord Ordinary proceeds is that he holds the summons to be wholly irrelevant. In that opinion I concur. The first conclusion is that it should be found and declared that the marriage-contract trustees hold the estate of Keill to the extent of £10,000, or such other sum as may be ascertained to be the extent to which it has been improved by Mr Fleming, in trust for the pursuer. That is a sort of conclusion I confess I never saw before, and how it is to be extricated I do not know. They do not hold the estate of Keill in trust for the pursuer to any extent whatever, and my humble opinion is that it is utterly inconsistent with our law of heritable and feudal property to declare in terms of any such conclusion. It is to my mind a conclusion utterly inextricable and inconsistent with any law of Scotland that I know of as to the titles to heritable or feudal property. No. 158.
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Then the second conclusion is that it shall be found and declared that the said sum of £10,000, or such other sum as may be ascertained to be the value of the improvements, forms a real lien and burden in favour of the pursuer as trustee on the sequestrated estate. I think your Lordship is of opinion that that conclusion will not do. I never before saw the attempt made to constitute a real burden by a declaratory conclusion in a summons in place of in the feudal titles, in which we all know it requires to be very carefully and very specifically done. That conclusion, if it could receive effect, would give the trustee a preference. A real burden is always a preferable burden, and that would give him a preference which I think, according to your Lordship's view, he is not entitled to.

The only other conclusion is for payment of the sum of £10,000, with interest thereon at five per cent, or such other sum as may be ascertained to be the extent to which the estate has been improved. Your Lordship has not said anything in favour of that conclusion, and I do not know anything that could be said in favour of it. The Lord Ordinary says in his note:—"There is a petitory conclusion against the defenders for payment of £10,000, but it was not insisted on." It was not insisted on before the Lord Ordinary. I do not recollect anything being said in favour of it here, and as far as I have observed nothing has been said in favour of it as yet by your Lordship. The whole contest, therefore, seems to be upon the first conclusion, which is the only thing left in the summons, to have it declared that to the extent to which the estate may have been improved it is held in trust for behoof of the pursuer as trustee on the bankrupt estate. Now, that does not recommend itself to my mind as an extricable conclusion at all.

Then the first plea in law for the pursuer is—"The trust-estate held by the defenders prior to 1871 having been more than sufficient to secure Mr Fleming's obligations under the marriage-contract libelled, the subsequent expenditure by him on the estate of Keill, while to his own knowledge insolvent, is an alienation struck at by the statute 1621, cap. 18, and a fraud against Mr Fleming's creditors at common law." These are two different things. I heard nothing argued under the statute 1621. The object of an action under the statute 1621 would be to reduce something—some alienation. Neither your Lordship, nor anyone at the bar, has said that there is room for a reduction in this case. Therefore the only thing left under that first plea is, that it is a fraud against the creditors at common law. Now, it may be observed that in the summons

No. 158. there is no allegation that Mr Fleming expended a single shilling in bad faith. It is said he happened to be insolvent, and he knew he was insolvent when he was going on with what was really an ordinary act of management or administration in improving and thereby utilising the buildings on his estate. It is not said that in this he did anything morally wrong; there is no allegation of that kind. He may have made a mistake in point of law, but how that is to be converted, without any statement to lay a foundation for it, into a fraud at common law, I do not understand, and I did not hear your Lordship say that it is a fraud at common law.

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Upon these grounds, I entirely concur with the views of the Lord Ordinary, that supposing there might have been a claim here, no relevant claim or ground of action has been stated in this summons. It is not necessary to go beyond the conclusions of the summons, but I may just make this observation, that it would be a very peculiar kind of conclusion that would bring what was done under any legal objection. Nothing was done, so far as appears, with a fraudulent intention, and the fact is obvious that, whether this estate was improved in value at the time or not, it remains to be seen whether, when the widow and the children come to make their securities available, it will be found of increased market value at all. We can take a proof upon things that have happened, but we cannot take a proof on things that have not happened. We have had instances of much more valuable estates than this, particularly in the west country, that have become totally unsaleable just because of the expensive mansions erected upon them. And if it happens that this estate, when the children have to realise their provisions, has become not worth these provisions, what is to become of the right of the trustee under the sequestration? I do not see my way through that at all. I mention that as a great difficulty and obstacle that may be in the distance, but it is not necessary here to go into it. In my opinion, the Lord Ordinary is right in coming to the result that none of these conclusions are relevant.

LORD MURE.—This case is one of some difficulty, and I have had some hesitation in making up my mind as to the course we ought to pursue. The estate of Keill is held by trustees in security of marriage-contract provisions of an onerous description, which are very clearly declared in the antenuptial marriage-contract between Mr and Mrs Fleming. The estate was given over to the trustees to be held for behoof of the beneficiaries in the marriage-contract, and, together with certain Borneo bonds and policies of insurance, is the capital fund out of which the annuity of £1000 settled upon Mrs Fleming is to be met, while the capital upon her death is to go to the children. Now, that is a trust of a very onerous description, and one which I am satisfied we are bound to take care is not interfered with by any steps proposed to be taken by Mr Fleming's trustee with a view to acquire an interest in the subject-matter of the trust. It is said that after the estate of Keill was acquired Mr Fleming expended a large sum of money upon it, and that he did this after 1871, when he was insolvent. At that time it is said the estate was worth about £11,000, having been purchased for somewhere about £8900. But it is now alleged that by these improvements made upon it, between 1871 and Mr Fleming's bankruptcy in 1878, the estate is increased in value to the extent of £10,000—that is to say, that it is now worth £21,000. And the object of this action is to enable the trustee on Mr Fleming's estate to get the benefit of that expenditure to the extent to which the value of

the estate has been increased. Assuming these facts to be proved, the summons No. 158. contains three different conclusions—one a declarator that the trustees hold the estate in trust to the extent of that excess in value of £10,000. Then there is a conclusion of declarator that the £10,000 forms a real lien or burden in favour of the pursuer as trustee, and if that is not declared, then that the pursuer as trustee on the estate is entitled to immediate payment of £10,000. The Lord Ordinary has assoilzied the defenders from the whole conclusions of the action, holding that the pursuer is here in reality seeking a preference which he considers the pursuer was not entitled to in such a question. I am disposed to agree with the Lord Ordinary in thinking that the pursuer is not entitled to any preference over the marriage-contract trustees, and, being of that opinion, I concur with the Lord Ordinary in thinking that neither under the second nor the third conclusions can the trustee on the sequestrated estate take any benefit. But I think the Lord Ordinary has been misled as to what the pursuer actually wants, because he assumes throughout in his note that the pursuer asks a preference. It was, however, explained to us during the discussion that that is not what the pursuer wants. The second and third conclusions may perhaps amount substantially to a demand for a preference; but I understand the pursuer does not now ask decree in terms of the second conclusion, or assert any preference as against the marriage-contract trustees. That being the case, the question for decision is, whether under the first conclusion of the action the trustee is in the circumstances fairly entitled to have it ascertained whether there was this excess of value put upon the estate by Mr Fleming's expenditure after his insolvency, and if so, whether, when the marriage-contract provisions are satisfied, the trustee will be entitled to the additional value of the estate? Now, under an action of this sort brought by a trustee to shew that in point of fact there was an expenditure made upon the estate by the bankrupt, which he as trustee for the creditors has a right to claim, subject to any preferences there may be over the estate, I think that the trustee has taken up a position which he is entitled to assume, and that he is entitled to have it cleared up, whether in point of fact Mr Fleming did lay out this large sum of money upon the estate, and whether it has been increased in value to any extent beyond the value of £11,000 which it is admitted it bore at the time when Mr Fleming began the expenditure. And if this conclusion of the summons had gone no further than asking to have it declared that that sum was laid out, and that, upon the marriage-contract provisions being discharged, the trustee would be entitled to the difference between the value of the estate at the time the improvements were begun and the additional value given to it by the improvements, I think he would be entitled to have it so declared. But I have some hesitation whether declaring a trust in terms of this first conclusion of the summons may not go a little further than merely constituting the debt as it were, and entitling the trustee to have the benefit of that increased expenditure after the marriage-contract trustees have discharged their duty under the marriage-contract. If the conclusion were qualified in some way, so as to make it clear that it was only after the marriage-contract provisions had been satisfied that the trustee was to be entitled to take this additional value, I think the rights of the parties would be fairly and properly adjusted under it. I do not therefore object to a proof in order to have the matter inquired into; but I incline to think that this first conclusion of the summons will require to be qualified so as to shew that no trust is to be created in favour of the pursuer to the prejudice of the marriage-contract trustees. And

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No. 158. assuming that question to be open for discussion after the proof, I do not object to the course which your Lordship proposes. But I throw out for the consideration of the parties whether they might not qualify the conclusion so as to obviate any difficulty in this respect.

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LORD SHAND.—I concur with the majority of your Lordships in thinking that the pursuer is entitled to a proof of his averments in this case, and I entirely agree with the opinion which your Lordship in the chair has delivered. The case is one which seems to me to be really not attended with difficulty. The Lord Ordinary has said at the close of his note :—"The Lord Ordinary decides nothing more than that he (pursuer) is not entitled to the preference which he claims ;" and if the effect of the Lord Ordinary's judgment had been to decide nothing more I would have agreed with him. I am clearly of opinion, with all of your Lordships and the Lord Ordinary, that the pursuer is not entitled to any preference, and therefore that we could not give effect to the second conclusion of the summons. But, on the other hand, I am equally clear that if the pursuer succeeds in proving the facts which he alleges, he is entitled to a decree in terms of the first declaratory conclusion. For my part I should be quite content that he should obtain decree in the words in which it is asked, but I can see no objection to adding such words as Lord Mure has suggested. That, however, can be done when the case comes to be disposed of on the proof by the judgment to be then pronounced, if the pursuer shall succeed in proving his averments.

For the purpose of a decision on the relevancy of the case I do not think it necessary to look to any period prior to 1871 ; and to me it is quite immaterial what were the provisions of the marriage-contract relating to the particular purposes for which the trustees held the funds and estate. It is, I think, of no moment in what proportions or in what order the wife or children of the bankrupt were interested in the trust-estate. The fact is this, that the trustees held for the purposes of the trust a property which in 1871 was of the value of £11,000. That I take from the pursuer's statement, which he offers to prove. He says,—“The value of Keill in January 1871 was about £11,000.” Now, it is further alleged that the bankrupt, being of course interested in his own family, for whose behoof the trust was created, proceeded after 1871 to spend £28,000 upon the property. The pursuer says he did so when he was insolvent, and when he knew he was insolvent. Therefore he just spent so much money that was not his own, and which truly belongs to his creditors, on this particular part of the trust-estate. I do not understand it to be disputed that the pursuer's averments would be relevant in the ordinary case of a provision made in favour of a wife or family by one who has afterwards become bankrupt. The creditors in the ordinary case are entitled at common law to be restored against such an act by the bankrupt done in the knowledge of his insolvency. Suppose that, instead of laying out the money upon this estate, Mr Fleming had, in the knowledge of his insolvency, handed to trustees £10,000 for the purposes of their trust, being under no obligation to make any such payment, and they had invested the money upon heritable bonds, and the bonds remained ear-marked at the date of the sequestration, can it be disputed that the trustee on the estate would be entitled to require that the money should be paid back to him for behoof of the creditors to whom it belongs ? I think that is too clear to require argument or observation. Well, the case is not quite in that position. The

money cannot be identified or got back in the clear and easy way in which it might be recovered in the case I have supposed. But the pursuer says that after and by means of the £28,000 which was expended on Keill the estate in the hands of the defender has been increased in value to the extent of £10,000. What is the result of that? The result is that, assuming the property to have retained its value, there is £10,000 of the creditors' money in that estate at this moment, just as there would be £10,000 in the hands of the trustees if the money had been handed over to them and invested as in the case I have supposed. It appears to be the consequence of that state of matters that there is a resulting trust in the trustees to the extent of this £10,000 for behoof of the creditors of Mr Fleming. The trustees are feudally vested in this property, but what they are entitled to is £11,000 for their own trust, while Mr Fleming's creditors have right to the sum of £10,000, or such other sum as shall appear to be the amount by which the value of the property has been enhanced by the expenditure. The fact that the different funds have been mixed up by having been spent, one part in buying the property and another in permanently improving it, cannot give the beneficiaries the right to retain money not their own. The pursuer's right must be extricated in some way. He asks a proof in order to shew that the trustees are holding money belonging to the creditors which has been sunk in this property, and I confess I have never been able to see any reason, and I do not see any reason now, why he should not be allowed to prove that this is the fact, and that the expenditure thus increased the value of the property as he alleges. Having proved his averments, I think he would be entitled to decree in terms of this declaratory conclusion—as I have said already unqualifiedly—but if it be thought safer, to make the matter clear, that it should be qualified in some way so as to save the rights of the wife and children under the marriage-contract provisions, good and well, that may be done. The right, it appears to me, would neither be one of preference nor of a postponed nature, but of a *pari passu* nature to the extent to which it is made out. It is unnecessary to inquire what may be the next steps. The pursuer must make it clear that the facts are as he alleges; but I can only say, for my own part, that assuming this to be made out, then, whether the subsequent procedure is to be worked out by giving the pursuer a decree against the trustees to find the money, or by requiring them at a suitable time to sell the property or to grant a marketable security over it, the pursuer will, I think, be entitled to have matters somehow put in such a shape that he shall have the fund belonging to the sequestrated estate made available for division among the creditors.

On these grounds, and taking the case as one in which a preference is not now insisted in, I am clearly of opinion that a proof ought to be allowed.

Counsel for the pursuer then called attention to the 62d section of the Court of Session Act, 1868,* and suggested that a remit to a Lord Ordinary was incompetent, and that the proof must be taken before one of the Judges of the First Division.

* "The 3d section of the Act 29 and 30 Viet., cap. 112, is hereby amended to the effect of providing that, notwithstanding the terms of the said section, 'Where proof shall be ordered by one of the Divisions of the Court,' it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before any one of the Judges of the said Division, whose place may for the time be supplied by one of the Lords Ordinary called in for that occasion."

No. 158. At advising.—

June 30, 1881. **LORD PRESIDENT.**—We have conferred with the Second Division on this point of practice, and we are of opinion that the 62d section of the Act of 1868 does not apply. It applies to cases in which a Division orders a proof to be taken, but here we are merely going to recall an interlocutor of a Lord Ordinary dismissing an action. The case will then proceed as if that interlocutor had never been pronounced, and the next step will be to send the case to probation. This has often been done.

THE COURT pronounced this interlocutor :—"Recall the interlocutor, and remit to the Lord Ordinary to allow the parties a proof before answer."

DAVIDSON & SYME, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 159.

THOMAS CAMPBELL BURTON, Pursuer.—*Macdonald—Lang.*
ROBERT MOORHEAD, Defender.—*Guthrie Smith—Shaw.*

July 1, 1881.
Burton v.
Moorhead.

Reparation—Liability of owner of dog for damage.—Held that the owner of a dog, known by him to be ferocious, is bound to take, not only reasonable, but effectual, precautions against its attacking the public, and that, in the event of the precautions taken proving insufficient, he will be liable in damages to the injured person.

2D DIVISION.
Sheriff of
Lanarkshire.
M.

IN December 1880 Thomas Campbell Burton, professor of dancing, Glasgow, presented a petition in the Sheriff Court there against Robert Moorhead, commission agent, Glasgow, concluding for damages to the extent of £150 in respect of injuries alleged to have been inflicted on him by a dog belonging to the defender.

The pursuer averred that—(Cond. 2) "On 29th May last pursuer, whilst proceeding past the defender's house at Craigielinn, Paisley, along with Mr Quin, contractor, Glasgow, was attacked and severely bitten on the left leg, near the ankle, by a dog belonging to the defender, which was allowed to be loose or insufficiently guarded or secured." (Cond. 3) "The pursuer in no way interfered with the said dog, which was well known to the defender to be a vicious, ferocious, and dangerous animal."

He pleaded ;—(1) The defender's dog having bitten pursuer, the defender is liable in reparation, in respect that there was no fault on the part of pursuer, and said dog was vicious, ferocious, and dangerous. (2) There being *culpa* on the part of defender, or those for whom he is responsible, in not having the said dog sufficiently attended or secured, the defender is liable to pursuer for the injuries sustained.

The defender pleaded ;—(1) The pursuer having been trespassing when he suffered the injuries complained of, he has no right of action. (2) The pursuer having provoked the defender's watch-dog, he is not entitled to recover damages.

A proof was led on January 18, 1881, from which it appeared that Mr Moorhead's house was situated near Paisley, about 300 yards back from the public road, and that access was obtained to it by means of a private road leading from the public road past the house towards the new water-works for Paisley. Close by this road was a kennel in which the defender kept a watch-dog chained. Much evidence was led as to the temper of the dog, but eventually the Sheriff-substitute found, and it was hardly disputed on appeal, that the dog was of a savage character, that it had bitten several people, and that the defender had been put on his guard as to its propensity to attack people. The dog was secured by a chain attached to a

ring passing through a staple driven into the ground. It appeared that on 29th May the pursuer and his wife were on their way to inspect the Paisley waterworks, having been invited to do so by Mr Quin, contractor for the said works, who had advised them to go by the defender's private road, as being the shortest and least steep. The pursuer and his wife were in a gig belonging to Mr Quin, who was to join them at the works. There was a conflict of evidence as to whether Mr Quin had permission to use the private road, and to give others leave to do so. No. 159.
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Mr Quin, in his evidence, deponed—"On the date in question, the 29th of May, I had invited Mr and Mrs Burton to see the works, and I drove them out as far as the hill foot, up to the end of Mr Moorhead's house. I told them to drive round by the house, the nearest and easiest way. I had some business which took me up the other way. It is a much easier ascent than the other way. I had frequently driven the way I sent them. It takes them past the end of Mr Moorhead's house, and on to the works, round the back of the house. That was not the only occasion on which I had any stranger with me, this time, the 29th of May, that Mr and Mrs Burton were with me. (Q.) You had availed yourself of the road frequently? (A.) I took full permission of the road. That was by Mr Moorhead's direction. He did not put any restriction upon me as to the use of that side road."

In cross-examination he further deponed—" (Q.) Did Mr Moorhead allow you to give permission to other people to go (by the private road) as well as to go yourself? (A.) From what he said I took it for granted that I had permission, and I took all my friends that way, and I took the water commissioners up, and Mr Sharpe. (Q.) Did you ever send any other body that way when you were not going yourself? (A.) I am not very sure, but I would if I were sending them direct to the work. If I had nothing else to do I would send them. (Q.) Did you understand Mr Moorhead had given you permission to invite people to go that way when you were not going yourself? (A.) Certainly he did; and I told my foreman to go that way. It was understood we had full permission to go that way. I understood that."

Mr Moorhead, in cross-examination, said—"I have heard to-day what the witness M'Leod said, and also what Mr Quin said, as to my having granted permission to them to use that road in their visit to the works. I never granted permission to either of them. I say, positively, I never granted permission to either. (Q.) Then you say their statement is untrue? (A.) I was never asked permission. Had I been asked I might have granted it, up to a certain point. I never was asked, and I most certainly never gave, liberty. I think I only saw Mr Quin once on my property. We had a few passing words, I daresay. We had none whatever about this road."

As Mr and Mrs Burton were driving up the private road, Mr Burton got down from the gig and walked to rest the horse. As he passed, the watch dog flew out upon him, broke its chain, and bit the pursuer severely on the leg. It was not proved that the pursuer had in any way wantonly irritated the animal.

Much evidence was led as to the strength of the chain, the effect of which was to shew that it looked strong and was in fact sufficiently strong to hold in the dog on ordinary occasions.

On January 27, 1881, the Sheriff-substitute (Lees) pronounced the following interlocutor:—"Finds that on 29th May 1880, the pursuer was passing along a private road leading past the defender's house to the water-works, in course of construction for the burgh of Paisley, and that said road led near a kennel, at which there was chained a retriever dog

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belonging to the defender, and kept by him there as a watch-dog: Finds that the said dog was of a most savage character, and that it had bitten several people, and that the defender had been put on his guard as to its propensity to attack people: Finds that in these circumstances it was incumbent on him to take all proper precautions for the safety of people having occasion to pass along said road: Finds that the precautions adopted by the defender were, that the dog was secured by a chain attached at one end to its collar, and at the other to a ring passing through a staple driven into the ground: Finds that on the occasion in question the dog sprang so violently towards the pursuer that one of the links of its chain snapped, whereon it rushed on the pursuer and bit him severely: Finds that the said chain had been in use for two years, had been bought as a new chain, and as being of sufficient strength to restrain the dog, that apparently to the eye it was sufficient for this purpose, and that it has never before nor since 29th May given way: Finds, therefore, that the precautions taken by the defender were reasonably sufficient: Finds, in these circumstances, as matter of law, that the defender is not responsible to the pursuer for the injuries he has sustained through the unexpected fracture of the dog's chain: Therefore assails the defender from the conclusions of the action, and decerns."

The pursuer appealed to the Sheriff (Clark), who, on 5th April 1881, pronounced an interlocutor recalling the judgment of the Sheriff-substitute, on the ground that the occurrence took place through the failure of the defender to provide a chain sufficiently strong for the purpose intended, and assessing the damages at £50.

The defender appealed to the Court of Session.

Argued for defender;—The pursuer was on a private road, and had no right to be there, or at least was there by the kindness of the defender. That being so, the negligence proved against the defender must be of the grossest kind.¹ The dog in this case was not of an unusually ferocious character as in the case of *Renwick v. Von Rotberg*.² Besides, the defender was quite entitled to keep such a dog on his premises provided he took proper and reasonable precautions to restrain it, as he had done in this case.

Argued for pursuer;—The owner of a dog, known by him to be ferocious, was not only bound to take reasonable precautions to restrain it, but to take effectual precautions. If his precautions did not prove effectual, however sufficient they might appear to have been, he would be responsible for any damage resulting from their insufficiency.³ The pursuer had reasonable cause to suppose that he might be on the private road, and that being so, he was entitled to insist in this action for damages.⁴

At advising,—

LORD JUSTICE-CLERK.—There are two grounds on which the Sheriff's judgment is assailed, first, that the pursuer had no right to be where he was, and that, therefore, the obligation on the owner of the dog was not so strong as it would otherwise have been, and second, that the owner took all reasonable precautions to restrain this dog, and that the chain having broken from unsuspected causes, he was discharged from all responsibility. In regard to the first ground, I do not think that the evidence bears out the contention. Mr Quin

¹ *Moffat v. Bateman*, December 14, 1869, 3 L. R. Priv. C., App. 115; *Shearman on Negligence*, 580, sec. 498.

² *Renwick v. Von Rotberg*, July 2, 1875, *ante*, vol. ii., 855.

³ *Hale's Pleas of the Crown*, 430; *May v. Burdett*, June 2, 1846, 9 Ad. and Ellis, 101; *Addison on Torts*, 113; *Cowan v. Dalziel*, November 23, 1877, *ante*, vol. v., 241.

⁴ *Sarch v. Blackburn*, February 24, 1830, 4 Carr and Payne, 297.

says that he had leave to go on to this private road, and also had leave to take No. 159. anybody with him that he chose, and used that right without restriction by the owner. I do not quite understand the discrepancy between Moorhead and Quin's testimony, but still it is clear that Quin did go on to that road without interference of the owner, and took persons with him; therefore when he took the pursuer with him the pursuer was not a trespasser, but had, on the contrary, reasonable grounds to believe that he was doing what he was entitled to do. For my own part, if I were obliged to balance Quin's evidence against Moorhead's, I should be inclined, in the circumstances, to prefer Quin's; but I give no decided opinion on that point. If there were any difference between a person having a right to be on the road and one who has not, still I think the pursuer would be entitled to prevail on the ground of the owner's tolerance.

The second question is more important, and if the liability of the defender depended on his having taken reasonable precautions to restrain the dog I should think that he had very good grounds to prevail.

But that view depends, I think, on a misapprehension of the true principle of his duty. It seems agreed that where an owner of a dog has no reason to suppose that it is ferocious the mere fact that it has turned out to be so would not make him liable for anything it has done; the dog has in fact the privilege of one worry. But when the ferocity of the dog is quite well known to the owner his obligation is not one of reasonable care, but not to keep the dog at all, unless he does it in such a way as to make it perfectly secure. The distinction is most clear, and therefore the owner of the dog keeps it entirely at his own risk. He does not undertake that he will restrain the animal, but he must restrain, and, if he does not, he will be responsible for its acts. The following passage in Lord Hale's Pleas of the Crown shews the distinction clearly, for under the old English law what will save a man from a criminal prosecution will not save him from a civil action of damages. He says,—“If a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality he is not punishable, but if the owner be acquainted with his quality, and keeps him not up from doing harm, and the beast kills a man, by the ancient Jewish law the owner was to die for it. . . . If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ nature*, as a lion, a bear, a wolf, gnu, an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's* case, whose child was bit by a monkey that broke his chain and got loose. And therefore in case of such a wild beast, or in case of a bull or cow that doth damage where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escapes and do harm the owner is liable to answer damages. But as to the point of felony, if the owner have notice of the quality of the ox, &c., and use all due diligence to keep him up, yet the ox breaks loose and kills a man, this is no felony in the owner, but the ox is a deodand. But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of his condition, and kills a man, I think it is manslaughter in the owner.”

That precisely covers the case here, and brings out the distinction clearly between a man doing what is lawful in a neglectful manner, and a man doing what is unlawful, except on the condition of taking all the risk on himself.

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LORD YOUNG.—I entirely concur; and I think the case is very important. The Sheriff-substitute finds as matter of fact “that the said dog was of a most savage character, and that it had bitten several people;” and the Sheriff finds that the dog was “a powerful and ferocious dog.” Now, there is no necessity for a man to keep an animal of this kind—dangerous to human beings; there is no more necessity for him to keep it than there is to keep a wild animal. He may lawfully keep it, but he keeps it at his own risk; he is not only bound and obliged to use diligence, or, as the Sheriff-substitute says, “to take precautions which are reasonably sufficient” to restrain the dog; but the risk shall be entirely his, and the precautions he takes must be effectual. If they are not, the owner is responsible. That is the law, and it is well set forth in the passage from Hale’s Pleas of the Crown your Lordship has quoted. If it be a wild animal, or an ordinary domestic animal which is dangerous to human beings, the keeper shall not discharge himself of his obligation by using diligence, which in fact turned out to be ineffectual. It is different when there is a criminal question in the matter, and not merely one of damages, for when a man is sought to be made criminally responsible, then the question of reasonable diligence will be entertained. I concur in all the findings of the Sheriff-substitute as summarised by the Sheriff, with the exception of the finding as to the reasonably sufficient precautions. I think the precautions must be effectual, and not only reasonably sufficient, in the sense that though they were not effectual the owner was morally excusable. The reason of our judgment is that ineffectual precautions are no defence to an action for injuries done to a person, where he lawfully was, by a ferocious animal.

LORD CRAIGHILL concurred.

THE COURT pronounced the following interlocutor:—“Find that the dog in question was ferocious and dangerous, and known to be so by the appellant (defender): Find that the dog was kept on the chain, but that this chain was insufficient to render the dog secure, and that the chain broke, and the dog getting loose, bit the respondent (pursuer) severely: Find that the respondent was where he was entitled to be at the time of this occurrence: Therefore dismiss the appeal, approve the judgment of the Sheriff appealed against, and decern.”

MACBRAIR & KEITH, S.S.C.—RHIND, LINDSAY, & WALLACE, W.S.—Agents.

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July 5, 1881.
White, &c. v.
Dickson, &c.

MRS MARGARET WHITE AND OTHERS, Pursuers (Respondents).—*Gillespie.*

THOMAS DICKSON AND ANOTHER, Defenders (Appellants).—*Party.*

Interdict—Publication—Private Correspondence.—It is a question of circumstances whether the Court will grant an interdict against the publication of private letters by the receiver.

A person having informed certain of his wife’s relations that he intended to publish for circulation among his friends a private correspondence between himself and his wife and them, they presented a petition for interdict against the publication. The Court, after examining the letters, *refused* to grant interdict.

Observed (per Lord Justice-Clerk) that if, by the publication of the correspondence any injury was done, the mere fact that interdict had been refused in the present action would not shield the person publishing it from the consequences of his act.

IN September 1880, in the Sheriff Court of Lanarkshire, Mrs Margaret Marshall or White, Stanley Street, Glasgow, and others, presented a petition against Thomas Dickson, and his wife Mrs Calderhead Eadie White or Dickson, in which they prayed the Court "to interdict the defenders and either of them from circulating or publishing a pamphlet headed 'Correspondence between Mrs White, Miss White, Mr and Mrs Begg, Mr Thomson, and others, and Mr and Mrs Dickson, also record in action raised in Sheriff Court, with shorthand writer's notes of the proof taken, and Sheriff-substitute's interlocutor,' and commencing with a letter from the pursuer, Jane Calderhead Begg, dated Monday evening, and from otherwise making public said pamphlet or any letters written by the pursuers or any of them to the defenders or either of them, without the consent of the several pursuers, the writers of said letters."

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I.

From the condescendence annexed to the petition it appeared that the pursuer, Mrs White, was the mother, and the other pursuers the sisters and brothers-in-law of the defender, Mrs Dickson.

The pursuers averred, *inter alia*,—“(3) The defender, T. Dickson, has recently written to the pursuer, Mrs White, intimating his intention to publish, and intends to publish, a pamphlet headed 'Correspondence between Mrs White, Miss White, Mr and Mrs Begg, Mr Thomson and others, and Mr and Mrs Dickson; also record in action raised in Sheriff-Court, with shorthand writer's notes of the proof taken, and Sheriff-substitute's interlocutor.' He sent to said pursuers a proof copy of the first eight pages of said pamphlet, along with a letter dated 21st September 1880. (4) The defender, T. Dickson, has not obtained the pursuers' consent to the publication of any letters by them to the defenders or either of them. On the contrary, the pursuers wholly object to such publication. (5) The whole letters written by the pursuers to the defenders are of a private character. It will be hurtful to their feelings if said letters are made public, and no useful purpose is to be served by such a publication. (7) In the eight pages of proof sent by the defender T. Dickson to the pursuer, Mrs White, there are (1) a private note from the pursuer, Mrs Begg, to said defender, and (2) four private letters from the pursuer, Mrs White,—two to the defender Thomas Dickson, and two to the defender Mrs Dickson.”

The defenders averred, *inter alia*,—That the pursuers had shewn to friends portions of the correspondence. “The only course, therefore, which is open to the defenders for the vindication of Mrs Dickson's character is to circulate this correspondence among those relatives and intimate friends who know of the said estrangement. For this purpose the defenders are at present getting fifty copies of the correspondence printed in order that it may be more easily read, as it is very voluminous, and they intend to give a copy of the same to all those friends and relatives who are wholly or partially acquainted with the circumstances. The defenders have no interest—and they have certainly no intention—of spreading the matter further; and they do not purpose giving away more than the said fifty copies. . . . The copy record referred to in the petition is that of an action which depended publicly in the Sheriff Court of Lanarkshire at Glasgow. The greater part of the letters referred to in the present action were produced therein.”

The pursuers pleaded;—(1) The defenders intending to publish, without consent of the pursuers, private letters written by the latter, the pursuers are entitled to interdict, with expenses, all as craved. (2) The defences are irrelevant.

The defenders pleaded;—(1) The action, *quoad* future letters, is incompetent. (2) The action is irrelevant, and, particularly, the action *quoad*

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the copy record referred to, and the letters produced in the said action, is irrelevant. (3) The circulation of the said pamphlet being limited, as above set forth, and being for the vindication of the character of the defender, Mrs Dickson, the interdict should be recalled, and the defenders found entitled to expenses. (4) Generally, in the circumstances, the pursuers' material averments being unfounded in fact, the interdict should be recalled, and the pursuers found liable to the defenders in expenses.

Interim interdict was granted, and on 30th November 1880 the Sheriff-substitute (Guthrie) pronounced an interlocutor finding that the defenders had not stated any relevant defences, and making the interdict perpetual.*

The defenders appealed to the Sheriff (Clark) who, on 10th February 1881, for the reasons assigned by the Sheriff-substitute, adhered.

The defenders appealed to the Court of Session.¹

At advising,—

LORD YOUNG.—The parties here are related to one another by marriage, and I think that that being so the whole matter is much to be regretted. The mother of the appellant's wife seems to have objected to the marriage, and never to have taken kindly to her son-in-law. It seems that after the marriage the appellant brought an action in the Sheriff Court in his own and his wife's name against his relations by marriage for recovery of certain articles alleged to belong to his wife, which action is referred to in the correspondence, and with which the correspondence is to a considerable extent taken up. The appellant now proposes, in order to inform his friends of the exact state of affairs, to print and circulate a pamphlet headed "A Correspondence between Mrs White" and others, "and Mr and Mrs Dickson; also record in action raised in Sheriff Court, with shorthand writer's notes of the proof taken, and Sheriff-substitute's interlocutor." He communicated his intention to his mother-in-law, sending her the first eight pages of the pamphlet in proof, and saying that it was not his

* "NOTE.— . . . The law as to the right of the writer of a private letter is simple. It appears from a modern English authority (*Oliver v. Oliver*, 11 C. B. N. S. 139), as it may also be gathered from the Scotch cases on the subject reported in Morrison's Appendix, *s. v.* Literary Property, Nos. 1 and 4, that the receiver has a property in the manuscript,—in the *ipsum corpus* of the letter, but that he has no right to alter its nature, or use it otherwise than as a manuscript. See also *Gee v. Pritchard*, 1818, 2 Swanst. 402; *Percival v. Phipps*, 2 Ves. and B. 28; Bell's Princ. 1357.

"I am of opinion that the printing for private circulation, however limited, of letters of a personal nature passing between relations and friends is within this principle, for if it once be held that a man may print such letters for circulation within a limited circle, it is impossible to draw a line at which such circulation becomes objectionable. To hold otherwise would be to involve the tribunals in endless inquiries into delicate matters which in this country have happily been left to the good sense and good feeling of the persons concerned, except where relevant charges of slander are made.

"This being so, the defenders are not entitled to print the pursuer's letters as they propose to do, either separately or along with other matter. The pamphlet complained of includes such letters, and is, therefore, in its intended form, a *unum quid*, which is an infringement of the pursuers' legal rights.

"The defenders founded on the case of *Percival v. Phipps*, as supporting their contention that they are entitled to circulate the pamphlet for the vindication of character. That case, however, is very special in its circumstances, and differs from this materially, in so far as the question related to publications in public prints, in which the party complaining had taken the initiative."

¹ *Authorities*.—*Davis v. Miller*, July 5, 1855, 17 D. 1050, 27 Scot Jur. 542, and cases in Sheriff-substitute's note.

intention to omit anything whatever in all that might be printed, however much the omissions might be a saving of expense to him. He now says that it is for himself to judge of the prudence of the course he proposes, if the law allows him to take it, and he thinks that it concerns him to make his friends acquainted with the facts, as shewn by the correspondence and the legal proceedings. The Sheriff-substitute, being of opinion that such publication would be a violation of private confidence, interdicted him. Now, I am of opinion that by this publication the defender is not violating any right belonging to the pursuers. Generally speaking, a party is quite entitled to print or publish any proceedings, including correspondence, in a cause before the Courts, and there are many cases in which this has been done, where the parties thought it best to do so. I have seen many such cases myself. It is a novel proposition to me that this is against any right of the parties who do not wish to publish. Undoubtedly the publication of a correspondence of a literary character may be interdicted on the plea of infringement of copyright. For instance, a literary man travelling abroad may send accounts of his travels in the form of letters to a friend with or without the view of future publication. Then, if it was made known that his friend wished to publish these letters, the writer might get an interdict against the recipient, prohibiting him from doing so, on the ground of literary copyright. There might be imagined many other cases of a similar kind, but we need not stay to conceive such imaginary cases, as we have nothing to do with them here. I have looked through the letters which the appellant proposes to print here, and I am of opinion that there is no law to stop him from doing so. I have my own view of the prudence and expediency of the course proposed, but I allow that the party must be allowed to judge for himself of that. All that I can say is that the law does not interpose to prevent him publishing these letters if he chooses. I think the judgments appealed against ought to be set aside, and the petition dismissed.

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July 5, 1881.
White, &c. v.
Dickson, &c.

LORD CRAIGHILL.—In this case the respondents in the appeal, who were the petitioners before the Sheriff, ask interdict against the proposed publication by the appellants of letters which were written by the respondents to the appellants, and that interdict has been granted by the Sheriff. Hence the present appeal.

The question is one of importance; for, on the one hand it would be to be regretted were it the law that any letter written on the faith of confidential communication might as a matter of course, and notwithstanding the opposition of the writer, be published to the world. On the other hand, it would be a hard and unreasonable rule were it the case that even though the writer could not in any way be injured, and though the receiver has a reasonable purpose to serve, the opposition of the former is an absolute bar to publication. Law and the reason of the thing is to be found between these two extremes; and when I say the law, I mean to express what is my understanding not only of the rule recognised in Scotland, but of that also which is observed in England. The reason of the rule, indeed, appears not to be the same in the two countries. "In England," Professor Bell says (Principles, par. 1356), "it is on the ground of property alone; in Scotland, on the ground chiefly of just and expedient interference for the protection of reputation." Lord Chancellor Eldon, it may be observed, in deciding the case of *Gee v. Pritchard*, 2 Swanst. 402, while recognising the fact that such is the ground upon which the English doctrine was founded, did not speak of that ground as one which to his mind was satisfactory;

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but as the interests of those concerned had been, and might continue to be, protected upon that basis, he was not disposed to part with it, seeing difficulties might arise in adopting a new foundation for rules requiring to be maintained. What is more important is, that he looked upon cases in which an injunction against the publication of private letters was sought as cases of circumstances. In other words, there is in England no hard or fast line to which decisions in this department must be squared, and the results in *Percival v. Phipps*, in which the injunction was refused, and in the earlier case of *Gee v. Pritchard*, in which it was granted, may be cited in illustration. The views of our law upon this question, as well as the reasons on which it rests, as expressed by Professor Bell in his Commentaries, i., 111, 112, 7th ed., are entitled to great consideration. Mr Bell says, with regard to the publication of private letters—“In Scotland the Court of Session is held to have jurisdiction by interdict to protect not property merely, but reputation and even private feelings, from outrage and invasion. In one respect the publication of private letters may outrage both; and the question has been, whether, where private letters have been written and sent to a correspondent, the author by sending them to his friend authorises him to disseminate them or publish them for gain. Now, the purpose of the communication is quite different. It rather implies a veto on publication. Compositions for the public and those for the eye of a friend are in a different spirit. It is one of the great charms of epistolary correspondence that one writes not under the awe of a misjudging world, but throws out unscrupulously his genuine and undisguised sentiments, utters his most secret thoughts, and with as little reserve, as in the secrecy of his own chamber, expresses his feelings of affection, or his murmurs of disapprobation and of censure, in full reliance that they are confided to a friendly ear. By the publication of such effusions—confidential, careless, unthinking of consequences—a man may be wounded in his tenderest part, his literary reputation hurt, his character traduced. It is accordingly the understood or implied condition of the communication—the implied limitation of the right conferred—that such communications are not to be published. With these natural feelings on the breach of epistolary confidence the determinations of the Court of Session have accorded.”

Where, however, none of these results can reasonably be contemplated from publication, and where, besides, there is a legitimate interest in the receiver to publish, the Court ought not and will not interfere to prevent publication. All questions of literary property are of course outside the present controversy. These, when they arise, will be dealt with on their merits, and must probably be decided upon other considerations.

These being my views of the law, which, I may add, are not in any way inconsistent with the cases reported in Morrison's Appendix, *voce* “Literary Property,” Nos. 1 and 4, to which the Sheriff has referred, I concur in thinking that the interdict prayed for ought not to have been granted, and that, having been granted by the Sheriff, it ought now to be recalled. The respondents will not be injured, and the appellants may be, and think they will be, benefited by the publication. I regret that the appellants insist upon their right. Much better would it be for them, and for all who are concerned in the family *embroglio*, to forbear, but, as I think, there is no ground in law on which they can be prevented.

LORD JUSTICE-CLERK.—I concur entirely in the judgment proposed by your

Lordships. The question of granting an interdict is always a matter for the discretion of the Court, and I do not think that it should be granted here. I concur in thinking that there is no question of property here involved. The holder of the correspondence is, in the first instance, master of the letters. If he uses them to the prejudice of the parties who wrote them or others he will be responsible, but the question here for us to decide is whether it is so plain that such injury will be done to the pursuers by the publishing of these letters that we should interdict the appellant from doing so. My view of the matter is very clearly set forth by Lord Eldon in the case cited by Lord Craighill. If the appellant does injury to any one by the publication, and if that is proved, the mere fact that we have refused the interdict will not save him from the consequences of his act. I should like to add my tribute of advice in this case, and to put it to the appellant whether it would not be more wise if he let this petty matter rest where it is, and not proceed to carry out his intention of publishing the correspondence, even though we have found him entitled to do so if he likes.

THE COURT recalled the Sheriff's judgment, and dismissed the petition.

J. & J. ROSS, W.S.—CHARLES S. TAYLOR, S.S.C.—Agents.

ALEXANDER C. MACPHERSON, Pursuer.—*Shaw*.
THE CALEDONIAN RAILWAY COMPANY, Defenders.—*R. Johnstone*.

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July 6, 1881.
Macpherson v.
Caledonian
Railway Co.

1ST DIVISION.

Jury Trial—Place and time of trial.—Issues were adjusted for the trial of an action of damages against the Caledonian Railway Company at the instance of A. C. Macpherson, for injuries sustained in a railway accident at Pennilee, on the Greenock section of the Caledonian Railway, near Glasgow. The only question between the parties related to the amount of damages, liability being admitted.

The pursuer proposed that the trial should be at the Autumn Circuit at Glasgow, and had therefore not given notice for the July sittings in Edinburgh.

The defenders now moved to have the case tried in Edinburgh, because a trial there (1) would be less costly, as was shewn by the account of expenses in a case arising out of the same accident which had been tried at the previous Glasgow Circuit; and (2) would be more impartial, as the community of Glasgow and neighbourhood were affected unfavourably to the defenders, and a number of that section of the public from whom the jury would be chosen were season-ticket holders upon the line.

The Court held that no sufficient grounds had been set forth for granting the motion.

CUMMING & DUFF, S.S.C.—HOPE, MANN, & KIRK, W.S.—Agents.

ROBERT CARSWELL, Pursuer.—*Mackay—Graham Murray*.
MARTHA SWAN OR CARSWELL, Defender.

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July 6, 1881.
Carswell v.
Carswell.

Husband and Wife—Divorce for desertion—Foreign—Jurisdiction—Domicile.—A Canadian married a Canadian wife in Canada. The wife deserted her husband there in 1873, and subsequently refused to adhere. The husband came to Scotland in 1879, and in 1880 raised an action of divorce on the ground of wilful and malicious desertion, averring that he was now domiciled in Scotland. In proof of this averment he deposed that he had abandoned Canada as his home, and had come to reside with his children in Edinburgh; that he had bought a business there, and that his present intention was to remain in Scotland as his home; that one

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2D DIVISION.
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 B.

main reason of his leaving Canada was his desire to obtain a divorce, which he could not get by the law of Canada. The action was undefended. *Held* (1) that the pursuer had proved a domicile in Scotland; and therefore (2) that the husband's domicile was that of his wife; and therefore (3) that the Court had jurisdiction to pronounce decree of divorce.

In July 1880 Robert Carswell, a Canadian by birth, residing at 10 Warrender Park Road East, Edinburgh, brought an action of divorce against his wife, Martha Swan or Carswell, "now in America, or elsewhere furth of Scotland, and whose place of residence is unknown to the pursuer," on the ground of wilful and malicious non-adherence and desertion.

From the pursuer's statements it appeared that he was lawfully married to the defender, also a Canadian by birth, on 31st August 1866, at Sydney, in the province of Ontario, Dominion of Canada, and that they lived there together as husband and wife down to March 1873. That at that date the defender had deserted him, and had refused to come back to him, although he had repeatedly asked her to return.

The 4th article of the pursuer's condescendence was in the following terms:—"In the autumn of 1877 the pursuer resolved to dispose of his business of law bookseller in Toronto, or to enter into such a partnership as would leave him free to transfer his residence to Scotland. On 11th September 1877 negotiations for a partnership of this kind were commenced, and they were completed in October 1878. In February 1879 the pursuer visited Edinburgh, with the view of establishing a business there, and took and furnished the house 3 Warrender Park Terrace. In June 1879 the pursuer went to Canada, and returned in October with his children, the said Martha Roberta Carswell and John Carswell, and also Emeline Carswell, his daughter by his first wife. He then took on lease the shop 11 St Giles Street, Edinburgh, of which the lease runs until Whitsunday 1885. He has lately purchased the whole law library and law business of Mr James Stillie, Hanover Street, Edinburgh. The said children reside with the pursuer, and are being educated in Edinburgh. It is the intention of the pursuer to reside permanently with his children in Edinburgh, and to carry on business there, and he has no intention of returning to Canada. The pursuer has thus acquired a Scotch domicile."

He then went on to state that since establishing himself in business in Edinburgh he had made strenuous efforts to ascertain the present residence of his wife that he might have an opportunity of again requesting her to return to him and live with him as his wife, but that these efforts had been unsuccessful.

He pleaded;—(1) On the facts stated, and, in particular, the pursuer having acquired a Scotch domicile, the defender is subject to the jurisdiction of the Court of Session. (2) The pursuer is entitled to divorce the defender for wilful desertion. (3) The defender having been guilty of wilful and malicious non-adherence to and desertion of the pursuer for the space of four years, the pursuer is entitled to decree of divorce as concluded for.

The action was undefended.

On 18th November 1880 the Lord Ordinary, on the motion of counsel for the pursuer, that the summons be found relevant, and the pursuer allowed a proof of his averments, reported the case to the Second Division.*

* "NOTE.—The Lord Ordinary reports this cause, because it appears to him that the allegations of the pursuer disclose a case of an unusual character, and raise questions of importance which, in the present state of the authorities, ought not to be decided in favour of the pursuer without the sanction of the Court. It was admitted by the pursuer's counsel that no case could be cited in which an action of divorce for desertion had been sustained against a defender

On 17th November 1880 the Court remitted to the Lord Ordinary to allow proof before answer, both on the question of jurisdiction and of desertion. No. 162.

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who has never been in Scotland, and who, so far as appears, has had no notice of her husband's removal to this country, and of his requirement that she should here give her adherence to him.

"According to the averments in the condescendence, the pursuer and defender were married in Canada in 1866. Neither of the parties appears to have had any connection with Scotland either at that time or during their cohabitation as married persons. Their residence, from the time of the marriage down to 1873, was in Toronto, where the pursuer carried on business as a law bookseller. In 1873 the defender separated herself from her husband, and he states that although he subsequently saw her and cohabited with her in a lodging which she had taken, she declined all proposals that she should return to live with him. In 1875 he sued her in the Courts of Toronto for the custody of two children of the marriage. At that time, therefore, he appears to have recognised her as having in Canada a separate *persona standi in judicio*. An attempt was made at that time, he says, at reconciliation, but she was irreconcilable, and from that time he has not seen her. The only communication which he has since received from her is the letter, or sheet of verses, No. 38 of process, dated from St Louis, Missouri, in February 1879. In 1879 he came to Edinburgh, and commenced business there as a law bookseller. He produces a contract of copartnership (No. 7 of process), from which it appears that the business in Edinburgh is a branch of the business of a Toronto copartnership, to which he transferred his business in Canada, and of which he is still the leading partner. He alleges, however, that it is his intention to reside permanently in Edinburgh, and that he has thus acquired a Scotch domicile. He has resided in Edinburgh since October 1879. His wife appears never to have been in Scotland; and he alleges, notwithstanding strenuous efforts, he has been unable to ascertain her present residence. Certain documents have been produced by him in support of this allegation, which may be held to afford *prima facie* evidence that she was last heard of in California, working in a photographer's establishment, and that his agents in America have failed to make delivery to her of a letter dated 21st May 1880, requiring her to come to Scotland, and live with him as wife.

"In this state of matters it is obvious that the question whether the non-adherence of the wife has resulted from 'malicious and obstinate defection' within the meaning of the statute of 1573, or whether she can allege and establish a 'reasonable cause' for it, is one which cannot very conveniently be tried in this Court; indeed it was stated that most of the evidence would have to be taken by commission; and probably the only evidence that would be taken here would be that of the pursuer himself. It was argued, however, by the counsel for the pursuer, that if he should prove his possession now of a Scotch domicile, this Court has jurisdiction in the cause, by reason of the domicile of the wife following that of the husband; and if it had been clear that the matter of jurisdiction in such a case depends exclusively upon the present domicile of the husband, and that the pursuer's allegation on that subject is sufficient, the Lord Ordinary would have allowed proof of the averments bearing on that point. It is here, however, that some of the authorities to which the Lord Ordinary is about to refer raise serious difficulty.

"In the first place, assuming that the pursuer could establish that he has acquired a Scotch domicile, it appears to be doubtful whether the jurisdiction in such a cause against a wife depends entirely upon the domicile of the husband. In the case of *Pitt v. Pitt*, on appeal to the House of Lords (4 M'Q. 627, and 2 Macph., H. L., p. 32), the Lord Chancellor (Westbury) after stating the grounds upon which, in his judgment, a Scotch domicile had not been established, added, — 'If it had been necessary, which I trust it will not be, to arrive at a different conclusion as to the fact of his (the husband's) domicile, I should still have had the greatest possible difficulty in holding that the domicile of the husband was,

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A proof was accordingly led before the Lord Ordinary on 3d June 1881, when, in regard to domicile, the pursuer deponed, *inter alia*,—"In

in a case of this kind, to be regarded in law as the domicile of the wife, by construction or by attraction, so as to compel the wife to follow the husband, and to become subject, for the purpose of divorce, to the jurisdiction of the tribunal of any country in which the husband might choose, even for that purpose alone, to fix, and to declare that he intended to acquire an absolute domicile.' The Lord Ordinary is of opinion that the difficulty here pointed out is one which has been recognised in the law of Scotland, and which affects in a very special manner divorce on the ground of desertion, as against a wife who has never been in Scotland, and whose non-adherence has taken place in a foreign country to which the married pair have always hitherto belonged. In the case of *Ringer v. Churchhill* (2 D. 307), Lord Moncreiff explained very fully (foot of p. 325) the necessity of not pushing too far the presumption of the law that the wife's domicile follows that of the husband. And in the case of *Jack v. Jack* (Feb. 7, 1862, 24 D. 467), the opinion of the Lord President, and of Lords Ivory and Curriehill, contains the following passage (p. 471) :—"The general rule that the domicile of the wife follows that of the husband is not absolute, universal, or invariable; and it has never been applied to such a case as the present. It is truly inapplicable to such a case. The husband here did not transfer, or attempt or intend to transfer to any other country, the home or domicile of the married pair, which had been established in this country, and which, being in this country, made the Court of this country the proper *forum* for trying any action to be brought for dissolution of the marriage. In that respect, the condition of matters continued unaltered, with the acquiescence of both parties, until the present action was raised.' Lords Neaves and Mackenzie, in the same case, stated their opinion to be that 'no Court can entertain an action of divorce except one which has power to deal with the marriage of the parties, and to affect the status of both of them as persons subject to its jurisdiction;' and in that view, dealing with a case in which the wife remained in Scotland, and the pursuer was in America, admittedly *animo remanendi*, they thought it doubtful if the wife 'could be subjected to the jurisdiction of another country where she has never resided, and in which the marriage can never be said to have subsisted.' In the earlier case of *Shields v. Shields* (15 D. 142) the same view was expressed by the Lord Justice-Clerk, and the other Judges concurred with him. That was a case similar to *Jack v. Jack*. The husband, pursuer, was alleged to have acquired a domicile in America, and his wife, who had been left in Scotland, pleaded that as her domicile followed his, the Scotch Courts had no jurisdiction. The Lord Justice-Clerk said,—"This plea rests entirely on the ground assumed, viz., that the domicile of the husband not only is in all circumstances to be that in which it is competent for the husband to cite the wife, but the only *forum* in which she is called upon to answer to a suit at the instance of the husband. I think these are not conclusive propositions. The ground adopted by the defender seems to arise from a misconception of the case of *Warrender*, and an unwarranted application of some expressions in the opinions stated in that case. The case lays down, no doubt, the general proposition that the proper domicile of the husband is the domicile of the wife, and that though she has left him, and is living abroad, he shall not be deprived thereby of the remedies against her competent to him by the laws of his own country. But that proposition was stated in reference to a case in which the husband continued in the original domicile of the spouses as married parties, and by the law of which country the wife's provisions, in case of his death, were secured. The proposition was not laid down in an abstract manner, to the effect, or with the intention of establishing that in all circumstances, and whenever a husband chooses to leave his wife behind him in their native country, and to remove to different parts of the world, that the wife is bound to follow him, and meet in that country in which he finds it most easy to obtain a divorce, or that such foreign country is the only *forum* in which it is competent for him to proceed against her; and accordingly, when the case of *Warrender* was quoted in one of the

the autumn of 1877 I sold my business as a law bookseller in Toronto to Messrs Frankish, Collins, & Poole, retaining an interest myself in it. I

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former cases to establish such a proposition Lord Mackenzie at once corrected the error, and said he drew no such consequence from it.

"In short, according to the views expressed in these cases, the domicile of the husband cannot be said to be the domicile of the wife, to the effect of founding jurisdiction in an action of divorce against her, unless the place where that constructive domicile is situate is, in the words of Lord Mackenzie in the case of *Ringer v. Churchill*, 'the place where the wife may reasonably be held bound to be present, and to answer to all actions against her.'

"If any effect is to be given to these views, and if the difficulty stated by Lord Westbury in the case of *Pitt v. Pitt* has any foundation in law, the Lord Ordinary is of opinion that the present action cannot be sustained. He thinks it impossible to hold, upon the allegations in this summons, that Scotland is the place where the pursuer's wife may reasonably be expected to be present and to answer to an action at the pursuer's instance, and more especially to an action of divorce on the general ground of desertion under the statute of 1573. For although such an action now proceeds without any previous process of adherence (that process being dispensed with by the Conjugal Rights Act, 1861), the first point to be established is the breach of the obligation to adhere. In such a case the question is, as stated by Lord Fullerton in *Gordon v. Gordon* (9 D. 1293), 'Is this a Scotch desertion, or not?' In this case, not only has the defender never been in Scotland, but the pursuer himself has been here for little more than a year. His wife remains abroad, where she had been living separate from him for many years. She knows nothing of his removal to Scotland, or of his arrangements for that purpose. In such a case the difficulty of sustaining the constructive domicile as sufficient to found jurisdiction *ratione domicilii* appears very clearly, and if the circumstances of the case of *Pitt v. Pitt* suggested the point, the Lord Ordinary thinks it worthy of consideration here before the *forum* is sustained.

"The Lord Ordinary was referred to the case of *Warrender*, 2 Sh. and M'L. 154, and to the opinion of Lord Penzance in the case of *Wilson v. Wilson* (2 L. R. Probate and Div. Cases, p. 435), as contrasted with the judgment of the Court of Session in a case between the same parties reported in Macpherson's Reports, vol. x., p. 573. It was contended that these authorities prove that the present domicile of the husband is the only question in all cases. The authorities already mentioned seem to establish that the case of *Warrender* does not support this contention, and it is indeed difficult to apply to a case like the present the observations made in a case where Scotland was the actual domicile of the wife. For Lady Warrender had married into Scotland. Her husband was throughout the married life of the parties a domiciled Scotchman. Her residence in England was under a revocable contract of separation. In the present case the home of the parties is in Canada, and although it is alleged by the pursuer that he has acquired recently a Scotch domicile, he does not say that his wife is aware of his removal to Scotland. Her refusal to live with him when his home was in Canada seems to have been acquiesced in, and the letter written by him since he came to Scotland has not been delivered.

"With regard to the judgment of Lord Penzance in the case of *Wilson*, the Lord Ordinary of course recognises it as of high authority in the law of England. But there is nothing in it which can justify him in declining to recognise as of higher authority in Scotland the judgment of Lord Ormisdale, unanimously affirmed by the Judges of the First Division of the Court. Nor can he hold that the rule stated by Lord Penzance in that case, assuming it to have been correctly applied to the circumstances of Mr and Mrs Wilson, is at all applicable to the case presented by the present pursuer. The statement of Lord Penzance was as follows:—'The only fair and satisfactory rule is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes

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sold everything I had of a moveable character in Toronto. In February 1879 I brought my eldest daughter to Scotland, and subsequently my two younger children. They are getting their education here. I have no near relatives in Canada, except a married sister at St Louis. I have commenced business as a law bookseller in St Giles Street, Edinburgh. I have taken a lease of the premises for five years. I have stocked the shop, and have purchased the law department of the business of James Stillie. My business has been profitable so far. There is a congregation of the New Jerusalem Church in Edinburgh, and I have joined it. One main reason of my leaving Toronto was my desire to obtain a divorce. I found I could not obtain a divorce in Canada. I read up the law of Scotland and the laws of different States in the United States. I found I could have got a divorce in the States, but I should have had to become a citizen of the States, and I wished to retain my nationality. I have also a liking to Scotland and to Scotland's laws, and my idea is that they are what they ought to be. It is my present intention to remain in Scotland as my home. My intention is not to return to Canada. I have reasons for not returning there. I have abandoned Canada as my home."

which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer these laws. The rule so stated does not differ substantially from the rule applied in *Shields v. Shields*, and *Jack v. Jack*. It assumes that both parties have an actual domicile in one country, and that both are *de facto* members of the community to the tribunals of which an appeal is made. In the present case the defender is not a member of that community. She has never *de facto* belonged to Scotland, or been subject to the laws of Scotland. If she has a domicile here by reason of her husband having come here in 1879 it is a mere legal fiction, and not at all the kind of domicile which Lady Warrender had. Actual jurisdiction over her person this Court has none, and if it could affect her status by giving decree of divorce in terms of the conclusions of the present summons the exercise of such a power at the instance of the pursuer, and in the circumstances stated, would be altogether without example in the law of Scotland.

"This leads the Lord Ordinary to notice, in the second place, another difficulty in the way of sustaining the present action. The allegations disclose no case of Scotch desertion. Divorce for desertion is in Scotland founded on statute. The statute is applicable to Scotch spouses. It used to be thought that the only persons who could be sued in the process of adherence 'are such as continue within the kingdom'—*Ersk. I. 6, 44*. The statute has not been so read, however, in practice, as to exclude altogether action against a Scotch husband or wife going out of the country, and deserting his or her home. But it has not been in use to be applied where there was nothing of the nature of desertion by a Scotch husband or wife from a Scottish home. (See the cases of *Black v. Anderson*, 4 D. 615; *A B v. C D*, 7 D. 556; *Gordon v. Gordon*, D. 1293; *O'Rourke*, 11 D. 976; *Hume v. Hume*, 24 D. 1342). The opinion of Mr Fraser (II. Husband and Wife, 1332) does not appear to be supported by any decision. It is true that in divorce for adultery the *locus delicti* is held to be immaterial, but no divorce for desertion can take place in Scotland without constituting in some form the obligation to adhere in this country, and establishing with reference to that obligation the 'malicious and obstinate defection' required by the statute. In the present case there is nothing to show that the defender could have been compelled to adhere in Canada during the period when the pursuer was admittedly a domiciled Canadian; and as the pursuer has been in Scotland only for a year, and apparently without his wife's knowledge, the Lord Ordinary has difficulty in finding the allegations relevant."

On 8th June 1881 the Lord Ordinary reported the proof to the Second No. 162. Division.*

The pursuer argued;—The pursuer had come to Scotland with a settled purpose of taking up his residence there. There was nothing to suggest anything to the contrary. Assuming that to be the case, then he was a domiciled Scotchman, and was entitled to the benefit of the laws of Scotland. That being so, the wife's domicile must be held to follow the husband's, and a divorce on the ground of desertion was competent. The dictum of Lord Chancellor Westbury in *Pitt v. Pitt*,¹ cited by the Lord Ordinary, was

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* "NOTE.—In case it should be desired by the Court, the Lord Ordinary thinks it right to report his opinion upon the evidence. The only witness examined before him (with the exception of the agent, who was called to prove certain documents) was the pursuer himself. He gave his evidence with candour, and impressed the Lord Ordinary favourably as a reliable witness. But the result of the evidence as a whole is, in the Lord Ordinary's opinion, that the pursuer has failed to establish facts and circumstances sufficient to authorise the Courts of Scotland to adjudge the absent defender guilty of malicious and obstinate desertion, and to pronounce decree of divorce between the spouses.

"The primary defect in the evidence which the Lord Ordinary observes is, that the domicile which the pursuer has set up in Scotland since 1879 is not established as in any real sense the domicile of the defender. It was not acquired as a domicile for her but as a domicile against her, and in order to enable the pursuer to obtain a divorce. The pursuer's evidence is quite frank on this point. 'One main reason of my leaving Toronto,' he says, 'was my desire to obtain a divorce.'

"But it farther appears that any domicile which the pursuer has established in Scotland has been acquired without his wife's knowledge; and although it may be the pursuer's misfortune more than his fault, it is nevertheless the fact that, so far as appears, the defender has never yet received notice of his change of home, or of his desire to have her society in this country. No steps appear to have been taken by the pursuer between 1873 and 1879 for the purpose of enforcing his conjugal rights in Canada; and the evidence does not shew that anything which can be held equivalent to a demand for adherence in Scotland has been notified to the defender. The letter of 5th December 1879 appears never to have been delivered; and although the reason of this may be that she cannot now be found, the Lord Ordinary is not satisfied that he can apply to such a defender the provisions of the Conjugal Rights Act, 1861, to the effect of holding her duly cited. She has never been in Scotland, and is not in any way subject to the law of Scotland, unless the pursuer's domicile can, by construction of law, be held to be her domicile. This, in the opinion of the Lord Ordinary, cannot be held in the present case. For further explanation of the view upon which he has arrived at this conclusion the Lord Ordinary refers to the note to his interlocutor of November 1st, 1880.

"On the merits,—if the Lord Ordinary were called upon to deal with them, he would say that the cause of separation between the spouses is proved to have been incompatibility of temper, and disagreement on matters of opinion. This, in law, is no sufficient cause for remaining separate, and would afford the wife no defence in an action of adherence. But it rather appears from the evidence that although the pursuer sent certain messages to his wife he practically acquiesced, at least down to 1879, in her remaining separate. Prior to 5th December 1879 he had given her no intimation of the kind contained in the letter of that date, and that letter unfortunately is not proved to have been delivered. On the whole, the Lord Ordinary could not affirm, on the evidence before him, that the defender has been for four years in 'malicious and obstinate defection.'

¹ *Pitt v. Pitt*, April 6, 1864, 4 M'Q. 627, 2 Macph., H. L. 28; *Ringer v. Churchill*, January 15, 1840, 2 D. 307; *Jack v. Jack*, February 7, 1862, 24 D. 467, 34 Scot. Jur. 234; *Warrender v. Warrender*, August 27, 1835, 2 Sh.

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obiter to the case, and was not adopted by the other Judges. If the pursuer had died, the Scotch law would have regulated his succession.¹ In England the actual domicile of the husband at the date of the raising of the action settles the question of the jurisdiction of the Courts.² The domicile here was *bona fide*, though it was acquired partly for the purpose of getting the divorce.

(The Court did not call on counsel for the pursuer to complete his argument.³)

At advising,—

LORD JUSTICE-CLERK.—In this case some very important questions are raised by the Lord Ordinary in the note to his report.

The action is an action of divorce at the instance of Robert Carswell, who says he is domiciled in Scotland—describing himself as a law bookseller, residing at Warrender Park Road, Edinburgh,—against his wife, whom he married in Toronto, and who, he says, has deserted him since 1873. There seems no doubt whatever that his wife did desert him in that year. The Lord Ordinary expresses a doubt on the proof of this matter. He seems to doubt whether the evidence establishes that the wife has been guilty of malicious and obstinate desertion. That is certainly an element in the case, and I must say that so far as it is concerned I never saw a case in which malicious and obstinate desertion was more clearly proved in the sense of a resolute determination of the wife not to return to cohabitation with her husband. I fancy that is a state of matters which truly fulfils the entire and most absolute meaning of the words “malicious and obstinate desertion.” No doubt it is necessary that a wife should be asked to return to her husband, or that her husband should not shew any disinclination to receive her, should she manifest a desire to return, but I can find nothing in the evidence to indicate any disinclination on the part of the pursuer to receive the defender; still less is there any proof of a refusal on his part. And if the case had rested there I should have been of opinion that in the conduct of this wife the words of the old Scottish statute had been fulfilled. She has gone away from him, separated herself from him, hid herself from him, expressed her determination over and over again not to live with him, and, as far as the evidence leads us to an opinion on the point, there is no palliation of her conduct, or excuse for it. There is nothing in the pursuer’s treatment of his wife—and only one or two instances of his conduct are alleged—which can for a moment justify the absence of the defender from her husband.

But the other question raised by the Lord Ordinary is surrounded with difficulty; and while I have come to the conclusion that the pursuer is entitled to prevail in this action, I must own it is not without very considerable difficulty.

It is quite true that the domicile of the wife follows that of the husband.

and M’L. 154; Wilson v. Wilson, March 8, 1872, 10 Macph. 573, 44 Scot. Jur. 295.

¹ Hog v. Lashley, July 12, 1804, 4 Pat. App. 581; Hall’s Trustees v. Hall, July 13, 1854, 16 D. 1057, 26 Scot. Jur. 570.

² Wilson v. Wilson, March 14, 1872, 2 L. R. Prob. and Div. Cases, 435.

³ *Other Authorities*.—Harvey v. Farnie, April 22, 1880, 5 L. R. Prob. Div. 153; Briggs v. Briggs, May 11, 1880, 5 L. R. Prob. Div. 163; Lauder v. Van Ghent, 1692, Ferguson’s Div. Rep. 250; Muir v. Muir, July 19, 1879, *ante*, vol. vi. 1353; Udny v. Udny, December 14, 1866, 5 Macph. 164, 39 Scot. Jur. 163, June 3, 1869, 7 Macph., H. L. 89; Bell v. Kennedy, May 14, 1868, 6 Macph. H. L. 69.

It is also quite true that the husband here has done all that he could to acquire a domicile of this kind—that is to say, all that he could, if he could shake himself free of the circumstances under which he first came into this country. But that is a difficult matter. He was a domiciled Canadian. The domicile of the marriage was Canadian. The wife when he left her or when she left him was a Canadian. He has never been able to communicate with her, for he does not know where she is. Consequently, if we have jurisdiction to pronounce this decree it is because the wife's domicile follows that of the husband. No. 162.
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Now, the authorities quoted to us at the debate certainly prove this, that in such a matter as that of divorce it is not in every case or to every effect that the wife's domicile follows that of the husband. If the wife were here resisting the action—if she were here complaining that Toronto was her domicile, and that she was compelled to assume a new domicile because her husband had gone away to Scotland, and in that way had obliged her to follow him to a foreign country and a foreign Court—foreign so far as she is concerned—and a country not the country of her marriage, grave difficulties might present themselves; there might be a hardship and a want of expediency also, perhaps a want of principle, in following the course which now suggests itself to us.

But I want to save my opinion on that matter. I am of opinion that it is not in every case that we should hold that the wife's domicile follows that of her husband.

On the other hand, I am of opinion that the husband has done all he could in the present case to acquire a new domicile for himself in Scotland. He has set himself up in business, he has acquired property, he has made provision for the future, he has done everything that a man honestly could do who had the intention of remaining here for the future. He has been here two or three years. There is, it is true, another consideration to be taken into view. The origin of his Scottish domicile, supposing him to have acquired it, was under peculiar circumstances. That origin, beyond all question, was the pressure of an immediate object, and that object was the obtaining of a divorce from the laws of this country which the laws of his own domicile would not afford him. It is impossible to tell for how long it is his intention to remain here. We have to take his own statement of that. It is impossible in the meantime to say whether it will turn out in the end that the man was or was not domiciled in this country in the sense that he had an *animus remanendi* apart altogether from the question of his obtaining a divorce.

While I have thus stated the difficulties which have presented themselves to my mind, and presented themselves, I may say, very strongly, I am not prepared to refuse the remedy which the pursuer seeks. I think the desertion has been entirely causeless, malicious, and obstinate. The defender has also debarred herself from making any reply to the accusations of the pursuer. She does not wish to reply to them, and, so far as I can see, she could make no good answer to the charge of wilful and malicious and obstinate desertion. For my own part, therefore, and taking and weighing all those difficulties that occur on both sides, I think we shall do more justice, and not infringe on the abstract principle of law, in giving the pursuer the remedy he seeks.

LORD YOUNG.—I am of the same opinion. Of course we can only consider the fact of desertion on the assumption that the pursuer is a domiciled Scotchman. Agreeing with your Lordship that we can effectually consider the question,

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I concur with what your Lordship has said as to the result. I think the wife is proved to be in malicious—in the proper sense of that term—and obstinately continued desertion of her husband.

Passing now to the interesting question which your Lordship has touched upon, whether or not the pursuer is really a domiciled Scotchman, I think that is mainly a question of fact, for the legal subtleties upon the subject are much more perplexing than useful. To begin with, the pursuer is no foreigner in the sense of being an alien. He is a born subject of the Queen (if that makes any difference, which I think it does not—at least no material difference). His home, and therefore his domicile, which simply means home, was in Canada. He married there, and both he and his wife were entitled to look to the Canadian law as governing the relations between them as husband and wife; and it is our duty, without any doubt, to see that no fraud is practised upon that law, or upon the rights of the wife to have her position as a wife determined by it. I need not say that in the decision we are to pronounce we shall be on our guard against that.

However that may be, every Canadian—indeed every free and intelligent human being—is, according to the views of the law of Scotland, at liberty to change his domicile. He may leave the country where he was born, where his domicile and his home have been since his birth, and he may adopt another country and make it his home. That is always in his power, if, as I say, he is a free man, and intelligent enough to be left at liberty to use his freedom. That is his right. Now, the question of fact is, Has the pursuer exercised that undoubted right of his, or not? Any Canadian is at perfect liberty, being free and intelligent, to come to Scotland, and adopt it as his home—making it his domicile, which he does by making it his home. Of course no man acts at all, certainly not in so serious a matter, without a motive. The motive which has influenced anybody's actions is very important to consider in determining the question of fact whether a man has really adopted another country, and made it the country of his domicile or home. But the moment the fact is determined that he has changed his domicile, his having had the former domicile ceases to be material. If I could think the pursuer was making a mere pretence in having adopted Scotland as his home, that he had come here merely as a visitor in order to invoke the Scotch law against his wife, and that having achieved that end he intended to return to the country which, *ex hypothesi*, had never ceased to be his home, I should not entertain his action for a moment. But I am satisfied upon the evidence here that the pursuer, in the exercise of his undoubted liberty and legal right, has adopted Scotland and made it his home, and that there is no fraud in the matter at all. And I think so none the less that I think it is extremely likely—indeed I should think it quite certain—that if his wife had made his home a happy one in Canada he never would have left it. We may even consider it quite certain that he has made Scotland his home because he prefers the law which in that view would govern his domestic relations, and enable him to be free of the woman who has maliciously and perseveringly deserted him, and who, according to the evidence before us, evidently had the intention of taking up with anybody she met with and thought a nice person to live with.

Now, if he took advice, as I think as a prudent man he probably did, he would be advised in this way—"If you adopt Scotland as your country, and make it your home really, and your new domicile, in that case, it being your

new domicile, it will be your wife's also." For I think that is a universally accepted principle, that when a free man, being married, changes his domicile, at all events to Scotland, he changes it not only for himself but for his wife. There is a good deal of talk of fictitious domiciles, about a man having been long enough in a country to acquire a domicile of citation, and so on. I do not think that has anything to do with the matter. Certainly a man may come here and subject himself to the jurisdiction of the Courts of this country and be cited in it, having what is called a domicile of citation, without that having the slightest effect upon the domicile of his wife. But if he comes here and makes Scotland his home—comes *animo remanendi*—then the domicile is changed not only for him but for his wife. And I know of no exception to that proposition. For it is not the case of a substitution of one country for another for himself alone. His household are subject to the change. It is his home that he changes, and his wife must change with him.

The Lord Ordinary says here that the pursuer has acquired his domicile in Scotland without his wife's knowledge. How is that? Simply because she has deserted him. It is very questionable, I think, if she is ignorant of his whereabouts. But whether she is or not, it is because she is not doing her duty. According to the law of the pursuer's domicile, or, I suppose, to any law whatever, she remains in ignorance because of a breach of her duty, and it is for that same breach of duty that the law affords the remedy. Her duty as a wife is to be with her husband here, and I cannot accept the language of the Lord Ordinary that the pursuer's domicile in Scotland was acquired as a domicile not for her, but as a domicile against her. It is a domicile for her, assuming that he has made Scotland his home. And I have arrived at the conclusion that he has done so without any difficulty. I think he has made it his domicile from no unworthy motive, although I cannot enter into motive at all, being satisfied of the fact, and motive being material only where inquiry is necessary to ascertain whether the fact be so or not. The pursuer, I repeat, has made this country his domicile, and it is the domicile of his wife. I cannot say, in such a state of the facts, that the law of Scotland is an unfair law to govern the domestic relations of a man who has adopted this country as his home. The duty of his wife is to be here, and subject to the same law as her husband. If he had deserted her she might have appealed to our law for the remedy which our law affords. Our law governs equally, and I assume justly and equitably, the rights and interests of both parties. Now, it is because she has gone away from him that she does not know he is here, and is not here with him—if indeed she is ignorant, which I have already said I consider extremely doubtful—for although she is keeping herself concealed from him, he has not done anything to keep his movements concealed from her. Therefore I entirely agree with your Lordship, and I confess that my mind is not disturbed by any difficulties as to the conclusion we should reach either in point of fact or in point of law. I think, as matter of law and justice, the pursuer is entitled to appeal, as he has done, and upon the evidence to appeal with success.

LORD CRAIGHILL.—This case, which comes before us on the report of the Lord Ordinary, is an undefended action of divorce at the instance of Mr Carswell, formerly of Toronto, who is in business as a bookseller in Edinburgh, against his wife, who is not now and never has been in Scotland. Three questions are presented for decision,—First, Our jurisdiction to grant divorce. Second,

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Whether ground for divorce has been established. And third, Whether service of the summons edictally ought, in the circumstances, to be sustained as sufficient execution of the summons.

The last arises only because Mrs Carswell, the defender, has not appeared in the suit, for her appearance would have obviated any objection that could have been stated to the sufficiency of the citation. Even, however, though the defender has not appeared, and it is possible, though highly improbable, that the institution of this action has not come to her knowledge, nothing more can be done to give her intimation, as the place where she is cannot be discovered. The action therefore may be allowed to proceed.

The 10th section of the Conjugal Rights Act, 1861 (24 and 25 Vict., c. 86), leaves the course to be followed to the discretion of the Court. An opposite determination on this point would be a suspension of all procedure in the present action, which of itself is a consideration appearing to me conclusive of the way in which this point ought to be decided.

Passing now to the other questions, the first thing which is to be kept in view is that the non-appearance of the defender in no degree diminishes the responsibility of the Court in the administration of the laws of this country. On the contrary, it increases the anxiety which we must feel in deciding, if it does not also increase the difficulty in decision. Had the defender appeared here, her counsel would have assisted in the argument, but as she is absent, we must, as best we can, make up for the want of the aid which the Court receives when both parties in a suit are represented in the argument upon the points raised for judgment.

This being an action of divorce, and so including other than mere patrimonial interests, the Court is bound to see that both parties are, as in a question relative to their status as married persons, subject to its jurisdiction. The pursuer says he is, because he is domiciled in this country—that is, has his true domicile, or domicile of succession, in this country, and, as a consequence, his wife, the defender, must be amenable to our jurisdiction, her domicile being the domicile of her husband, the pursuer. Taking these points in their order, has the pursuer shewn by the evidence adduced that his domicile is now in Scotland? He is a Canadian by birth, and he married in Canada. His only business connection until 1879 was there. But he then left Canada, and since 1879 he has been in Edinburgh, where he has established a business. These things are perfectly compatible with the idea that his Canadian domicile is unchanged. But they all are material—one of them indeed is all-important. The pursuer is now in this country, and hence one of two elements essential to the constitution of domicile, namely, personal presence, has been secured. What, then, is required for the constitution of domicile? On this subject the statement of the law given by Lord Chancellor Westbury in *Udny v. Udny* (L. R., 1 Sc. App. 458) has, I think, been generally received, namely, that “domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time.” This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general

and indefinite in its future contemplation. It is true that residence originally temporary or intended for a limited period may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or *animus remanendi*, can be inferred, the fact of domicile is established." No. 162.
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What, therefore, is to be decided is, Whether there is proof of a purpose to change the original domicile? The answer to this question depends on the credit to be given to the testimony of the pursuer. The shortness of the period during which he has been in Scotland necessarily must be taken into account, but as to this it may be well to bring into view a passage from the opinion of Lord Westbury in the case of *Bell v. Kennedy*. He there says (L. R. 1 Sc. App. 320, 6 Macph. H. L. 69):—"Residence and domicile are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of domicile. Domicile, therefore, is an idea of law; it is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place. Now, this case was argued at the bar on the footing that as soon as Mr Bell left Jamaica he had a settled and fixed intention of taking up his residence in Scotland. And if, indeed, that had been ascertained as a fact, then you would have had the *animus* of the party clearly demonstrated, and the *factum*, which alone would remain to be proved, would in fact be proved, or at least would result immediately upon his arrival in Scotland." This I take to be an accurate statement of the law, and consequently the shortness of the time during which the pursuer has been in this country does not preclude the idea that his domicile is now in this country. The pursuer says that he has come for an indefinite period, that he has not come for any temporary purpose, and that he has no intention of leaving at any period which for the present is in contemplation. If he is to be taken as speaking the truth, then there is not only the fact of his presence here, but the intention to abandon his Canadian domicile, and to acquire a domicile in this country. And these are the two elements, and the only two elements, which are required. I see no reason why the pursuer is to be discredited, and I credit his testimony. I think that the facts necessary for the constitution of domicile have been established. In so dealing with the case I am materially influenced by the views of the law which were explained in the judgment which was pronounced by Lord Penzance in the case of *Wilson v. Wilson*, March 14, 1872, L. R. 2 Prob. and Div. 435. He there rested his decision on the answer to the issue, Was the pursuer to be credited or not? And having given credit to the pursuer, he held that the grounds for jurisdiction had been established. The other facts in that case, it may be added, were of course consistent with but were no more suggestive of a change of domicile than those which are before the Court. Assuming that the pursuer has his true domicile in this country, it is next to be considered whether the defender, his wife, is also domiciled in Scotland. This appears to me to be a plain, not to say necessary, result. Lord Penzance so held in the case referred to, and (though I leave open for consideration the amenability of a wife to the Courts of this country if

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a more limited domicile than the true domicile is that upon which the husband sues) I give it as my opinion that in a case where the husband's true domicile is the source of jurisdiction that must be held to be the domicile of the wife. On the whole matter, I am of opinion that the Court have jurisdiction.

And in regard to the credibility of the pursuer in making the statements he has made about his change of domicile, I only desire to add this, that the case appears to me to be as strong as the case of *Wilson v. Wilson* which I have already referred to, and in which the jurisdiction as regards the pursuer was sustained by Lord Penzance. The pursuer here has come to this country, and has established himself in business in this country. All that he has done since he came to this country is consistent with the facts as he alleges them. There being nothing to throw discredit on that testimony, we are not entitled—nothing calls upon us—to criticise it as at all doubtful. We must take the fact from him that he has come here making this country his home, and because it is his home his domicile is now in this country. If his domicile is in this country I concur with my brother Lord Young, and with your Lordship, in thinking that the domicile of the wife is in this country also. The domicile now acquired by him is acquired not for himself alone but also for his wife. Hence, as regards both pursuer and defender—for we must have jurisdiction over both before we can give the remedy which is asked—they are, in my opinion, subject to jurisdiction in this country, because they are domiciled in Scotland.

There being no doubt in my mind that the defender wilfully and maliciously deserted the pursuer, according to the ordinary administration of the law in such cases the pursuer is entitled to have decree of divorce as concluded for.

On the question whether the desertion has been established, I think that the facts proved in evidence established the desertion, and consequently, there being jurisdiction, decree of divorce ought to be pronounced.

THE COURT granted decree as craved.

PRINGLE & DALLAS, W.S.,—Agents.

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Pitman, &c. v.
Burnett's
Trustees.

FREDERICK PITMAN AND OTHERS, Petitioners.—*J. P. B. Robertson—Graham Murray.*
THE REVEREND DANIEL FOX SANDFORD AND ANOTHER (Burnett's Trustees),
Respondents.—*Johnstone—Young.*

Burgh—Jurisdiction of Dean of Guild Court—Competition of heritable rights—Title must be ex facie apparent.—A party pleading want of jurisdiction in the Dean of Guild Court, on the ground that the question raised is one of right to heritable property, must set forth upon record an *ex facie* good title to the subjects.

1ST DIVISION.
Dean of Guild
Court, Edin-
burgh.
C.

THE petitioners were in right of certain subjects upon which were built the three houses Nos. 112, 113, and 114 Princes Street, Edinburgh, and the respondents were in right of certain other subjects upon which were built Nos. 115, 116, and 117, being, with that part of No. 1 Castle Street which fronted Princes Street, also belonging to the respondents, the whole property in Princes Street between the house No. 114 and Castle Street.

Both sets of subjects were originally feued from the town by a Mr Robert Burn, who conveyed them in 1787 and 1794 respectively to the authors of the two parties. The petitioners' subjects were "bounded on the west by the centre of a mutual gavel built between the ground hereby and that other part of the ground feued to the said Robert Burn, . . . on the south by Princes Street, and on the north by the meuse lane." No. 163.
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The petitioners proposed to take down their houses and to erect new buildings to be used as a club-house for the Scottish Conservative Club, and this was an application to the Dean of Guild for warrant to do so. It was opposed by the respondents upon different grounds, *inter alia*, upon the following:—At the back of the said houses, and on the other side of the mutual gable which formed the western boundary of the petitioners' property, a passage or lane ran north to Rose Street Lane, and was used as a back entrance to some of the respondents' houses. The operations of the petitioners were calculated to affect this lane. The plans shewed that the operations included the formation of gratings on the *solum* of the lane for the purpose of giving light to an under floor of the buildings, and it also appeared that the scarcement was to extend some feet below the ground of the lane. To this the respondents objected.

Both parties claimed the right of property in the said lane, but neither set forth a good title to it upon record. The respondents pleaded, *inter alia*;—4. The questions raised in this process, including particularly those as to the said private lane, the property in part of the ground immediately to the north of 114 Princes Street, now claimed by the petitioners, but belonging to the respondents, Burnett's Trustees, and the necessity of leaving space for light and air to the other subjects flowing from the common author, Robert Burn, being questions of heritable right, are not competent for decision in the Dean of Guild Court, and the petition accordingly falls to be dismissed.

The Dean of Guild, upon 16th June 1881, pronounced this interlocutor:—" . . . Finds that the petitioners and respondents respectively claim the exclusive right of property in the said lane by virtue of their titles, and the respondents further allege that it has been in their exclusive possession from time immemorial as a part and pertinent of their properties: Finds that a question of heritable right is thus raised between the parties, which cannot be competently decided in this Court: Sits process *hoc statu* that the petitioners may, if so advised, raise a declarator to establish their right to the said lane as proposed to be used by them."

The petitioners appealed, and argued;—It was not enough for the respondents to set forth a vague claim of property. Their titles did not bear the construction they sought to place upon them. The fact was that neither party had any right to the *solum* of the lane. The lane was the boundary in each case. The right was one of common interest, which did not exclude the jurisdiction of the Dean of Guild.¹

The respondents argued that if they had no right of property, which was not clear upon their titles, they at least had a common interest in the *solum* of the lane, and had been in the exclusive possession of it. That was a heritable right, and assuming that they could plead the case no higher, that was sufficient to exclude the Dean of Guild's jurisdiction.²

¹ Johnstone v. White, May 18, 1877, *ante*, vol. iv., p. 721.

² Anderson v. Dalrymple, June 20, 1799, M. 12831.

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LORD PRESIDENT.—When it is said that a question of heritable right cannot competently be tried in the Dean of Guild Court that does not by any means imply that no kind of question relating to heritage can be raised and decided in that Court, but if the question raised amounts to a distinct competition of title, then the titles must be cleared by a declarator in this Court. Now, what is the question here? Both the petitioners and the respondents aver, in general terms, that they are proprietors of this lane, and the question is, Whether there is a relevant averment to that effect on the one side or the other? I am of opinion that there is no relevant averment of property either by the petitioners or by the respondents. And when I say this, I mean that in order to a relevant averment of right of property, so as to raise a competition of title, it is essential that the averment should set forth a good title to the subjects *ex facie* of the record; and it appears to me that the title set forth in the record by the petitioners and the respondents respectively demonstrates that neither the one nor the other of them have any right in the *solum* of the lane. I am, therefore, of opinion that the Court should repel the fourth plea in law for the respondents, and remit to the Dean of Guild to proceed further with the case.

LORD DEAS.—If the state of the competition of titles had been as described in the interlocutor of the Dean of Guild there cannot be the least doubt of the correctness of his judgment. But that is not the true state of matters. So far from both parties claiming an exclusive right of property in the lane, it now appears that neither of them claims the sole right. There is nothing now claimed in regard to the lane except a right of passage. That is, no doubt, in one sense, a heritable right, but it is not a kind of heritable right from which the jurisdiction of the Dean of Guild is excluded. If his jurisdiction were excluded from that kind of heritable right then it would be excluded in a large class of cases very fit for his very useful jurisdiction. The respondents' counsel has referred to a clause in the title of one of the respondents, in which it is stated that certain subjects are conveyed "together with an entry or passage from the said dwelling-house, three feet three inches in breadth, into the meuse lane behind," but that on the very face of it is not a right of property at all. An entry or passage into a meuse lane or any other place may be a heritable right of passage, but it is not a heritable right of property. Both parties now confess that neither the one nor the other has a title to the property of this lane, and therefore I am most clearly of opinion that neither the one nor the other can interfere with the jurisdiction of the Dean of Guild in this matter, and that the only course open to the Court is to remit the case back to the Dean of Guild to be proceeded with.

LORD MURE and LORD SHAND concurred.

THE COURT recalled the Dean of Guild's interlocutor, repelled the fourth plea in law for the respondents, and remitted to the Dean of Guild to proceed with the case.

SMITH & MASON, S.S.C.—JAMES M'CAUL, S.S.C.—Agents.

JOHN BROWNLIE AND OTHERS (Liquidators of the "Scottish Savings and Investment Building Society"), Appellants.—*Guthrie Smith—J. A. Reid.* No. 164.

JAMES RUSSELL, Respondent.—*H. J. Moncreiff—Strachan.*

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Friendly Society—Building Society—Effect of winding-up order on position of members—Right of member to pay up loan and withdraw under rules—Stat. 37 and 38 Vict., cap. 42 (Building Societies Act, 1874), sec. 14.—Held that a member of a building society, who under its rules was entitled to withdraw from it on payment of the balance of a loan due by him to the society, was not deprived of this right by the society having gone into voluntary liquidation at a time when it was due no debts except to its own members.

THE "Scottish Savings and Investment Building Society" was established in 1856 under the Act 6 and 7 Will. IV., cap. 32. The objects of the society were stated in the first rule to be—"1st, To provide a mode of investing the savings of its members securely and profitably; 2d, to advance funds on heritable security, and to enable its members to erect or purchase houses or other heritable property in terms of the statute 6 and 7 William IV., cap. 32, and the following rules." 2D DIVISION.
Sheriff of
Lanarkshire.
M.

By rule 2 each share was fixed to be of the value of £25, but members might hold any number of shares that might be agreed upon.

Rule 5 provided for the manner in which the shares were to be paid up, and was as follows:—"V. The shares shall be paid by monthly instalments of 2s., or 4s., or 6s. per share, as may be agreed upon. Members may change from one to another scale of payment at the beginning of the financial year only. The monthly instalments shall continue to be paid until (with the profit arising thereon) they amount to the full value of £25, when the members holding such paid-up shares shall be paid out of the society, in the order of the shares being realised, and as the funds of the society permit. In the event of the society not being prepared to pay out a member when his shares are realised, he shall receive interest at the rate of 5 per cent per annum upon the amount of his shares, or upon the balance of the amount from the time of the shares being realised, until the member receives his full amount."

It then continued, dealing with profits, in these terms:—"The profits of the society shall be ascertained annually, and shall be declared by the manager in his statement of the accounts made to the members at their annual general meeting. And within three months after said meeting, the amount of profits accruing to each member in proportion to his capital, arising from instalments and profits, and to the time such capital has been in the society, shall be ascertained and carried to the credit of his account in the ledger, and also placed in his pass-book with the society as contingent profits, subject to the rules of this society, and to the Act 6 and 7 William IV., cap. 32, sec. 1."

Rule 9 provided:—"IX. Transfer or withdrawal of shares.—Members who have not received an advance may at any time, provided all arrears and penalties be paid, transfer their shares, with all the privileges effeiring thereto, in the form No. III in the appendix, on payment of a transfer fee of 1s. per share to the society; or they may withdraw the whole or any portion of their shares at any time after twelve months from the date of entry, by giving one month's notice, when the whole instalments on the shares withdrawn shall be repaid, with interest, as follows:—If the shares are withdrawn during the second or third year, the instalments shall bear interest at the rate of 4 per cent per annum; if during the fourth or fifth, 4½ per cent; and after that, and until the shares are

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realised, 5 per cent. Members withdrawing shall be paid out in the order of their application, and as the funds permit, and shall be bound at settlement to deliver up their pass-books and certificates of shares."

Advances to members were dealt with in rule 10, which, after providing that advances would be made to the members offering the largest bonuses therefor, proceeded:—"No member shall have a right to have an advance allocated to him, nor shall any member be entitled to bid for the money when offered for sale, unless six months' instalments, and all other payments due on his shares, shall have been paid; nor shall he receive a larger advance than the amount of shares for which he has subscribed. . . . Every member who receives an advance shall grant a bond or other deed or deeds for the same over the heritable property offered by him in security, under which deeds the directors may exercise all the ordinary rights and powers of mortgagees."

Rule 12 was as follows:—"XII. Repayment of advances.—All advances shall be repaid by monthly instalments, with interest at the rate of 5 per cent per annum; and which interest shall be paid monthly, in advance, and at the same time as the instalments. Any member failing to pay his instalments or interest when due shall be charged a fine of 1d. per month on every sum of 2s. he shall fail in paying. . . . It shall also be lawful at all times for a member who has obtained an advance to withdraw from the society, upon giving the manager one month's notice in writing, and paying up the whole of his debt, interests, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with interest thereon, calculated at the rates referred to in rule 9."

Rule 14 bore:—" . . . All the property vested in the society in security shall be insured by the manager in name of the trustees at the expense of the borrower with such insurance company as the directors may appoint, and that to the extent of the money advanced by the society, less the amount of instalments that may be paid on the shares upon which the loan has been granted, if any so desire it, but such adjustments of the amount in policies not to made oftener than once in three years, and only if the member so desiring is not in arrears of payments."

The society was subsequently, on 26th November 1879, registered under "The Building Societies Act, 1874."*

In November 1867, James Russell, portioner, Glasgow, became a member of the society, and in May 1868 he effected a loan of £700 from the society, and in accordance with the rules had twenty-eight £25 shares in the society allotted to him. To obtain this loan he paid a bonus of £14 and certain fees prescribed by the rules. He duly granted a heritable bond for £700 over subjects belonging to him, the following relative memorandum being signed by him and by the directors of the society:—"The said James Russell having, of this date, obtained an advance of £700 from the said society as the amount of twenty-eight shares held by him therein and granted a bond, it is hereby declared that notwithstanding of said bond and disposition in security being in the usual terms as regards the date of payment of the principal sum and interest, it is nevertheless understood that the same shall not be enforced by the directors and manager of the said society as long as the said James Russell shall continue the regular payment of the instalments, interest, and other sums to become due upon

* 37 and 38 Vict., cap. 42, sec. 14, of this Act provides:—"The liability of any member of any society under this Act, in respect of any share upon which no advance has been made, shall be limited to the amount actually paid, or in arrear on such share, and in respect of any share upon which an advance has been made, shall be limited to the amount payable thereon under any mortgage, or other security, or under the rules of the society."

his said shares in terms of the rules of the said society." No. 164.
 From 15th May 1868, when the advance was made him, he paid the
 monthly instalments and interest in accordance with the rules of the
 society.*

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On 20th February 1880 the directors of the society applied in the
 Sheriff Court of Lanarkshire for and obtained a winding-up order from
 that Court. Under this order John Brownlie and others were appointed
 liquidators. At the date when the winding-up order was pronounced

* (1) *Excerpt from Respondent's first Pass-Book.*

No. 691.

MR JAMES RUSSELL, CARVER AND GILDER, 9 SOUTH PORTLAND STREET,

IN ACCOUNT WITH THE SCOTTISH SAVINGS INVESTMENT AND
 Dr. BUILDING SOCIETY, ON 28 SHARES, Nos. 16,552-16,579. Cr.

When Due.	Instalments on Shares.	Bonus and Interest on Advance.	Entrance Fees and Fines.	TOTAL.	1868.
1867.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	
Nov.	2 16 0	...	1 9 0	} 4 7 4	
Dec.	2 16 0	...	0 2 4		
1868.			0 4 8	3 0 8	
Jan.	2 16 0	...	0 7 0	3 3 0	
Feb.	2 16 0	...	0 9 4	3 5 4	
Mar.	2 16 0	...	0 11 8	3 7 8	
April	2 16 0	...	...	2 16 0	April 3
May	2 16 0	...	...	2 16 0	May 5
June	2 16 0	...	...	2 16 0	June 2
		2 18 4	...	2 18 4	June 2
July	2 16 0	2 18 4	...	5 14 4	July 7
Aug.	2 16 0	2 18 4	...	5 14 4	Aug. 4

(3) *Sheets pasted on the inside of the cover of Pass-Books.*

SCOTTISH SAVINGS INVESTMENT AND BUILDING SOCIETY.
 CONTINGENT PROFIT ACCRUED ON 28 SHARES OF NOV. 1867, Nos. 16,552-16,579.

Up to 28th February, 1869,	.	.	.	£1 14 8
" " 1870,	.	.	.	3 17 9
" " 1871,	.	.	.	5 17 7
" " 1872,	.	.	.	7 13 5
" " 1873,	.	.	.	10 11 10
" " 1874,	.	.	.	14 2 2
" " 1875,	.	.	.	15 19 0
" " 1876,	.	.	.	19 10 3
" " 1877,	.	.	.	22 14 5
" " 1878,	.	.	.	21 12 5

SCOTTISH SAVINGS INVESTMENT AND BUILDING SOCIETY.

CONTINGENT PROFIT ACCRUED ON SHARES OF Nos.

Up to 28th February, 18	.	.	.	
" " 1879 (Loss),	.	.	.	£39 7 3
" " 18	.	.	.	

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Russell had paid in instalments to the society £414, 8s., and in addition interest upon the full amount of the loan up to date.

On 8th March 1880 the liquidators, through their agents, issued a circular in which they intimated that, in consequence of the winding-up order, "borrowing members must pay up their debts."

The circular proceeded,—"As the assets of the society are realised, dividends will be declared among the members from time to time. In the case of ordinary members these dividends will be paid to them in cash. In the case of borrowing members the dividends will be placed against the loan, and so reduce the debt, and the interest running thereon.

"Seeing that no interest runs on the money at the credit of any shares it follows that until the loan is reduced by dividends, or payments made to account of the loan itself, the interest must continue to be paid on the full sum borrowed. But as all members who are not borrowers stop their contributions at the date of the order to wind up, it is clear that borrowing members must, to be placed on the same footing, be held to pay their subsequent instalments to account of the loan. The effect, then, of the winding-up order on borrowing members is that any instalments paid or dividends declared after its date go to diminish the debt, and reduce the corresponding interest, and not to increase the sum paid up on the shares or the stake of the members in the society.

"As already explained, the winding up prevents the subsequent withdrawal of members, and the result to borrowers paying off their debts is that loans, if paid up, must be paid in full. The liquidators are prepared, however, to entertain proposals in such cases for the payment or deposit of a sum of money to meet the contingencies of winding up, and so facilitate the realisation of the society's assets.—We are, Sir, your obedient servants."

On 22d July 1880 Russell's agents wrote the agents of the liquidators as follows:—"We have been instructed by Mr James Russell, residing at 163 Greenhead Street, Glasgow, to intimate to you, as agents for the liquidators of this society, that he is prepared forthwith to pay, in terms of the rules, the balance due by him of the advance of £700 received on or about 16th May 1868, provided a discharge of the heritable bond executed by him on the said date in security of the said advance be granted by the liquidators. Mr Russell's monthly instalments at the date of the winding-up order amounted to £414, 8s., and he has paid subsequent to that date the sum of £24. In arriving at the balance due interest will fall to be credited to him on the amount of his instalments, in terms of rules 9 and 12. We shall be glad to know if the liquidators will accept this intimation as sufficient notice under the rules, and whether they will agree to discharge Mr Russell's bond in the manner now proposed."

The liquidators' agents, on 23d July, accepted the above letter as equivalent to intimation to the society, but denied the right of any member to retire pending the liquidation, and they accordingly refused to accept the proffered payment.

On 4th October Russell presented a petition in the Sheriff Court of Lanarkshire, in which he prayed to have it found (1) that the loan of £700 obtained by him on 15th May 1868 had been extinguished *pro tanto* by £414, 8s., being the *cumulo* amount of instalments paid by him up to 20th February 1880 when the winding-up order was pronounced, and that the liquidators were bound to impute towards extinction of the balance of the loan any instalments paid, or to be paid, since that date; (2) that as a borrowing member of the society he was entitled, upon giving notice in terms of rule 12, and paying up the balance of the advance still due by him, with interest as therein provided, to withdraw from the

society and receive a formal discharge of his bond; (3) that the liquidators were not entitled to set aside or pay away any part of the sum of £414, 8s. paid by him in extinction of the advance made to him to meet the losses of the members of the society *inter se*; and (4) that since the date of the winding-up order he was no longer liable in interest on the full sum of £700 advanced to him, but only on the balance of £285, 12s. There were two other cravings, which were, however, merely formal. The liquidators lodged answers, and a record was made up and closed.

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Pleaded for Russell;—(1) Upon a sound construction of the rules of the said society the instalments paid by the petitioner extinguished and were intended to extinguish *pro tanto* the amount of the said loan. (2) The petitioner, on a fair and reasonable construction of rule 12, and in conformity with the universal practice and custom of the society with regard to borrowing members, is entitled to withdraw from the said society upon payment of the balance of the said loan due by him. (3) The petitioner, being simply a debtor of the said society to the extent of his advance, is not liable to bear a share of the losses incurred by the non-borrowing members or shareholders of the society *inter se*. (4) The petitioner having paid interest on the full amount of his loan, without regard to the instalments thereof repaid from time to time, upon the footing that he would be entitled to participate in the profits of the society, and the said profits having been superseded by the liquidators, he is now only bound to pay interest upon the balance of the said advance.

Pleaded for the liquidators;—(1) Until the petitioner tenders payment of the balance of his debt and calls upon the liquidators in respect thereof to grant him a discharge the present application is premature and unnecessary. (3) The instalments paid by the petitioner having been paid to account of his shares in the society, and not to account of his debt, he is not entitled to credit therefor in the manner claimed by him. (4) The effect of the winding-up order is to equalise the rights and liabilities of all the persons who happened to be members of the society at its date, and to prevent the withdrawal of any members thereafter until the liquidation is completed. (5) As the instalments paid by all the members alike, whether such members have borrowed from the society or not, have been paid to account of such members' shares, to allow the pursuer or other borrowing members to impute such payments to account of their debt would produce inequality among the members, and is therefore illegal. (6) The losses, if any, sustained by the society, having been sustained in consequence of transactions entered into prior to the winding-up order before mentioned, and while the pursuer was still undoubtedly a member, he is not entitled, by giving notice of withdrawal, to escape his share of responsibility for such losses. (7) Except in so far as the same may be altered or modified by the terms of the Building Societies Act, 1874, and the winding-up order, the rules of the society still regulate the contract between the members thereof, and their several rights and liabilities as such members. The liquidators are therefore bound to enforce all fines and penalties for failure to make punctual payments in terms of said rules. (8) The pursuer having paid no more by way of instalments than any other member of the society of the same standing, and holding the same number of shares, he is not entitled in virtue of his having borrowed from the society to get interest on the sum so paid, while other members who have not borrowed are not getting interest.

Russell thereafter lodged a minute in which he formally tendered payment of the balance, which he admitted to be due by him conform to an account embodied therein.

The liquidators also lodged a minute to this effect:—"The said society

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and liquidators admit that there are funds enough in their hands to pay all the debts due to third parties so far as these have been intimated to the liquidators, or have come to their knowledge. The society are in possession of certain properties under their bonds and otherwise are involved in questions of accounting and liability with superiors, prior bondholders and proprietors, and it is impossible at present to say what claims may thence arise, but the liquidators have no anticipation of not being able to meet all such claims out of the funds and effects in their hands."

The Sheriff-substitute (Guthrie), on 22d February 1881, pronounced this interlocutor:—" Finds that the petitioner, James Russell, is a member of the Scottish Savings Investment and Building Society, holding twenty-eight shares, and that he obtained on 16th May 1868 a loan of £700 from the society, being the amount of his shares, for which he granted a bond and disposition in security over certain property in Crawford Street and Francis Street, Glasgow, the security having since been restricted on 28th October 1874 to the property in Francis Street: Finds that since the said 16th May 1868 the petitioner has regularly paid instalments on his shares to the amount in all of £414, 8s. as at 20th February 1880, the commencement of the liquidation, besides regularly paying interest thereon: Finds that the petitioner is not entitled to withdraw from the society on the terms set forth in the twelfth rule of the society: Finds that the petitioner is entitled, on paying up the balance of the said sum of £700, after deducting the amount of said instalments or subscriptions, being £285, 12s., with interest on the said £700 until payment of said balance and less discount at 4 per cent on the said sum of £285, 12s. from the date of payment to the date at which each instalment on said shares would have been payable under the rules, to receive from the respondents a discharge of his said bond and disposition in security, reserving *hinc inde* all rights and liabilities of the petitioner as a member of the said society; and with regard to the other cravings of the petition, appoints parties to be further heard on the 3d March next."*

* "NOTE.— In approaching the consideration of the questions which have been presented with great ability for the decision of the Court it is to be noticed that in the rules of this society the usual provision for redeeming the securities of borrowing members is entirely wanting. Such cases, therefore, as *Priestly* and *Hopwood*, 10 L. J. N. S. 646, and *Burgess's* case in the liquidation of the Doncaster Permanent Building Society, L. R. 3 Eq. 158, which dealt with the rights of parties under redemption clauses, while they are useful by way of illustration, afford little direct assistance in construing the rules before me.

"The main question is whether the applicant is entitled to withdraw from the society upon the terms specified in rules nine and twelve. The respondents say, with much force, that it is common law and statute law that after a winding-up order no such change can take place in the relation of members to the society. 'The Companies Act, 1862,' sec. 131, expressly provides that all transfers of shares and alterations in the status of members taking place after the commencement of the winding up shall be void. And, whether that provision is or is not applicable to liquidators under the section of the 'Building Societies Act, 1875,' it seems plain that the same result follows from the ordinary principles of bankruptcy law and common sense. The rights of parties in a winding-up are necessarily fixed as they were at its commencement. It seemed to be contended for the applicant, that as a borrowing member he was not really a shareholder of the society; that he was merely its debtor, and that on paying up his debt in the way and to the amount fixed by his contract he was entitled to be free from all further responsibility. I do not think that this view can be reconciled either with the contract and the rules of the society, with the English cases, or with the general principles on which building societies are constituted. There are indeed, as is contended, two classes of members, borrowing and invest-

On 19th March 1881 the Sheriff-substitute pronounced this further interlocutor:—"Under the last order refuses the third craving in the

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ing members, but both are members and both are liable, as the cases referred to and others shew, to be made contributories. The whole phraseology of the rules shews that borrowing members are simply those who take payment of their shares in advance, and out of whose interest, fines, and bonuses the profits of the society are made. In some societies it appears that borrowing members do not share in the profits, which are accumulated and divided at the realisation of shares, or when withdrawals take place; and in such societies there would, I imagine, be at least plausibility in contending that no liability for losses should attach to them. But, here, borrowing members, paying up the whole instalments on their shares with interest, not only are released from their debts to the society, but leave the society taking with them a part of the interest they have paid in name of profit. And so far as appears from anything in the rules, or in the process and argument, they have set apart for them from year to year precisely the same proportion of profits pertaining to their payments as the unadvanced members. In these circumstances there can be no reason why they should not be placed on the list of contributories precisely as other members; and this is what appears to have been done in England.

"Now, if this be so, how can they be allowed to withdraw on the terms proposed? The suggestion would hardly be made, I think, if the question were with third parties, outside creditors, or even with members who have given due notice of withdrawal before liquidation, and who must be dealt with as creditors. But the applicant has averred, and it is virtually admitted, that all creditors are paid, or at least that the liquidators have funds to pay them, so that the question is really one as to the rights of shareholders *inter se*. In such a question the case of *Burgess*, cited above, lends some support to the applicant's contention, for there, the society's debts having been paid, a call was suspended as to borrowing members who had been allowed to redeem, the call being made only for the purpose of paying up the other shareholders. This, however, was done entirely because the rules gave a certain power of redemption by paying up at once all future instalments, and provided that on that being done advanced shareholders should at once cease to be members. It may be said, that although the rules of this society contain no provision for redemption, the clause as to withdrawal at the end of rule twelve is really equivalent, for as Lord Cranworth said in *Fleming v. Selfe*, 24 L. J., Ch. 29, 'redemption is in truth withdrawing.' I cannot, however, look at this rule as giving the absolute power for which the applicant contends. The object of the liquidation is, after paying creditors, to give the members equality of rights and liabilities according to their respective interests in the society. Now, as I have said, both classes of members in this society participate in profits, and each year the contingent profits—so called, because those of each year are liable to be reduced or wiped off by the losses of a subsequent year—are credited in the books to each member in proportion to his capital arising from instalments and profits, and to the time such capital has been in the society. When a member of either kind withdraws it is true that he is not entitled to receive these profits, either as an addition to the instalments which are then repaid to the unadvanced member, or as a deduction from the balance of the debt, &c., paid up by the borrowing member. But in lieu of profits both classes of members are allowed interest on the instalments paid upon their shares, at stipulated rates, corresponding to the length of membership. This is provided by the ninth rule in regard to unadvanced members, and the twelfth rule provides for withdrawal of a borrowing member on paying up 'the whole of his debts, interests, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with interest thereon, calculated at the rates referred to in rule nine.' Now, it is impossible to read the twelfth rule as giving the borrowing member a right to withdraw stronger than, or superior to, that of the investing members under rule nine. It follows, if withdrawal is allowed after a winding-up order, that each member, whether advanced or unadvanced, will have an equal right to give notice of withdrawal, and thus a

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petition : Finds and orders that if the petitioner should not elect to pay up the balance of the loan of £700, as stated in the previous interlocutor,

winding-up order would, in such a society, be no longer a means of equalising the rights of all members according to their interests at its date, but would be just the starting point of a race for preferences, members withdrawing being paid out (rule nine) in the order of their application. This theory is therefore entirely inconsistent with the very idea of a liquidation. Moreover, it is obvious that the provision for payment of interest to withdrawing members is intended to apply to the society while carrying on business, and presumably earning profits exceeding in amount the interest allowed at this time, and in a liquidation it does not appear, and is not even alleged, that the funds permit of this interest being paid, without creating inequality and injustice to other members. It may be as the result of the liquidation that the applicant and others, who might be equally willing to withdraw at the present time, will all get interest on their instalments to the amount which he claims, but it does not seem to me that he has established, or relevantly averred, right to a preference over other members, such as to entitle him to get this interest now, and whether they get it or not. I therefore refuse the second prayer of the petition.

"To the other more important demand of the petitioner, viz., that it should be found that he is entitled to have his instalments or subscriptions credited to him as *pro tanto* repayment of his loan, I am not prepared to give so decided a refusal. Although there is not the usual provision for redemption in this society's rules, it seems to be unreasonable, when a liquidation has taken place, not only to keep the petitioner in the society as a member and a contributor, but to prevent him from paying up his loan and relieving his property from the security which the respondents hold over it. It may be very important for him to be able to deal freely with his property. The respondents have no right to retain that security except for the loan of £700. It is said that he can only have a discharge of the bond on paying up the whole £700, and that he must leave the instalments paid upon the loan to stand as his stake in the society, which may or may not be repaid to him at the close of the liquidation. I cannot adopt this construction of the rules. By the rules, and, indeed, according to the fundamental conception of building societies as they are usually constituted, advanced members are both members of the society and borrowers from it ; and the normal and usual way of repaying their loans is by paying precisely the same monthly instalments as investing members. The difference is that the instalments of the latter go to make up a fund of capital which is repaid with profit to the investing member when his shares are realised—i.e., are fully paid up—while the instalments of the former go to repay the advance which the advanced member has received on his shares, and for which he has given security. When all his shares are paid up he is entitled of right to have his security discharged, and if the society were carrying on business in the normal way he would doubtless (though in this case the rules are silent) be free to quit the society. He is entitled, as we have seen, to withdraw while the society carries on business, on paying up not the whole loan, but the balance, after reckoning his instalments, &c., and he may have his insurance and his security restricted, as has been done in Mr Russell's case, in proportion to the payment made 'on his shares.' Looking to the whole conception of the rules and to the general idea of such societies, it might be plausibly argued even in a question with third parties, creditors, that the mortgaged property of a borrowing member could not be made available except to the extent of the balance of the lent money after deducting the instalments paid to account of his shares. But in a case where only fellow-shareholders are concerned it admits of no doubt. It might almost be regarded as a simple case of setting off against the debt the amount which the petitioner holds of the stock of the society, and therefore, in a question *inter socios*, a setting off which the borrowing member would be entitled to plead under the last clause of section 101 of the 'Companies Act, 1862.' But in the actual circumstances it is better to call it a set-off which Mr Russell is entitled to plead in virtue of the contract between him and the society, which contem-

he is not bound since the 20th day of February 1880 to pay interest on the full amount of the said advance or loan of £700, but only on the sum of £285, 12s., being the balance due by him as at the said date after crediting the sum of £414, 8s. paid to account or in respect thereof; and *quoad ultra*, in respect of no opposition, finds and orders in terms of the remaining part of fourth craving: Finds it unnecessary to order as craved in the 5th place, in respect it is stated at the bar that the liquidators are about to issue a statement to the members of the society; refuses the sixth craving *hoc statu*." No. 164.

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The liquidators appealed to the Court of Session, and argued;—The payments made by Russell were instalments to meet the price of his shares, and were in no way referable to the loan. The liquidation prevented Russell from retiring under rule 12, and remaining a shareholder he should bear his share of the losses incurred along with his fellow-shareholders.¹

Argued for Russell;—The payments were made in extinction of the loan. This was apparent from the fact that the subjects disposed in the bond were insured for smaller sums as the balance due became less. Russell having no interest but as a borrower in the society was entitled to withdraw on complying with the rules of the society as to borrowers, and the liquidation, which was unnecessary, and the voluntary act of the shareholders, did not affect his rights.

At advising,—

LORD YOUNG.—This is a peculiar case, as the appellants' counsel remarked in the course of the discussion. The society of which we have heard, The Scottish Savings Investment and Building Society, is in the exceptional and fortunate position, so far as I can see, of being unable to contract any debts. The society may make money if it can, but it can incur no debts. There are shareholders in the society, and they hold shares of the amount of—that is to say, the utmost amount that can be paid upon any share is—£25; and the business of the society consists in lending the money of those who pay it in and do not borrow to those who require funds, generally, I suppose, to those who require to borrow

plated repayment of the loan in the way in which he has been paying it, and no other. The applicant is therefore entitled to a discharge of the bond and disposition in security granted to the society on payment of the balance of his loan due at 20th February 1880, less discount.

"The chief difficulty which occurs to me as arising from this determination is that the applicant remains a member of the society, although he will thus have paid up, so far as I am able to see, all that he can be asked to contribute. For the 14th section of the 'Building Society Act, 1874,' limits his liability to 'the amount payable on his shares under any mortgage or other security or under the rules of the society,' and this he will have paid. It may, however, be that, even under this clause, his liability is not exhausted; and in any view, if this judgment is sound, and if the liquidators' opinion as to the results of the liquidation is correct, it is probable that he will not desire to quit the society, seeing that possibly the only effect of his remaining connected with it may be to entitle him to dividends and not to subject him to losses.

"It does not appear that the remaining portions of the prayer of the petition can be satisfactorily disposed of at present. They are partly involved in the decision already arrived at, and partly are matter for adjustment in the course of the liquidation. It is possible, however, that the parties may wish to have the case in such a position as to enable an appeal to be taken, and I have appointed a further hearing chiefly for that purpose."

¹ *Seagrave v. Pope*, Feb. 26, 1862, 1 De Gex, M'N., and Gor. 783; *Mosley v. Baker*, Jan. 30, 1849, 3 De Gex, M'N., and Gor. 1032.

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without paying in. This is chiefly done, as it is the main object of the society to do, to members who are to build ; and the security afforded to the society for their advances is a conveyance of the ground on which the proposed buildings are to be erected. If the loans are providently and prudently made and regularly paid up with interest there will be a profit to those whose money is so lent, that is, to those who have contributed money to the society, but not borrowed any. Otherwise there will be a loss to them. There cannot be a greater loss to the whole of them than the whole money which the whole of them have contributed, but there may be a loss of that or of anything short of that.

Now, it appears that, on account, I suppose, of the amount or number of undertakings which speculative builders have entered into, and the amount of money which they have borrowed, the borrowers, and the securities which they granted, have proved not satisfactory, to some extent at least ; so that the contributing members—the investing members—those members who are looking to this as a mode of advancing their money securely and profitably—were to that extent disappointed. But there were other borrowers of a different description, among whom, apparently, is Mr Russell, the respondent in this petition and in this appeal. He was a good customer, and he paid back in instalments, as he had contracted to do, the loan which had been advanced to him, and the property which he had given in security was apparently good. He had paid no money into the society for the purpose of being lent to other people. On the contrary, as I have indicated, he was a borrower and not a lender, and the transaction with him might be a loss to those whose money he had undoubtedly borrowed, but no gain to himself, unless he could otherwise profitably use the borrowed money for himself. But it occurred to those who had lost money on the transactions of the society in connection with less profitable customers that they might impound certain payments which Mr Russell, and, I suppose, others in the same position, had made in pursuance of their contract to repay the loan by instalments, and thus enable them to get back their share of the loss which would otherwise fall upon them through their improvident lending to other people. And in order to attain this end, which it was, at least at one time, frankly admitted could not be done under the rules of the society, or the contract between the society and Mr Russell, they put the society into liquidation, and pleaded that that which could not be done before liquidation could be done after it.

Now, I must say I think this was a very questionable proceeding. I do not think there was any legitimate occasion for the liquidation of a society of this kind at all, which could incur no debts, and which had therefore no debts to pay. It was stated to us that any losses that might be incurred must of necessity be met by the contributions which had been paid in—by the actual money which was in ; and in these circumstances it seemed to be a question of the extent to which those who had paid in money in that way were to be entitled to get it back, or should be able to get it back. But it is in vain to say that such a society required a liquidator. Any shareholder of this society, moreover, is entitled to leave it upon a month's notice. The respondent's counsel was perfectly right. A shareholder does not require to remain in until he has paid up his £25 ; and if he has paid up the arrears due according to his undertaking—it may be 2s. a-week, or 4s., or 6s.—if he has paid up all those arrears, although his payments may only have been to the extent of a few pounds, he is

*led to bid them good-bye, and be off.

In this way there is no case here, and no possibility of a case here, such as No. 164. occurs in liquidations with which we are familiar—in which a liquidator is calling upon a party, a partner in a limited liability company, for example, to contribute the unpaid amount of his shares; or in the case of an unlimited liability company calling upon him to pay such an amount as may be necessary to meet the debts of the company. There is no case of that kind. The contributions of the shareholders of this society are in shillings a-week, and if all the instalments are paid up the shareholders are entitled to shake themselves free at any time.

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And this, it should be remembered, is provided by the rules of the society and by the Act of Parliament. The mode of borrowing here, it is true, is a peculiar one. A party becomes a shareholder of as many shares as, when fully paid up, will amount to the loan which he desires, or which is agreed to be granted to him, as was done here. The loan agreed upon being £700, the proposed borrower must become a shareholder of as many shares of £25 each as will amount to £700. Thereupon, the security being satisfactory, the £700 is advanced, to be repaid as clause 12 of the rules of the society, which constitute part of the bargain with the borrower, provides, by monthly instalments, with interest at the rate of five per cent. It was agreed between them that these monthly instalments in repayment of the loan should be put to the credit of the borrower as if it had been money paid up upon his shares—not that it was so in reality, but that it should be put to his credit as if it were so.

Accordingly, after he had paid between £400 and £500, Mr Russell considered, and he was entitled to consider, that his loan had been repaid to that extent,—that is to say, that his debt to the society had been discharged to that amount—for that is the meaning of the words in clause 12 which were acted upon, viz., that the advances were to be repaid by monthly instalments. He was not then entitled to cease to be a shareholder, for, in the first place, the Act of Parliament which applies to such societies as this provides that the liability in respect of any shares upon which an advance has been made “shall be limited to the amount payable thereon under any mortgage or other security, or under the rules of the society. He was therefore under a liability in respect of the shares which he held for the advances made thereon, and the mortgage granted in respect of said advances in so far as not repaid. But in so far as repaid by instalments there was not to be a second repayment. He was liable upon the mortgage for the unpaid balance of the debt. Upon that payment being made his shares are paid up and his debt is discharged, and his liability ceases by the Act of Parliament. As was pointed out by the appellants’ counsel, however, this provision is made by the Act subject to this, that the rules of the society may provide differently. The provision of the statute, and the primary provision, is, that if a shareholder has borrowed money upon his shares, granting a mortgage, his liability is limited to the amount borrowed, that is, to his liability under the mortgage. But the rules of the society may provide otherwise.

But do the rules of the society provide otherwise? Clause 12 provides that the advances shall be repaid by monthly instalments. That is the beginning of it; and the end of it is—“It shall also be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving the society one month’s notice in writing, and paying up the whole of his debt, interest, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with the interest thereon.”

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Now, Mr Russell proposes to withdraw precisely in accordance with the Act, and with those very words which I have read. And the other parties say—"Well, we could not, according to the fair meaning of these words and the understanding of the parties, and the honesty of the contract between us, have refused to allow you to go on making that payment of the balance due upon that footing." But then they appeal, as I said at the outset, to a liquidator. They call in a liquidator for no other purpose except to enable them to do a thing contrary to the good faith of the contract which they had made, and subject a mere borrower, upon a contract which he had purchased with a premium, to an impounding of what, according to that contract, were to be imputed as instalments in payment of a debt. Instead of acting according to the good faith of that contract they say to him—"But you are the borrower of £700, with no part of it paid up, and under the security we are entitled to sell your property, on the ground that no part of the debt has ever been paid"—for that would be the legitimate result.

I am of opinion that the law is altogether against that. I think the true view of the case, upon the statute, upon the contract, and upon the rules of the society—for they are all in harmony—is, that Mr Russell is bound to pay his debt in so far as the instalments which he has already paid do not cover it—principal, and interest at five per cent; and that upon that being done, then, according to the rules, and the statute, and the contract itself, his shares are fully paid up, and he ceases to be a shareholder, and that upon making the payment of the balance due now he is, in terms of the very language with which rule 12 concludes, entitled to withdraw from the society without remaining under any further obligation.

LORD CRAIGHILL—I am of the opinion which has just been expressed by my brother Lord Young.

The question raised here is one of great importance, not merely to members of this society, but to members of similar societies; and it is with considerable difficulty that I have arrived at what I consider to be a satisfactory conclusion. In the end, however, I have come to be very clearly of opinion that what has now been pointed out by Lord Young is the true result, and that accordingly effect ought to be given to that result in the interlocutor about to be pronounced.

The building society in question was established prior to 1868, and early in that year the pursuer, Mr Russell, who is the respondent in the appeal, became a member, and soon after he did that which many members of the society did, viz., applied for a loan from the funds of the society, and his application having been entertained and granted, he became a debtor to the society in the sum of £700. In security of the advance he subscribed for shares in the society amounting in the aggregate to that sum, and granted a bond and disposition in security over the property in respect of which he received the money.

Now, from 1868 down to 1880, when this society went into liquidation, Mr Russell fulfilled all the obligations incumbent upon him. And what he undertook to do was this, to pay in monthly instalments towards the extinction of the debt he was due to the society, or to make up the amount of the shares of which he had subscribed himself the holder. When the order for the winding up of the society came into force in February of this year he had repaid the principal in instalments amounting to £414, 8s., and he became desirous of withdrawing from the society, and gave the liquidators notice to that effect

through his agents, but the liquidators, instead of acceding to his request, made the demand that he should of new begin to pay up the instalments of the principal, as if none of it had ever been paid. The £414 which had been paid in monthly instalments had remained in the hands of the society, and it reasonably seemed as if Mr Russell's debt had been extinguished to that extent. This the liquidators would not allow, and accordingly the present action was raised for the purpose of determining the question. Mr Russell seeks to have it found that upon payment of the sum forming the difference between £414—the amount of the instalments—and £700—the amount of the advance—he is to be entitled to a discharge of his bond; and that the whole amount of the shares which he subscribed for having been met, he is to be looked upon as having ceased to be a member of the society.

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Now, I am of opinion that, according to the Act of Parliament, according to the law, and according to the contract between the parties, as that contract is expressed, not merely in the bond and relative memorandum, but in the laws and regulations of the society, this is a contention on the part of Mr Russell that ought to be allowed. I think it would be a very strange thing, indeed, if the contract of the parties was not a contract by which both parties were to be bound.

And in regard to this matter, I must be allowed here to say that it appears to me to be quite immaterial that the society has gone into liquidation. I look upon it that the issue to be tried and determined is simply this:—As at the date of the liquidation—February 1880—no payments having been made subsequent to that time, what was the amount of the debt due upon the bond that had been granted by Mr Russell to the society? If £700 had remained due upon that bond undoubtedly the society would be entitled to demand payment; but if the debt which is represented by that bond has been reduced by monthly instalments to something over £200, then the society, upon receiving payment of the difference, are, as I think, bound to give Mr Russell a discharge of the bond, and all the shares for which he subscribed having been thus paid for, Mr Russell necessarily, and according to the rules of the society, ceased to be a member of the society. The contention maintained for the liquidators would lead to an extraordinary result, for the contention, and any decision giving effect to it, would have been the same supposing that in place of £414 having been paid by Mr Russell in monthly instalments he had paid the full sum of £700. It would still have been said that although £700 had been paid in monthly instalments yet the amount of the loan remained as much as it was when first granted.

That, no one can deny, would be a very strange result, but, strange or not, it is a result against which the rules of the society are, as I think, quite sufficient. That repayments have been made to the extent of £414 is not matter of controversy. That which is controverted is whether they were paid on account of shares, leaving the amount of the bond unaffected, or whether—paid on account of shares or not—the condition on which payment was made was that to the extent of each payment the debt due should be diminished. If each payment on account of shares represents also a payment on account of money for which the bond was granted, by each payment there is necessarily reduced the amount of the debt due to the society.

Now, it appears to me that according to the rules, and particularly according to rule 12, this is the result, and the only result, at which we can reasonably

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arrive. The first sentence of section 12 does not appear to me to be susceptible of any other interpretation, because that which is thereby provided is, that "all advances shall be repaid by monthly instalments with interest at the rate of five per cent per annum, and which interest shall be paid monthly in advance, and at the same time as the instalments." Is that law for the society, and is it law for every borrower of the society who is also a member of the society? If it is, it appears to me that the result of every payment is to extinguish to the extent of every payment the debt that was due. And this does not stand alone, but must be read in connection with the clause adverted to by my brother Lord Young, at the end of article 12—"It shall be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving the manager one month's notice in writing, and paying up the whole of his debt, interest, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with the interest thereon." All monthly payments made on account of shares are called payments of debt, and this appears to me to be according to the true construction, the true result being this, that a member who pays on account of shares, if he is a borrowing member, when he pays monthly instalments also and necessarily pays the amount of his debt. Mr Russell paid on account of shares, and with reference to the number of his shares, but he was also a debtor on the bond, and when he made a payment he made a payment on account of this bond as well as on account of shares; and to the extent of the payment thus made the debt due to the society was, in my opinion, reduced, the consequence being, that after the liquidation the amount of the debt, which was £700 to start with, had been reduced by the amount stated. The amount of the instalments that had been made, and the interest upon these instalments, was a payment on account of debt due, and that to which the society were entitled, as a condition of granting a discharge, was the difference between £414 and £700.

No doubt there are things in the transactions between the parties following upon membership and upon this bond which appear at first sight to be inconsistent with the result at which I have arrived; but I think there is that in the laws of the society itself which shews what in truth was the reality of these payments—that they were payments, I do not say not on account of shares, but being, it may be, on account of shares, on account of debt also.

This was a loan over house property, and it is provided by rule 14 that when the society elect a member on the security of house property they are entitled to insure to the full extent at the cost of the member, so that in the event of the destruction of the property the society could recover from the insurance company as much at least as would extinguish the debt due to them. Now, how would that matter stand if some instalments had been paid? Does not the power of the company to insure become limited as the amount of their debt is paid up? They are not entitled in such circumstances to insure for the full sum, or to take the full sum, supposing instalments have been paid in extinction of the debt. All that they are entitled at their own hands to do, at the cost of the member who is their debtor, is to insure the property for such a sum as will cover the amount lent and not repaid. And how is this result secured? Simply by the payments that have been made from time to time diminishing the amount of the original debt in respect of which the society could make any claim. I do not think it is for the society, in reason, to contest the soundness of this deduction. If there had been no payments to account—

payments due under the bond—there could be no reason why the society should not insure for the full amount. But there was to be a limitation in the case suggested, and that limitation was regulated by the amount of the monthly instalments which, as at the particular period when the insurance was effected, had been paid to the society.

The necessary inference is, that according to what was the reality of the transaction and the legality of it, the sum that was paid on account of the member or debtor—whether you call it on account of shares or of instalments—was a sum by which the debt represented in the bond was extinguished. That was the purpose of the thing. I do not think there was anything of the nature of keeping up a debt on the one hand and giving credit for shares on the other. On the contrary, what was done was in fulfilment of an obligation to pay instalments upon certain shares, and, fulfilling this obligation, at the same time to extinguish a debt which had been constituted by a loan given to Mr Russell by the society.

Upon these grounds I am humbly of opinion that that which has been suggested by my brother Lord Young is the judgment which should be pronounced.

LORD JUSTICE-CLERK.—I concur entirely in the result at which your Lordships have arrived ; and as this question is one of very great interest to a large body of the people, I think it right to express in a word or two the grounds on which I have arrived at that result. I think the case a very important one ; and, moreover, I think the demand that is here made is a very unjust one, for it means nothing but this, that this liquidator wishes to exact payment of a debt which has been already discharged. It has no other meaning. If the liquidator succeeded in this case that would be the only result.

This association had two objects to serve, and they were quite distinct. One was the ordinary object of an investing society, in order to make profit of the interest of their money ; the other was to enable members to borrow money to carry on building speculations on terms that were accessible to the class who generally belonged to the association. It appears to me that in better times this association was entirely successful. But in regard to the first, it was to get a return for the money, and the second was to get the advantage of a loan on terms which they could meet.

Now, to that second class belonged the respondent, and that was his only character in the transaction from first to last. He was a borrowing member, and the provisions of the contract with the parties, as far as he is concerned, are those relating to borrowing members, and no other. The loan is a peculiar one, and very profitable to the lender, because he was to get full interest on the whole of his money, while the borrower was bound to pay into his coffers, whatever the terms and conditions of the payment of interest might be, certain instalments which in the end, if continued, would liquidate the whole of the advance. That was manifestly a great advantage, for not only was the full interest paid upon the whole debt, but the instalments themselves were rendered available for the earning of other interest.

Now, the respondent says he has paid up a certain amount of his loan ; and if the monthly instalments referred to are to be imputed to repayments of the loan there can be no doubt he is right. There is little dispute upon that matter. But the liquidator says he has not paid anything towards repayment of the loan,

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because the instalments were paid to account of the money due on his shares as if he had been an investing member. And so the real object of this proceeding is to compel the respondent to pay over again what he has already paid. It has no other object, and that is an object which, in my opinion, is directly in the face of the precise terms of the Act of Parliament. It is contended—and that is one of the pleas of the appellant here—that these instalments were not attributable to the loan, and that therefore the loan remains the same as if the instalments never had been paid. That view also proceeds in direct opposition to the precise words of article 12, which provides not only that the instalments may be taken into consideration, but provides that the debt shall be paid in that manner and in no other, for it is the nature of the provision in article 12 that these advances shall be paid by instalments. I daresay the manager of the association might accept payment otherwise—and there are provisions to that effect for certain circumstances—but the normal condition is that the instalments shall be paid by the borrowing member for no other purpose whatever but to extinguish the debt. He is bound to extinguish it in that way.

It is perfectly true that interest was paid upon the whole sum, and that is not an unimportant element in this matter. That was for the greater security of the company, and those payments or instalments doubtless remained in the hands of the company, while interest was paid on the whole debt; but that does not derogate from the clear provision, first, in the opening sentence of the 12th article, which provides that the debt shall be so paid, and secondly, from the concluding clause, which is couched in terms so precise that it is utterly impossible to mistake it.

Therefore I think that this demand of the liquidator is a most inequitable one, because the real meaning of it, as I have said, is to compel this party who has paid instalments under the Act of Parliament to pay them over again.

It is said that the company is in liquidation, and I must plainly say that, listening to the argument as I have done, I am at a loss to know what that means. It is not in liquidation of its debts, for there are none of those. It is not in liquidation of anything arising out of the investing part of its business, because the investing members do not owe anything to each other, and they do not owe anything to the outer world. There can be no liquidation with the borrowing members, for this simple reason, that if they are not only borrowing but investing members they will simply lose that money *pro rata* along with the rest of them. The way in which the investing members suffer, which is the only pretext for liquidation, is that they do not get so much for their money as they expected. There is no other. And if the borrower here had been an investing member, or held to be such, there would be so much the less profit, in proportion to the amount he had invested. Therefore, with Lord Young, I am utterly at a loss to comprehend on what ground liquidation is proceeding. It seems to me that liquidation is not the term to be applied to the winding up of the affairs of the company, if the company is to be put a stop to. I do not suppose they are to stop, and I think this is a mere device to raise this question, which has for its aim the compelling a man to pay his debt twice over.

I therefore think we had better affirm the judgment of the Sheriff-substitute. He no doubt finds that in the present condition of the company the respondent is not entitled to withdraw, but I apprehend that that only means that he is not entitled to withdraw independently of having his bond cancelled. Cancellation of the bond would, I daresay, be quite enough to obviate any objection of that sort.

THIS interlocutor was pronounced :—" Recall the interlocutor of the No. 164. Sheriff of 22d February 1881 appealed against: Find that the advance or loan of £700 obtained by the respondent (pursuer) July 7, 1881. from the Scottish Savings Investment and Building Society, registered under the Building Societies Act, 1874, and having its Liquidators of the Scottish Savings and Investment Building Society v. Russell. registered office at 53 West Regent Street, Glasgow, has *pro tanto* been extinguished by the sum of £414, 8s. 0d., being the amount *in cumulo* of instalments from time to time paid by the respondent to account or in respect thereof from 15th May 1868 to 20th February 1880, when the said society was, by the Court, appointed to be wound up, and that the appellants are bound to impute towards extinction of the said advance or loan all instalments paid to them by the respondent since 20th February 1880, or which may yet be paid, to account or in respect thereof: Find that the respondent, as a borrowing member of the said society, on giving notice in terms of rule twelve of the said society, and upon payment to the appellants of the difference between the said sum of £700 and the amount *in cumulo* of the instalments paid by him to account or in respect of the said advance or loan, with interest due to him thereon calculated or added thereto, in terms of rule nine of the said society, is entitled to withdraw therefrom, and that the appellants are bound thereupon to execute a formal discharge of the bond and disposition in security for £700, dated and recorded in the Register of Sasines for Renfrewshire and regality of Glasgow, &c., 16th May 1868, and granted by the respondent to the trustees for the said society in security of the said advance or loan: Find the respondent entitled to expenses in the Sheriff Court and in this Court, and remit to the Auditor," &c.

J. SMITH CLARK, S.S.C.—R. H. MILLER, L.A.—Agents.

GEORGE BARRON (Trustee upon John Mitchell's sequestrated Estate), No. 165.
Petitioner.—*Strachan*.

JOHN MITCHELL, Respondent.—*Salvesen*.

July 8, 1881.
Barron v.
Mitchell.

Bankrupt—"Estate" under section 103 of the Bankruptcy (Scotland) Act, 1856—*Schoolmaster's salary*.—The trustee on the sequestrated estate of a teacher in a burgh school presented a petition under the 103d section of the Bankruptcy Act, 1856, praying the Lord Ordinary to declare all right and interest which belonged or might belong to the bankrupt in the salary and emoluments of his office to belong to the trustee, until the bankrupt's debts should be paid, but subject to payment by the trustee to the bankrupt of a reasonable allowance for his maintenance.

Held that as the bankrupt held the office at the date of his sequestration the emoluments subsequently accruing therefrom were not "estate acquired by the bankrupt" after the date of his sequestration in the sense of section 103 of the Act, and petition dismissed.

Opinion (per Lord Fraser, Ordinary) that the section does not apply to fees earned by the personal labour of a bankrupt after the date of his sequestration.

THE estates of John Mitchell, English master in Elgin Academy, were 1st DIVISION. sequestrated under the Bankruptcy (Scotland) Act, 1856, and a trustee Lord Fraser. appointed early in 1881. At that date Mitchell was in receipt of an M. income of £200 per annum, composed of school-fees and salary.

The trustee brought this petition under the 103d section* of the

* The section is quoted in the Lord Ordinary's note.

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Bankruptcy Act, 1856, praying the Court "to declare all right and interest which belongs and may belong to the bankrupt in the salary and emoluments attaching to the foresaid office held by him to be vested in the petitioner as trustee foresaid as at the date when the same has or may become payable, to the same effect as is provided by the said statute in respect to estates vested in the bankrupt as at the date of the sequestration, and that until the debts due by the bankrupt as at the said date are duly satisfied and paid, or until your Lordship shall make order to the contrary, but subject always to the payment by the petitioner to the bankrupt out of said salary and emoluments of such reasonable allowance for his maintenance and support as to your Lordship may seem proper."

The petition set forth—"The bankrupt is a teacher in one of the burgh schools of Elgin, and the salary and emoluments attaching to his office amount to at least £200 per annum. . . . Since the date of the said sequestration the bankrupt has acquired right to the portion of the said salary and emoluments which have fallen due since that date, and he will further have right to the said salary and emoluments so long as he holds the said office of teacher in the said school."

The petition did not state on what tenure the teacher held his office, but it was stated at the bar that his appointment was *ad vitam aut culpam*.

Mitchell stated in answer that his income, which consisted of £40 of salary and £160 of fees, was barely sufficient for the maintenance of his wife and family in such a condition as became his position, and that it fluctuated.

He pleaded;—(1) The statements in the petition being irrelevant, the petition ought to be dismissed, with expenses. (2) The respondent not having acquired right to any "estate," in the sense of the section quoted in the petition, the same should be dismissed. (3) In any event, the respondent's income not being in excess of a reasonable aliment for himself and family, the prayer of the petition should be refused.

The Lord Ordinary, on 10th June 1881, found the allegations not relevant to support the application, and refused the petition.*

* "NOTE.— . . . The bankrupt, since the sequestration, has, in order to obtain a subsistence for himself and family, continued to teach in the Elgin schools, and has obtained thereby an income amounting to £200 per annum. The question now is whether this is an 'estate' which can be declared vested in the trustee under the 103d section, the words of which are as follows:—

"If any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee as at the date of the acquisition thereof or succession, for the purposes of this Act; and the trustee shall, on coming to the knowledge of the fact, present a petition setting forth the circumstances to the Lord Ordinary, who shall appoint intimation to be made in the *Gazette*, and require all concerned to appear within a certain time for their interest; and after the expiration of such time, and no cause being shewn to the contrary, the Lord Ordinary shall declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee as at the date of the acquisition thereof, or succession thereto, to the same effect as is hereinbefore enacted in regard to the other estates.' It is further declared by this section that if the bankrupt do not immediately notify to the trustee that such estate has been acquired, or has come to him as aforesaid, he shall forfeit all the benefits of the Act.

"The word 'estate' is defined as follows in the interpretation clause (sec. 4), —'The words "property" and "estate" shall, when not expressly restricted,

The petitioner reclaimed.

No. 165.

Argued for the petitioner :—The law, as stated by Mr Bell, Comms. i. 127 and 128 (M'Laren's ed., 123 and 124), favoured the petitioner's claim. A clergyman's stipend was arrestable.¹ So, too, was the salary of a professor of

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include every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interest therein capable of legal alienation, or of being affected by diligence, or attached for debt.

"It appears to the Lord Ordinary that the fees from the personal labour of a bankrupt are not the kind of estate which is here contemplated. The trustee in the sequestration has no right to direct that the bankrupt, say a professional man, an advocate, a physician, or dentist, shall proceed to labour and earn money to be handed over to him, the trustee, for the payment of the creditors; and if he has no such right to order the bankrupt so to labour for the creditors' behoof, it seems logically to follow that if the bankrupt voluntarily does so the trustee cannot demand from him the produce of his brains. In the present case the petitioner, the trustee, is willing, as he states in the petition, to allow the bankrupt to retain as much as will be a subsistence to himself and his family, and only claims the surplus not required for that purpose. This implies, if it be a sound position, that the trustee has a right to insist upon the bankrupt continuing his profession for the benefit of his creditors—a doctrine for which, under the present bankrupt laws, there is no authority whatever.

"Cases similar to this must have frequently occurred in Scotland, where professional men, in order to live during the pendency of the sequestration, continue in the exercise of their profession. But there is no instance of any demand having been made, or at all events successfully made, by the trustee to claim a vesting order in the fees which the bankrupt earns. The question, however, seems to have occurred frequently in England. The result of the decisions there seems to be this, that the trustee has no right to seize the profits of the bankrupt's personal and daily labour. In one of these cases (*ex parte Vine*, 28 March 1874, 8 Chan. Div. 366), Lord Justice James said, 'The general principle always has been, that until a bankrupt has obtained his discharge all his property is divisible among his creditors. But an exception was absolutely necessary in order that the bankrupt might not be an outlaw—a mere slave to his trustee; he could not be prevented from earning his own living.' This was only following up the leading case in the time of Lord Mansfield, of *Chippendall v. Tomlinson*, 4 Dougl. 318. But this case has been distinguished in England from other cases, where the bankrupt continues to carry on his business by means of servants and skilled workmen, and the Courts have held that the returns here must be accounted for to the trustee. Thus a bankrupt, acting as a furniture-broker, employing men and vans, and an apothecary supplying medicines, were not considered as merely using personal labour in this sense—(*Crofton v. Poole*, 1 B. and Ad. 568; *Elliott v. Clayton*, 16 Q. B. 581); and Mr Justice Fry, in a recent case dealing with the estate of a bankrupt architect, held that his trustee was entitled to sue for remuneration due in respect of professional work done in the bankrupt's office since his bankruptcy for plans there prepared, and for damages for breach of an alleged contract to employ the bankrupt in his professional capacity—(*Emden v. Carte*, 11th April 1881). This class of cases, however, differs essentially from those where a professional man, such as a teacher, a dentist, an advocate, by his own brains or hands earns fees, and which if taken from him would simply, in the words of Lord Justice James, constitute the bankrupt a slave to his trustee.

"But apart altogether from the light cast upon the subject by these English cases, the Lord Ordinary is of opinion that the word 'estate,' in the 103d section of the Scottish Bankrupt Act, never was intended to apply to anything else than some tangible property which has come to the bankrupt by succession, bequest, donation, or other means irrespective of the labour of the bankrupt himself."

¹ A B v. Sloan, June 30, 1824, 3 S. 195.

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civil law.¹ The Court were entitled to make it a condition of freeing the bankrupt that he should give up his salary *salvo beneficio competentie*. It had never been decided in England that the portion of a bankrupt's estate which was excessive did not fall to the trustee. There was no distinction in Scotland between personal earnings and profits made in trade. The Second Division had held that a sum recovered in name of damages by an undischarged bankrupt vested in his trustee.² The salary here asked for had become due since the sequestration, and was "estate" in the sense of the Act.

The respondent argued ;—(1) The passage in Bell's Commentaries was not in favour of the petitioner's demand. It was nowhere stated that a school-master's salary was arrestable. The decisions which had been quoted did not proceed upon any principle. They were cases which had occurred in cessios. That of *A B v. Sloan* was the only one that had occurred in a sequestration, and it was very unsatisfactorily reported. (2) A school-master's salary which was not fixed, but fluctuating, being dependent partly upon the school-fees, was not "estate" within the meaning of section 4 of the Act. It had been held that a *spes successionis* was not "estate."³ Further, an annuity was not arrestable.⁴ In any case, personal earnings were an exception. (3) The English cases quoted by the Lord Ordinary were in point, because the English statutes were quite as comprehensive as the Scotch.⁵ (4) The salary here was in the bankrupt's possession at the time of his sequestration, and the 103d section of the Act referred only to future estate. Besides, the words "full right" meant whole right, and therefore if the trustee was entitled to any part, he was entitled to the whole estate, but it was conceded that the respondent must have a *beneficium competentie*, so that the section could not apply. If it did apply, then the salary was not excessive.⁶

LORD PRESIDENT.—The Lord Ordinary has found that the allegations of the petitioner are not relevant to support the application. Therefore he refuses the petition, and in that result I concur, but in doing so I have no intention of repeating or adopting the grounds of his Lordship's opinion, which he gives in his note, and which I do not think are necessary to the decision of the present question. The question is whether the petition is competent under the 103d section of the Bankruptcy Act. The petition is laid on that section, and the prayer is quite in accordance with the language of the section. The question is, whether the estate which is the subject of the present dispute is "estate," using the word in the wide meaning of the interpretation clause of the statute, which has been acquired by the bankrupt, or has descended, reverted, or come to him after sequestration? Now, what has vested in the bankrupt is his office of schoolmaster, and that was vested in him at the date of sequestration. Therefore, it is not estate which has been acquired by him, or has descended, reverted, or come to him after the sequestration. And what the trustee wishes to have attached are the emoluments of this office,—a subject which had vested in the

¹ Laidlaw v. Wylde, 1801, M. App. Arrestment, No. 4.

² Jackson v. M'Kechnie, Nov. 13, 1875, *ante*, vol. iii. 130.

³ Trappes v. Meredith, Nov. 3, 1871, 10 Macph. 38.

⁴ Smith and Others v. Innes, May 29, 1855, 17 D. 778.

⁵ Besides those in Lord Ordinary's note—Williams v. Chambers, 1845, 10 Ad. and El. 337; *In re Dowling*, Feb. 12, 1877, L. R. 4 Chanc. Div. 689; Acts 1 and 2 Vict. cap. 110, sec. 37, and 2 and 3 Vict. cap. 41, secs. 3 and 81.

⁶ Moinet v. Hamilton, Feb. 2, 1833, 11 S. 348.

bankrupt at the date of sequestration. On this single ground I am for refusing No. 165. the petition.

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LORD DEAS.—I am clearly of opinion that this claim does not fall within the 103d section of the statute. The words of it cannot be repeated without seeing that this is so. This single ground disposes of the case, and I am not inclined to go into the point discussed by the Lord Ordinary in his note without necessity. The point would involve a very serious question, and until it is properly raised on its merits I do not say what my opinion on it might be.

LORD MURE.—I am of the same opinion. It is a difficult question how far salaries like the present are assignable or attachable. It is not necessary to determine that here, because this bankrupt was teacher in the school at the date of the sequestration, while the 103d section contemplates new estate only. I am quite clear therefore that the present petition is not within the 103d section.

LORD SHAND.—I am of the same opinion. The bankrupt was teacher at the date of the sequestration. It is not disputed that he held office *ad vitam aut culpam*, and had the right to draw all future emoluments. Therefore, if the trustee has any claim he has it in virtue of the sequestration, and not in virtue of the 103d section. But if he goes further he will be met, in the first place, with the difficulty dealt with by the Lord Ordinary; and, secondly, there is the consideration, whether, looking to the circumstances and position of the bankrupt, £200 a-year is an excessive amount for the maintenance of himself and his family.

THE COURT adhered.

WILLIAM OFFICER, S.S.C.—BOYD, MACDONALD, & Co., S.S.C.—Agents.

EDEN COLVILLE, Pursuer.—*D.-F. Kinnear—Dundas.*
Mrs ISABELLA COLVILLE OR MARINDIN, Defender.—*J. P. B. Robertson*
—*Low.*

No. 166.
July 12, 1881.
Colville v.
Marindin.

Process—Entail—Form of interlocutor where reclaimer's counsel were unable to submit argument in support of reclaiming note.—In an action for declarator that three deeds of entail were invalid, in respect that they contained no irritant clauses against altering the order of succession, the Lord Ordinary declared the deeds invalid. The defender reclaimed, but, at the hearing, her counsel stated, that, in consequence of the current of decision, they were unable to submit an argument in support of the reclaiming note. *Held (diss. Lord Justice-Clerk)*, that the Court should pronounce an interlocutor to the effect that, having heard counsel for the reclaimer, they refused the reclaiming note and adhered.

EDEN COLVILLE, of Ochiltree and Crombie, raised an action on 31st^{2D} March 1881, for declarator that three several deeds of entail, under which he held his lands, dated respectively in 1727, 1819, and 1833, were invalid and ineffectual under the terms of the 43d section of the Rutherford Act, in so far as the irritant clauses were not applicable to the prohibitions against altering the order of succession to the lands. The principal substitutes, under the three deeds of entail, were called as defenders; but Mrs Isabella Colville or Marindin, the next heir, alone lodged defences.

On 9th June 1881, the Lord Ordinary pronounced this interlocutor:—

No. 166. " Finds that the deeds of entail libelled are defective as regards the prohibition against alteration of the order of succession, in respect that there is no irritant clause applicable to said prohibition, and the same must be regarded as defective in all the prohibitions ; therefore finds, decerns, and declares in terms of the summons."

July 12, 1881.
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Mrs Marindin reclaimed. At the hearing in the Inner-House, counsel for the reclaimer stated that, in the face of the series of decisions upon the subject,¹ it was impossible for them to submit an argument to the Court with the slightest hope of success, and explained that the reclaiming note had only been brought with the object of obtaining an Inner-House judgment, which, in the opinion of conveyancers, was considered of more effect than an Outer-House judgment.

LORD YOUNG.—I am averse to doing anything unusual, but in this case I am prepared to refuse this reclaiming note. It appears that these deeds of entail contain no irritant clauses directed against the alteration of the order of succession, and the law is quite settled that when that is the case the entail is invalid. The contrary was not attempted to be maintained by the reclaimer's counsel. That being the case, I think there is enough before us to entitle us to pronounce an interlocutor refusing the reclaiming note.

I quite appreciate what was stated on behalf of the reclaimer, that there is a feeling among conveyancers in Scotland that a title to an estate is safer if it depends on an Inner-House judgment rather than on an Outer-House one. I am inclined to regard that as a superstition, and would have thought that a decree in absence would have been sufficient. But when a case of this sort is brought under the notice of the Inner-House, and both parties concur in stating that clauses are awaiting in these entails which are essential, I think we are in a position to pronounce a judgment. I would suggest that the proper form of interlocutor here should be a simple refusal of the reclaiming note.

LORD CRAIGHILL.—I feel some difficulty in this case. If we are to be called upon to exercise our judgment judicially, we are certainly entitled to all the assistance which can be afforded us. But probably counsel for the reclaimer have done enough when they have stated that it is impossible for them successfully to adduce an argument in the face of the decisions. It therefore appears to me that all we require to do here is to pronounce an interlocutor to the effect that, having heard counsel for the reclaimer, we refuse the reclaiming note.

LORD JUSTICE-CLERK.—My view is entirely different. I cannot say that I am judicially satisfied as to this case. Nothing has been argued to us, and in such circumstances I decline to pronounce a judgment. It is not the business of the Court to examine deeds or pronounce on propositions which are not contentious.

I am inclined to be of opinion that we should pronounce an interlocutor in these terms,—“ In respect that counsel for the reclaimer submitted no argument, adhere.” As however your Lordships think differently, the interlocutor will be :—“ Having heard counsel for the defender on her reclaiming note against

¹ *Authorities*.—Dick Cunyngham v. Dick Cunyngham, March 9, 1852, 14 D. 636, 24 Scot. Jur. 323 ; Dewar v. Dewar, July 20, 1852, 14 D. 1062, 24 Scot. Jur. 661 ; Ferguson v. Ferguson, November 18, 1852, 15 D. 19, 25 Scot. Jur. 21 ; Hamilton v. Hamilton, April 29, 1870, 8 Macph. H. L. 48, 42 Scot. Jur. 396.

Lord Curriehill's interlocutor of 9th June 1881, refuse the reclaiming note, No. 166. and adhere to the interlocutor reclaimed against, and decern."

July 12, 1881.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the defender on her reclaiming note against Lord Curriehill's interlocutor of 9th June 1881, refuse the reclaiming note, and adhere to the interlocutor reclaimed against, and decern."

Colville v. Marindin.

MACKENZIE & BLACK, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

MARGARET FERGUSON OR MARSHALL, Applicant.—*Sym.*
THE NORTH BRITISH RAILWAY COMPANY, Respondents.—*C. S. Dickson.*

No. 167.

July 13, 1881.

Poor-roll—Admission where the reporters on the probablis causa litigandi are equally divided in opinion—A. S. 21st November 1842, sec. 1.—Where the reporters on the *probablis causa litigandi* reported to the Court that two of them were of opinion that an applicant had, and that two of them were of opinion that she had not a *probablis causa*, the Court (*diss.* Lord Shand) admitted the applicant.

Marshall v. North British Railway Co.

MRS MARGARET FERGUSON OR MARSHALL applied for the benefit of the poor-roll to enable her to carry on an action of damages against the North British Railway Company.

1st Division.
B.

The application was remitted to the reporters on the *probablis causa litigandi*, who, after hearing the agent and counsel for the parties, reported:—"We are equally divided in opinion as to the *probablis causa litigandi* of this applicant,—Mr Readman, advocate, and Mr Lindsay, W.S., being of opinion that the applicant has not, while Mr Macfarlane, advocate, and Mr Rennie, S.S.C., are of opinion that the applicant has a *probablis causa litigandi*, and we respectfully crave your Lordships to dispose of the remit in the circumstances; and we beg respectfully to refer your Lordships to Mr Mackay's treatise on the practice of the Court of Session, vol. i., p. 337, par. 5, in which an unreported case is cited where a division of opinion similar to the present occurred among the reporters, and in respect thereof the Court admitted the applicant."

The North British Railway Company objected to the admission of the applicant, on the ground that she had not obtained a favourable report, and moved the Court to appoint special reporters to deal with the case.¹

LORD PRESIDENT.—The Act of Sederunt of 21st November 1842, in its first section, provides—"That the Faculty of Advocates, the Writers to the Signet, and Solicitors before the Supreme Courts, besides electing counsel and agents for conducting the causes of the poor as at present, shall also respectively name two advocates, one writer to the signet, and one solicitor each year, to act exclusively as reporters on the *probablis causa* of the pauper applicants for the benefit of the poor-roll; the lists to be furnished to the senior principal Clerk of Session of each Division of the Court, and also to the Keeper of the Minute-book, in order to be printed and published on the meeting of the Court in January yearly, and headed 'List of Lawyers and Agents for the poor, 1843,' and so on yearly." Now, that arrangement was made with these bodies of practitioners after a careful consideration of the subject, in order to remedy an

¹ Clark v. Campbell, July 6, 1833, 11 S. 908; M'Callum, June 26, 1841, 3 D. 1102; Rutherford, July 20, 1855, 17 D. 1140.

No. 167.

July 13, 1881.
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existing evil arising from the great laxity in the mode of admission to the poor-roll. I had a good deal to do personally with the framing of that Act of Sederunt, and I know that it was the intention of the Court that nobody should be allowed to act as a reporter on the *probabilis causa* except the persons named by the Faculty of Advocates, the Writers to the Signet, and the Society of Solicitors. I should consequently be very slow indeed to resort to the remedy of remitting to persons not named by these bodies. The question therefore is, whether where there is an equal division of opinion among the gentlemen to whom alone this business is entrusted, the result ought to be to exclude or to admit the applicant to the benefit of the roll? On this point I have not much difficulty. If there is so much doubt in the particular case as to lead to two of the reporters to be in favour of admitting the applicant, I have little hesitation in following the case mentioned in Mr Mackay's book. I am for granting the application.

LORD DEAS and LORD MURE concurred.

LORD SHAND.—I cannot agree with your Lordships that this Court has not power to remit to other persons than those appointed under the Act of Sederunt of 1842. It is true that the Act of Sederunt says that these gentlemen are "to act exclusively as reporters on the *probabilis causa*," but I cannot doubt, notwithstanding this provision, that the Court has the power to remit to any other person whenever it seems necessary to do so. I think therefore that we should have acceded to the motion of the respondents to remit to an independent third party.

As to whether a *probabilis causa* has in the present case been made out, if it is a decided point that an equality of division among the reporters is sufficient evidence of a *probabilis causa*, there is an end of the matter; but if the point is still an open one, then I must say that I differ from your Lordships. The *onus* upon the applicant is to shew that he has probable cause of success, and I do not think that he has done so when the reporters are equally divided. It is not enough to shew that he has a fair chance of success; I think he must have a preponderating chance. I therefore must be against admitting the applicant.

THE COURT admitted the applicant.

D. CUTHBERT, S.S.C.—ADAM JOHNSTON, Solicitor.—Agents.

No. 168.

Mrs MARGARET POLLOK or WHYTE, Pursuer.—*D.-F. Kinnear—Low—Graham Murray.*

July 13, 1881.
Whyte v.
Hamilton, &c.

Mrs JANE M'NISH WHYTE or HAMILTON, Defender.—*Dickson.*
JAMES FRANCIS WATSON and OTHERS, Defenders.—*Guthrie Smith—Mackay.*

Succession—Testament—Holograph Will headed "*Notes of intended Settlement.*"—In the repositories of a person who died leaving no other testamentary writing, the following holograph document was found bearing a date seven years before his death :—

"Bankhead, 19 June
1873

"Notes of intended settlement by Walter Whyte of Bankhead.
first—I liferent my wife Mrs. Margaret Pollok or Whyte, in my whole estate both Heritable & Moveable burdened with an Annuity of £300 Stg Three hun-

dred pounds Sterling a year to," &c. After various bequests expressed in the same full and careful manner, the writer's signature was appended. No. 168.

After a parole proof as to the circumstances, *held* (rev. judgment of Lord Fraser) that the document was effectual as a testamentary writing of the deceased. July 13, 1881. Whyte v. Hamilton, &c.

WALTER WHYTE of Bankhead died on 16th September 1880, at the age of sixty-seven. 2D DIVISION. Lord Fraser. M.

On 9th December 1880 his widow, Mrs Margaret Pollok or Whyte, raised this action in the Court of Session, concluding for declarator that the writing after mentioned was the last will and settlement of her late husband. The writing referred to bore:—

" Bankhead 19 June
" 1873

" Notes of intended Settlement by Walter Whyte of Bankhead.

" first—I liferent my wife Mrs. Margaret Pollok or Whyte, in my whole estate both Heritable & Moveable burdened with an Annuity of £300 Stg Three Hundred pounds Sterling a year to my Sister Mrs Jane Macknish Whyte or Hamilton Widow of the late James Hamilton Writer in Glasgow should my wife survive me—at the death of my Wife said Annuity to cease, In place thereof I leave to my said Sister Mrs Jane Macknish Whyte or Hamilton in liferent only and to my nephew John Hamilton Writer in Glasgow in fee my pro indiviso half of the lands of Kenmuir situated in the parish of Old Monkland & County of Lanark, likewise my pro indiviso half of the lands of Shettleston situated in the Barony parish of Glasgow & said County of Lanark—To my nephew James Hamilton I leave my lands of Cuthill & Newmill of Brieche &c situated in the parish of Whitburn & County of Linlithgow subject to the liferent of his mother the said Mrs. Jane Macknish Whyte or Hamilton I also leave to my nephew James Frances Watson presently residing at Ardmore house in the Parish of Caddross Dumbartonshire, my Estate of Bankhead situated in the parish of Rutherglen and County of Lanark, but I wish it expressly understood that in the event of my said Nephew James Frances Watson dieing without leaving any lawful mail heir of his body—Then & in that event my said lands of Bankhead are to revert back to my said nephew John Hamilton, my Moveable Estate at the death of my said wife is to be equally divided between the families of my two sisters Mrs Frances Killian Whyte or Watson now deceased and the said Jane Macknish Whyte or Hamilton *excluding* (excluding) the Males in each of said families—I also exclude the Jus mariti of their present or any future husbands And as regards my two Nieces Anna Maria Watson or Ewing, and Margaret Buchanan Watson or Ellis, their respective shares are to be handed over to their Marriage Contract Trustees, to be invested by them for the sole behoof of my said two Nieces, Anna Maria Watson or Ewing and Margaret Buchanan Watson or Ellis to be altogether quite exclusive of the Jus Mariti of their present or future husbands I also leave a legacy of £500 Stg Five hundred pounds Stg to my Nephew Walter Whyte Hamilton, said legacy to be paid him by my said Nephew John Hamilton from the lands of Kenmuir & Shettleston upon his succeeding to them at the death of his Mother Mrs Jane Macknish Whyte or Hamilton—I likewise leave the sum of One Hundred pounds Sterling to the Royal Infirmary in Glasgow to be paid free of Legacy duty.

" WALTER WHYTE."

The heirs-at-law, representatives in moveables, and the executrix-dative of Mr Whyte, were called as defenders, and all appeared in the action. The condescence, after narrating Mr Whyte's death, &c., continued,—(Cond. 3) " After Mr Whyte's funeral on the 20th of September his re-

No. 168. July 13, 1881. *Whyte v. Hamilton, &c.* positories were opened and searched by the law-agents acting for the different persons interested in his estate, and there was found in a portable desk which he had in daily use, and which stood on a sideboard in his parlour, a holograph and signed document by him in the following terms:—‘Bankhead, 19th June 1873,’ *supra*. (Cond. 4) “The said document consists of a single sheet of ordinary letter-paper, and it was found lying flat in the desk, with no appearance of ever having been folded, and it had no written backing upon it. No other settlement or writing of a testamentary nature by Mr Whyte has been found.” (Cond. 5) “The pursuer believes and avers that the signature to the said document was not appended thereto at the time of the document being written, but was done by Mr Whyte on a day about the beginning of August last, when he was engaged in arranging his papers, or at least on a day subsequent to the said 19th day of June 1873.” (Cond. 6) “The late Mr Whyte never consulted any lawyer as to the preparation of any will or settlement, and on various occasions, and to different persons, he spoke as if his affairs were regulated by some deed which should be operative as a will.”

The pursuer pleaded;—(1) The document or writing condescended on being of a testamentary character, must receive effect as the last will and settlement of the late Walter Whyte, and regulate his succession.

The defenders denied the statements in condescendence 5 and 6; and with regard to the averment as to the nature of the document and the repository in which it was found, they stated that it was merely a jotting of proposed notes, and not a testamentary writing, and that it was found among current bank-books and loose accounts and papers, but no documents of importance were near it.

They pleaded;—(1) The document in question is not, upon its just construction, a valid testamentary writing, or entitled to receive effect as such.

On 23d February the Lord Ordinary allowed both parties a proof of their respective averments,* which was afterwards led.

* His Lordship added this note,—“The Lord Ordinary is not prepared to turn this action out of Court on the ground maintained by the defenders, viz., that there is enough set forth in the document founded on by the pursuers to indicate that it is not a will. Documents more indicative of inchoate intention than this one have not, in other cases, been so summarily dealt with. The Lord Ordinary is of opinion that inquiry ought to be made as to the averments contained in the 5th and 6th articles of the condescendence, and also as to the averments by the defenders in answer to the 3d article; and such inquiry is in accordance with the usual practice of the Court where informal documents are propounded as wills. Either the facts connected with the time of writing the paper and of signing it, the place where it was found, and the verbal declarations of the writer in regard to it, were all ascertained by proof, or by admissions in special cases presented for the opinion of the Court, or probation was renounced before judgment was given, and the facts connected with these matters were held to be relevant and material in judgment, whether the document was to be considered as a will.

“Thus, in the leading case of *Munro v. Coutts* (1 Dow, 437), correspondence between the testator and his agents was admitted for this purpose, and the House of Lords thought that the Court of Session should have gone further, and admitted parole evidence. Lord Eldon expressed himself thus:—‘The written correspondence on this subject had been admitted as evidence, and he thought properly admitted, as the paper was of a doubtful and ambiguous character, and required explanation; but they should have gone further. Upon what principle did they not let in such parole testimony as that of M’Intosh and George Munro, as to the conversation that took place?’ In the case of *Scott v. Seales* 5th Feb. 1864, 2 Macph. 613), the Court, *ex proprio motu*, appointed an exami-

The Lord Ordinary in deciding the case (on 21st May 1881) gave the following summary of the more important parts of the evidence in his note:—
 “Mr Whyte was a landed proprietor, who had no profession or business to occupy his attention. Like most people in Lanarkshire, he went to Glasgow on the Wednesdays without having any particular business to do. There he, upon each of these occasions (and this is important), saw his brother-in-law, Mr Walter Pollok, a writer in Glasgow, to whom he never gave any instructions for the preparation of a will. In his own home he occupied himself with the management of his property. The proof discloses nothing about the rooms in his house, with the exception of three. He had in his bedroom a bureau, in which was found the money that he left at his death, and the deposit-receipts for money in bank. Off this room there was another, in which there was the charter-box containing his title-deeds and other valuable documents. There was, thirdly, a parlour in the lower storey, in which there was a writing-desk, which usually rested upon the sideboard. In this parlour Mr Whyte wrote all his letters upon this desk, the key of which he carefully retained in his own possession.

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“Upon the day of his funeral, his brother-in-law Mr Pollok, his nephew Mr John A. Hamilton, and his friend Mr John M. Hill, examined his repositories. They found no writing in the bureau in the bedroom, nor in the charter-box, of a testamentary character. But in the desk they found the document which is now propounded as a will. It was lying flat in the bottom of a compartment in this desk amidst miscellaneous documents, and along with Mr Whyte's cash-books.”

Evidence as to the state of Mr Whyte's health, and as to the alleged

nation to be made of the testator's agent ‘as to all matters of fact bearing on the question, what are the testamentary papers of the deceased?’ In *Lowson v. Ford* (20th March 1866, 4 Macph. 631), the parties adjusted a joint minute, setting forth the facts which they thought material, and renounced further probation, but the Court were not satisfied with the information so given, and pronounced an interlocutor allowing proof of all facts bearing on the question, ‘what are the testamentary papers of the testator?’ The facts in the case of *Cunningham v. Murray's Trustees* (15th March 1871, 9 Macph. 713) were set forth in a special case, as they were likewise in the case of *Forsyth v. Forsyth* (13th March 1872, 10 Macph. 616).

“The practice thus established by these decisions is in accordance also with that followed in the Probate Court in England, and is well illustrated by a decision upon a document very similar in its terms to that founded upon in the present action. It began thus,—‘This is a memorandum of my intended will.’ But, said Sir John Nicholl, ‘it goes on throughout in dispositive terms; it appoints executors, is dated and signed by the deceased himself, and the character of the signature is different from that of the body of the instrument. Still, the term “memorandum of my intended will” would raise a sufficient doubt to let in evidence of circumstances, whether it was finished in order to have effect, or only as a deliberative memorandum. Parole evidence, then, being let in, the history of the deceased and of this paper may give to his intentions a more decided character.’—(*Barwick v. Mullings*, 2 Hagg. Eccl. Rep. 225). Other cases to the same effect, which begin with such words as these,—‘heads of will,’ ‘a plan to be afterwards drawn out,’ are mentioned and commented upon in *Williams on Executors*, vol. i. p. 360.

“The Lord Ordinary expresses no opinion at this stage of the case upon the merits, but looking to the opinions of the Lord President and Lord Kinloch in the case of *Forsyth*, the averment in the 5th article of the condescendence becomes very material. If the signature was appended at a date subsequent to the writing of the body of the document, this perhaps may be indicated by a difference in the character of the handwriting or of the ink. The document should be exhibited at the proof.”

No. 168. signing of the document, was given by a Miss Jamieson, a niece of the pursuer, as follows :—" I am 34 years old. I live at Bankhead. I am a niece of Mrs Whyte. I went to live with her in 1878. My uncle was in bad health at the time, and had an operation for a growth on his leg. It was so far successful, but about a year after there was a second operation, and he gradually sank afterwards. I often saw him looking through his papers. I remember seeing him do so on an occasion in August 1880. They were in his desk in the parlour. He often carried papers from his bedroom upstairs down to the parlour. He kept some of his papers in the bureau in his bedroom. On the occasion in August 1880 I saw him come downstairs with a sheet of paper ; I was going into the same room, and I saw him open his desk and lay the paper on it, and he seemed to write something on the paper. It seemed to be a sheet of letter-paper. I have not seen the document now in question. (Shewn 'Notes of intended settlement,' exhibited by Mr Balfour of the Register House)—The sheet of paper deceased had on that occasion was similar in appearance to this. The desk stood on the sideboard in the parlour downstairs. The parlour was used as a breakfast-room. It was not much used during the day. Deceased always wrote his letters in that room. The desk was invariably kept locked, and he always kept the key ; it was never out of his possession." Cross for Watson, &c.—"On the occasion in August spoken to I met my uncle at the foot of the stairs, and he walked into the parlour before me. I was going into the parlour to see after some house duties ; I had some lamps to look after. My uncle was in the habit of going up and down stairs. I was in the habit of going out and in to the parlour. He did not say anything to me on that occasion. I was in the parlour for about ten minutes, and then I left. He stood at his desk. He did not sit down till he closed the desk and left it. The desk was at the left-hand side of the sideboard. When he closed the desk he sat down in the parlour. He did not speak to me at all on that occasion. That was the desk that he wrote all his letters at. He was at the desk every day. He kept his writing-paper and envelopes in it, also his paid accounts. (Q.) Where did you understand that he kept his valuable documents ? (A.) In that desk. (Q.) Only ? (A.) There were some of them found in the bureau in his bedroom. I did not know much about that till after his death. I knew the bureau was upstairs, but I did not know what was kept in it. He kept his money in the bureau, but I did not know that till after his death. I knew he had a tin box, but I did not know what was in it. I never saw into it. After the repositories had been searched by the men of business I found in the bureau a number of deposit-receipts. I gave them all to Mr Pollok. My aunt looked and saw that some certificates for stock which deceased held were among the deposit-receipts. I found them all in a secret drawer of the bureau." By the Court.—"On the occasion when my uncle went with the paper into the parlour I saw him unlock the desk. He had the paper in his hand. He seemed to write something on the paper, leaning his arm on the desk. The desk was open. I saw him open it and write something. He wrote for a very short time. (Q.) Did he write longer than it would take to write his signature ? (A.) No. He then put the paper into the desk, and closed the desk. He said nothing to me. He had not been writing that morning before. This was between eleven and twelve o'clock. It was about the beginning of August, but I cannot tell the particular day. He had undergone an operation before that, but was better then. I left him sitting in the parlour, reading the papers. He never spoke to me about his will. I never saw him writing upstairs at the bureau."

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Mr Pollok, writer, Glasgow, the brother-in-law of the deceased, de- No. 168.
 poned,—“ I was constantly in deceased’s house when he was alive. He
 never spoke to me about making a will, but on one occasion he asked me July 13, 1881.
 if he could increase his wife’s annuity under the marriage-contract. Whyte v.
 had written that contract, and on one of his Wednesday calls upon me Hamilton, &c.
 he said,—‘ I suppose I can increase Maggie’s annuity?’ I said he could
 neither increase nor diminish that annuity, but he could give her an
 additional annuity. He replied ‘ Ay,’ and said no more. He did not tell
 me to make out a deed, and I did not like to volunteer it. . . . ‘ I
 think the conversation between deceased and myself about his wife’s
 annuity took place some time during the year 1877.’ ”

On 21st May 1881 the Lord Ordinary found “ that the writing dated
 19th June 1873, and registered in the Books of Council and Session the
 22d September 1880, entitled ‘ Notes of intended settlement by Walter
 Whyte of Bankhead,’ is not the last will and settlement of the said de-
 ceased Walter Whyte, and cannot receive effect as such : Assolizies the
 defenders from the whole conclusions of the action, and decerns : Finds
 the pursuer entitled to expenses.” *

* “ NOTE.—It is with reluctance, and somewhat with regret, that the Lord
 Ordinary feels himself constrained to pronounce the foregoing interlocutor. He
 is satisfied that Mr Whyte intended very largely to increase the provision in
 favour of his widow. But the dead hand has not in this case executed his
 purpose effectively. . . .

“ The question now is, whether this document can be treated as a will. The
 Lord Ordinary is of opinion that it cannot. In its favour there are the follow-
 ing circumstances :—First, that it is proved that Mr Whyte intended to increase
 the provisions in favour of his widow ; and he did so by the document in
 question, by giving to her the liferent of his whole estate under the burdens
 therein mentioned. Secondly, that the language of the will is dispositive and
 absolute. Thirdly, it is carefully written out, and must have been copied from
 a draft which he had made, and this is indicated very strongly by the way in
 which he writes the word ‘ excluding.’ Not being satisfied with it as first
 written, he attempts to correct the writing, and then repeats the word, indicat-
 ing thereby his determination to make the matter quite clear and distinct ; and
 Fourthly, he signs this document.

“ There can be no doubt whatever that if this document had stood alone,
 without its title, it would have been a perfectly valid will and settlement of Mr
 Whyte’s estates. But the following are the grounds upon which the Lord
 Ordinary considers that it cannot be accepted as such :—1st, The date of the
 document is 19th June 1873, and the title is, ‘ Notes of intended settlement by
 Walter Whyte of Bankhead.’ These words indicate simply this, that they were
 merely jottings, put down by Mr Whyte as of a settlement which he intended
 to make. The Lord Ordinary has endeavoured to read the title in this way—
 ‘ I intend my property to be disposed of as follows,’ or ‘ This is my intention
 about the settlement of my property.’ But with every desire to give effect to
 an apparently rational settlement, he is unable to come to this conclusion.
 Because, 2dly, in the year 1877 Mr Whyte asked his brother-in-law, Mr
 Pollok, whether he could increase the annuity to his wife. Now, if he in the
 year 1873 had made a will of the whole liferent of his estate to his wife, this
 was a very odd question. It must be deduced from the fact of his putting such
 a question that he had forgot entirely what he had done in 1873, and that his
 ‘ Notes of an intended settlement’ were never meant by him to be anything
 more than notes, which he might carry into effect at some time or other when
 he had fully made up his mind upon the subject,—by asking his brother-in-law
 or his nephew to prepare a settlement in accordance therewith, which he never
 did. 3dly, This is not a case where the document is first written out, and then,
 after an interval, the signature is appended. If this state of the facts existed,
 it might justly be concluded that what was first intention had been carried into

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Mrs Whyte reclaimed, and argued ;—The document here was holograph, dated and signed, and contained dispositive words. There was also no trace of any other document of a testamentary nature in the deceased's repositories. In such a case, if the document were rejected as not testamentary, then the result would be intestacy. Where intestacy would be the result of rejection informal writings had always been favoured. The only objection which could be stated to the writing was derived from its heading. But the facts that it was dated and signed were strong indications that the writing was intended to be final.¹ The *prima facie* inference is that such a writing as this was intended to be operative, and in that case the *onus* fell on the objector to prove to the contrary.² Cases of drafts of codicils and instructions to agents which were never carried out, especially when they came into competition with formal prior writings,³ belonged to quite a different category from this. "Notes of intended settlement" were in

act, and had become a positive bequest. Some attempt to prove a case of this kind was made on behalf of the pursuer, but it was unsuccessful. On a day in the month of August 1880, one month before Mr Whyte died, it is proved by Miss Jamieson that Mr Whyte came downstairs with a sheet of paper in his hand similar to that now propounded as his will ; that he took it to the side-board on which his desk lay ; that he wrote something upon that sheet of paper and put it into his desk, and that what he wrote would not occupy more time than would be necessary for his signature. It is suggested that he then and there brought the document in question from upstairs to the parlour, and then and there adhibited to it his signature in the parlour, in 1880, the body of the document having been written in 1873. The Lord Ordinary entirely rejects this suggestion. The same pen which wrote the body of the document in 1873 wrote at the very same time the signature appended thereto ; and it must have been some different document altogether upon which Miss Jamieson saw Mr Whyte write on the occasion to which she speaks. Lastly, the place in which the document was found cannot be overlooked as an element in the case. The alleged will professed to dispose of the whole of the estate ; and one would naturally suppose that if it was intended to have this effect it would be found in the bureau in which he had put away the deposit-receipts and where he kept his money, or in the charter-chest where he kept his titles and bonds. But it was not so. The paper is found in a desk, containing, no doubt, cash-books in daily use, but also the ordinary loose papers commonly seen in a man's writing-desk,—drafts of letters, jottings, papers containing writing and papers without any, envelopes ; in short, the alleged will had very bad company, and its character must be judged of very much according to that of the company it had. The conversation with Mr Pollok about increasing his wife's annuity in the year 1877, in truth, shews that Mr Whyte had forgotten altogether 'the notes of intended settlement,' which was lying under a heap of miscellaneous papers in his writing-desk. The cases of *Forsyth* and *Cunningham*, referred to in the Lord Ordinary's note to the interlocutor of 23d February 1881, indicate that in circumstances such as occur in the present case the use of peremptory, absolute, and dispositive words, and the signing the name to notes and jottings, are unavailing against evidence that the writer did not intend these papers to be the expression of his final will ; and there is such evidence here. The expenses of this process must be borne by the estate of Mr Whyte, he himself having caused a litigation on the subject by leaving such a document in his repositories."

¹ *Lowson v. Ford*, March 20, 1866, 4 Macph. 631 (Lord Benholme, p. 640), 38 Scot. Jur. 325.

² *Mitchell v. Mitchell*, 1828, 2 Hagg. Eccl. Ca. 74 ; *Barwick v. Mullings*, Jan. 14, 1829, 2 Hagg. Eccl. Ca. 225.

³ *Munro v. Coutts*, July 3, 1813, 1 Dow, 437 ; *Forsyth's Trustees v. Forsyth*, March 13, 1872, 10 Macph. 616, 44 Scot. Jur. 353 ; *Aim's Trustee v. Aim*, Dec. 15, 1880, *supra*, p. 294.

much more favourable position than these other writings, and must be held to be operative until superseded by a more formal writing,¹ which in this case they could not now be.

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Argued for Mr Hamilton and others ;—The attempt to make out that the document had been signed shortly before Mr Whyte's death had failed, and it must be held to have been signed at the date it bore. The place in which it was found was not a repository of the nature in which such writings as had been sustained were usually found. It was an ordinary writing-desk, and the writing was not along with valuable securities or documents, as was usual in such cases. Its heading indicated that it was not a final document, and headings were held to control all such writings.² The fact that this writing was never sent to be put in shape by a law-agent shewed that it did not contain the deceased's final intentions, and put it in a worse position than writings which had been sent to be put in shape but had never been executed.³ In order to support the finality and operativeness of such a writing, which bore only to express the present intention of a deceased, much stronger parole evidence was required than had been here adduced.⁴

At advising,—

LORD JUSTICE-CLERK.—I think the Lord Ordinary was entirely right in allowing parties to lead evidence in regard to the circumstances bearing on the testamentary character of the writing in question, and I adopt the reasoning contained in his note to his interlocutor of the 23d February 1881. Such is now the established practice of our own Courts and of those of England, at least until the recent Wills Act, when writings more or less informal and ambiguous are propounded as containing the expressions of the testamentary intentions of a deceased.

The remaining question which we have now to decide is one not so much of legal construction as of fact or of inference from fact. Are we to infer from the writing founded on, and the surrounding circumstances, that the deceased Mr Whyte intended that it should regulate his succession, or was it merely a memorandum made for his own guidance, which he might or might not afterwards give effect to by a formally executed testament?

The document speaks for itself. The surrounding circumstances are very accurately and fairly summarised by the Lord Ordinary in his note, and I need not examine them at length.

It is not without hesitation that I differ from the Lord Ordinary on such a question, and it is one of difficulty as well as of interest. But I have come to a different conclusion. I think, on a balance of the elements of proof in this case, that Mr Whyte intended this writing to regulate the succession to his property after his death. I do so for the following reasons :—

1. The writing itself in its substance is a completed settlement. It is the work of a man with some knowledge of legal phraseology, is evidently carefully

¹ *Hattat v. Hattat*, 1832, 4 Hagg. Eccl. Ca. 211.

² *Stainton v. Stainton*, Jan. 17, 1828, 6 Sh. 363; *Cunningham v. Murray's Trustees*, March 15, 1871, 9 Macph. 813, 43 Scot. Jur. 362; *Lindsay v. Lindsay*, April 18, 1872, L. R. 2 Prob. and Div. 459.

³ *Vide cases, supra*, p. 946, note 3.

⁴ *Mathews v. Warner*, Nov. 22, 1798, 4 Vesey, 186; *Hattat v. Hattat, supra*, note 1; *Coppin v. Dillon*, 1833, 4 Hagg. Eccl. Ca. 361; *Williams on Executors*, vol. i., 360.

No. 168. extended from a draft, written in a fair and distinct hand, very clearly expressed in appropriate language, and signed by the writer. The deceased plainly knew how to make an effectual testamentary writing, and so far as the framework of this instrument is concerned it leaves no room for criticism.

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But, no doubt, it has a heading or superscription, in which it is entitled—"Notes of intended settlement by Walter Whyte of Bankhead." The question is, whether this title reduces this very careful composition from an expression of present testamentary intention, which its terms import, to the level of a mere memorandum of what he thought he might possibly do at some future time.

Taking the writing and its title together and alone I cannot come to that conclusion. These might be notes of his testamentary intentions, in the sense that they should only operate if he did not embody them in a regular and extended deed. But the real question is, Were they notes, the expression of a testamentary intention, or merely notes to help him if he ever came to execute a testament? I cannot reconcile this last assumption with the careful terms and the signature of the instrument itself. *Prima facie*, at all events, the presumption is that a man who executes a settlement means it to take effect, and I do not think that the title of this paper overcomes this presumption. Had the terms of it been less precise, the signature of it might not have been conclusive, but the signature of a document expressive of a clear and deliberate testamentary intention in the body of it is what we should expect from its substance, and a very weighty element in this question.

2. The surrounding circumstances are few, but I think all of them lead to the same result. First, this man had made no other settlement. I think this important, both in itself and with reference to some of the other cases which were cited to us. If it were propounded as a mere codicil to a regular settlement it might be inferred that the deceased would naturally execute one part of his testamentary writings as he had executed others. But he had made no other will, and it is hardly to be thought that he meant to die intestate. When he wrote this he certainly did not intend to do so. He died after a prolonged illness, but shewed no anxiety about his affairs. Secondly, this will carries out what from his conversation with his law adviser we know was in his mind, and what for a childless husband was in all respects natural. He wished to increase the provision for his wife, and so Mr Pollok tells us. I draw from the conversation in question an inference the reverse of that drawn by the Lord Ordinary. He thinks that it shews that the deceased had forgotten the writing in 1873. I think it shews that he remembered it very well, and merely wished to ascertain indirectly whether it was within his powers. There might be reasons in his own mind for not divulging his intentions to anyone—not even to his law adviser.

I give no weight to the "bad company" in which the Lord Ordinary says this writing was found. The place in which it was found was his private desk; it was lockfast; he kept the key himself; and where his cash-books were was sufficiently private I should think for his will.

Many cases of this class have occurred both with us and in England, but they are all cases of circumstances. This one I think the strongest in support of the writing which I have seen. That which comes nearest to it of those cited is the case of *Hattat*, 4 Haggart, 211, in which the writing was sustained as a will although bearing a superscription not dissimilar from the present, and the views expressed by Sir John Nicholl in the case of *Barwick* tend in the same direction, although there was a subsequent attempt to make a different settlement. The

document in the case of *Forsyth* was unfinished, and that in the case of *Cunningham* No. 168. *ham* did not bear to be a testament. I can find no reason to suppose that Mr *Whyte* meant to die intestate, and, on the whole, I am satisfied that he all along *Whyte v. Hamilton, &c.* July 13, 1881. relied on what he had done to prevent that result.

LORD YOUNG.—I concur, and I must own that I do so without any hesitancy. Indeed, from the time that I understood the case I did not regard it as attended with any material difficulty. The Lord Ordinary says, and says I think soundly, that there can be no doubt whatever that if this document had stood alone without its title it would have been a perfectly valid will and settlement of Mr *Whyte's* estates. But I agree with the Lord Ordinary and with your Lordship in thinking that its title raises or suggests sufficient room for doubt to admit of parole evidence as to the circumstances in which the document was found, including, of course, the place where it was found. But for the heading, which alone creates any doubt, without which there would have been no doubt that this was a valid settlement, parole evidence would have been incompetent,—not admissible in the case at all—assuming always that the will was not impeached upon any ground valid in law. Evidence would have been inadmissible, as in the case of any other proper writing expressive of a man's intentions. But the heading just creates sufficient ambiguity to make parole evidence of the whole surrounding circumstances admissible. Now, I entirely agree with your Lordship that in that parole evidence there is nothing at all to confirm the doubt, but everything to dissipate it. To begin with, I think the doubt a very slender one. The heading here is—"Notes of intended settlement by Walter *Whyte*." If it had been "Notes of settlement by Walter *Whyte*" there would have been no doubt at all; or if it had been "Intended settlement by Walter *Whyte*" there would have been no doubt at all. Now, the doubt is scarcely more than visible when you join these words together, "Notes of intended settlement." The alternative here,—and I concur with your Lordship in thinking that that is important,—is not between this and some other document expressive of his will, but between this, which is the only expression of his will, and the legal rules of succession.

These operate as the presumed will of the deceased where he says nothing to the contrary. That is the theory of the matter. But this gentleman has left us notes of his intention to the contrary. We are to take note of that. That is really the meaning of it. He has left us notes for our guidance as to his will regarding the disposal of his estate after his death; and I do not at all read the word "intended" as expressive of an intention to do something in the future. It is what he means to be done with his estate after he ceases to be capable of doing anything. I do not read it as equivalent to this,—“I intend to make a settlement of my estate in the following terms.” That would be almost ridiculous. A man does not note with a heading his intention to himself,—“You take note that you intend to do so and so at a future time.” That is not the meaning of it. It is a note of his intention for the information of others. Now, one is not put to ingenious conjectures—of which there is no end—as to possible circumstances attending the place and the finding of this document, which might have induced us to throw it aside as not a satisfactory expression of the testator's will. It is sufficient to say that there is nothing here to induce us to do that. It is found in the desk, of which he kept the key, and to which he was in the habit almost daily of resorting,—a very natural place for a document expressive of his

No. 168. intention to be found. I do not think it necessary to dwell further upon the matter. The evidence having been admitted—and I think properly admitted—the question truly in my view is one of fact. The law is exhausted when we say that the heading renders evidence admissible to see whether it dissipates or confirms the doubt assumed *prima facie* to exist. But the evidence being admitted, the question is one of fact, although as it has to be determined by the impression which is made upon a bench of Judges, there is always more or less uncertainty about it; for different men will have different impressions as to such matters. But, in point of fact here, concurring with your Lordship, I think there is nothing in the evidence to confirm, but, on the contrary, that there is sufficient to dissipate any little doubt that existed to begin with.

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LORD CRAIGHILL.—I am of the same opinion, and I concur with both your Lordships in all that you have said in explanation of the grounds of judgment. The case is one of interest; and as the Lord Ordinary has adopted a different view from that at which we have arrived it cannot be regarded as a case free from difficulty. At the same time, the conclusion which I have reached is one that I have adopted in the end without any hesitation. There is no doubt whatever that the Lord Ordinary, when he allowed a proof of that which was set forth on record, acted with the greatest propriety, and according to precedent, because the writing as a whole did give such an indication of ambiguity as rendered it necessary, or at least in the highest degree expedient, that recourse should be had to the surrounding circumstances for the purpose of obtaining—if it could be got—additional information relative to matters which presumably would throw further light upon the intention of the supposed testator. That evidence having been taken, I agree with your Lordships in thinking that the result over all is that it is not only disproved that the testator did not intend that this paper should be an operative will, but that it is plain that he did intend that such should be taken to be its character. The paper itself was found in a place where certainly the will of the testator Mr Whyte might have been expected to be found; indeed, it was one of those repositories in which naturally his settlement might have been placed; for, to say the least of it, I think that a locked desk, the key of which was retained by himself, was as natural a place as any other in which any paper of this kind might be deposited. I do not say that this goes very far, because even if the document in question were to be regarded as having been written by himself, not as a final expression of his will, but as a paper that might afterwards come to be used in the course of the preparation of his will, it is not only conceivable, but it is extremely likely that this place, or a similar place, would have been the repository in which it would have been placed. Now, what appears to me, considering everything which has been adduced, to be the conclusion in this case is this, that the testator, intending to make a will, made this writing as his will, by which he intended that the succession to his property should be regulated. There are but three things, apparently, one or other of which this writing must be taken to be: it must be taken to be his will, meaning the will by which he intended his affairs to be regulated after his death, or it was a paper from which another will was to be copied, or, last of all, it was a paper of instructions to be communicated to some one by whom the will was to be prepared. Now, with reference to the second of these, it seems to me impossible to reconcile the language and the anxiety exhibited in the preparation of this will with the pre-

paration of mere notes or the preparation of a mere copy, which was afterwards No. 168.
to be used in the preparation of a more formal deed. A more formal deed could
hardly, indeed, have been framed. And what is remarkable is this, that if we July 13, 1881.
are to use the word "notes," as it is sometimes used, as a short expression for Whyte v.
that which was afterwards to be set forth at greater length, it is not possible that Hamilton, &c.
that can be the signification here, because everything which is mentioned in the
writing itself as of a testamentary character is absolutely expressed at full
length. Nay, more, when you come to the mention of sums, such is the anxiety
exhibited by the writer of this instrument that he is not content with specifying
the sum in figures, but he writes out at full length the same sum in words.
It is hardly conceivable that a paper which was prepared with such anxiety
could be intended merely either as a short statement of that which was after-
wards to be lengthened, or as instructions which were to be communicated to
some one by whom another deed was to be prepared. And I think even this
heading, from which the difficulty has originated, seems to suggest, at least, that
he did not introduce it for the purpose of indicating that what he was about to
do was simply to make notes or a synopsis of something that might be after-
wards lengthened, or to set down instructions which might hereafter be com-
municated that some one else might prepare a deed. His description of it is,
"Notes of intended settlement by Walter Whyte." Now, that could not be
for his own information; and I do not think it could have been put down for
the information of anyone to whom instructions were to be communicated.
That is not the way in which they would have been communicated. But I
think these words, describing himself at full length, as he afterwards describes
the intended beneficiaries at full length, shew that this which he was perform-
ing was the preparation, as it was afterwards to be the completion, of the testa-
mentary writing from which all in the end would learn who he was, what he in-
tended to do, and who were the beneficiaries who, if his intentions were carried
out, would be benefited. And so, coming to that conclusion upon the face of
the instrument, and agreeing as I do with the observations that have been made,
I do not think that this heading or this superscription suggests so great a
difficulty as that which has been found to occur in other cases, because if he had
said, "this is my intended settlement," that surely would not have been held
to indicate that what he did was not to be operative, or that he intended it
merely as a notandum of something that was to be done at a future time. I
think that this is neither more nor less than simply the expression of an inten-
tion that what he then wrote was the will or settlement by which he intended
that his affairs should be governed. It is quite true that it was unnecessary
that that should have been stated. The statement of it, indeed, looking to the
formality with which other parts of the deed are executed, could not have been
expected; but after it was stated, it does not seem to me, fairly and reasonably
interpreted, to derogate in the least from the effect which appears to me to be
due to the other parts of the writing. The writing is carefully prepared, the
greatest possible anxiety is exhibited in the expression of it, and, last of all, it
is signed, so that, so far as the maker of an instrument could accomplish it,
he did all by which he could express his final resolution that his estate, while
this paper remained unaltered, should be governed by this paper. For these,
and also for the reasons which your Lordships have explained, I quite concur
with your Lordships in the judgment which is to be pronounced.

THE COURT pronounced this interlocutor:—"Recall the said inter-

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locutor: Find and declare in terms of the declaratory conclusions of the summons: Find that the expenses hitherto incurred by the parties fall to be paid out of the estate of the testator," &c.

TODD, MURRAY, & JAMIESON, W.S.—CAMPBELL & SMITH, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

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July 14, 1881.
Mather v.
M'Kittrick.

GEORGE MATHER, Pursuer and Appellant.—*Rhind—Strachan.*

WILLIAM LETHAM M'KITTRICK, Defender and Respondent.—*Jameson.*

Bankruptcy—Trustee—Report—Right of Trustee to withhold Report—Bankruptcy Act, 1856, 19 and 20 Vict., c. 79, sec. 146.—Held (diss. Lord Deas) that when in a bankrupt's sequestration five months have elapsed from the date of the deliverance awarding sequestration, the trustee is not entitled to refuse to deliver to the bankrupt, when required by him, a report under sec. 146 of the above Act "in regard to the conduct of the bankrupt, and as to how far he has complied with the provisions" of the Act.

1ST DIVISION.
Sheriff of Renfrew and Bute.
M.

GEORGE MATHER, builder, 3 Elcho Place, Strathbungo, raised this action in the Sheriff Court of Renfrew and Bute against William Letham M'Kittrick, accountant, Glasgow, who was trustee on his sequestrated estate, concluding for decree ordaining the defender "to prepare a report with regard to the pursuer's conduct, and as to how far he, the pursuer, has complied with the provisions of the Bankruptcy (Scotland) Act, 1856, and, in particular, whether he has made a full and fair discovery and surrender of his estate, and whether he has attended the diets of examinations, and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortunes, or losses in business, or from culpable or undue conduct, and forthwith to deliver such report to the pursuer, all in terms of section 146 of the said Bankruptcy (Scotland) Act, 1856" (quoted in Lord Mure's opinion).

The defender averred;—(Stat. 1) "The application for pursuer's sequestration was made by the pursuer himself with concurrence of a creditor to the statutory amount, and was made for pursuer's own benefit. Nothing has been realised from the estate by the creditors, and the bankrupt alone has derived any advantage from the sequestration." (Stat. 2) "The defender's remuneration as trustee has been paid, with the exception of a small balance of 10s. 9d., but there remains unpaid a balance of £32, 5s. 1d. of a law account incurred by the defender, as trustee foresaid, to Messrs W. E. and A. J. Annan, writers in Glasgow, for the necessary expenses of pursuer's sequestration." (Stat. 3) "The pursuer, in his business of builder, has recently had some good contracts, for the profits of which he has not accounted. The defender believes and avers that from the profits of these contracts the pursuer is able, or ought to have been able, to pay the balance of the expenses of his sequestration."

The defender pleaded;—(1) The creditors of pursuer having realised nothing from pursuer's sequestration, and the pursuer alone having derived any advantage from it, it is but reasonable that he should pay the expense of the sequestration. (2) The pursuer, being able to pay the balance of the expenses of his sequestration, is not entitled to his discharge, nor to the report asked for, except on condition of his paying the said balance. (3) The pursuer having failed to make a fair discovery and surrender of his estate, the defender is not bound to furnish the report craved.

The Sheriff-substitute (Cowan) pronounced this interlocutor:—"Sustains the defences, and, in *hoc statu*, refuses the prayer of the petition," &c.*

* "NOTE.—The statute makes it an essential of the bankrupt obtaining his

The pursuer appealed to the Court of Session.¹

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LORD MURE.—In this case the bankrupt has presented a petition, founded on the 146th section of the Bankruptcy Act, in which he craves the Sheriff to ordain the respondent to prepare and deliver a report in terms of that section. He asks for that, and that alone. This is opposed by the respondent, the trustee on the sequestrated estate, on the ground that the bankrupt is due to him certain accounts incurred in the sequestration, and that until these accounts are paid he is not entitled to obtain a report. The Sheriff-substitute has given effect to these defences, and has refused the petition, finding the defender entitled to expenses; and in his note he indicates an opinion that the trustee's objection is, on the merits, a good objection.

Under this application it is maintained that the bankrupt is entitled, as a matter of right, to get what he asks for, and I am unable to read the section founded on without coming to the conclusion that this is the just construction of the statute. The section, after some general provisions relating to the bankrupt's discharge, enacts "that it shall not be competent for the bankrupt to present a petition for his discharge, or to obtain the consent of any creditor to such discharge, until the trustee shall have prepared a report with regard to the conduct of the bankrupt, and as to how far he has complied with the provisions of this Act, and, in particular, whether the bankrupt has made a fair discovery and surrender of his estate, and whether he has attended the diets of examination, and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortunes or losses in business, or from culpable or undue conduct; and such report may be prepared by the trustee, upon the requisition of the bankrupt at any time after the bankrupt's examination, but shall not be demandable from the trustee till the expiration of five months from the date of the deliverance actually awarding sequestration." The matters therefore on which the trustee has to report are as to certain points connected with the bankrupt's conduct and position, which are peculiarly within the cognisance of the trustee, and as to which it is desirable, if not essential, that the Sheriff should be informed when he proceeds to dispose of an application for a discharge. It is made a condition, precedent, moreover, to the bankrupt moving for his discharge, that he shall obtain this report, and I can see nothing in the statute which puts it in the power of the trustee to refuse to deliver the report after the lapse of five months from the date of the deliverance awarding sequestration, whatever discretion he may have in that respect before the expiry of those months. After their expiry he is, I think, bound to prepare and deliver the report.

discharge that there shall be produced a report by the trustee. By necessary implication this contemplates the possibility of there being cases in which the trustee may withhold his report, and while, under the authority of *White v. White's Trustee* (March 19, 1879), 6 Rettie, 854, the action of a trustee in withholding a report is reviewable by the Court, so that, upon frivolous grounds, he cannot be permitted to do so, yet, where good and sufficient reasons for that action on his part are disclosed, the Court will not compel him to furnish it. In the present case, the bankrupt himself applied for sequestration, which has been carried through for his benefit. It is most unreasonable that he should not pay the expenses incurred. The case referred to at the debate, *Napier v. Paterson* (Dec. 3, 1850), 13 D. 222, is quite in point."

¹ *Authorities*—*Napier v. Paterson*, Dec. 3, 1850, 13 D. 222, 23 Scot. Jur. 82; *White v. White's Trustee*, March 19, 1879, *ante*, vol. vi., p. 854.

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In the present case the trustee has refused to give the report, because he thinks that there are accounts connected with the sequestration which should first be paid, and the Sheriff-substitute is of opinion, on the authority of the case of *Napier v. Paterson*, that the trustee is right. Now, the non-payment of these accounts may be a sufficient ground for refusing to grant the bankrupt his discharge, and if the matter had come up before the Sheriff-substitute in the proper way he might have been quite right in refusing the discharge. But, in the present proceeding, on the other hand, I am unable to concur in the conclusion he has come to. The bankrupt, in the view I take of the case, is entitled to demand this report as a matter of right under the provisions of the statute on which he relies; and I have a strong impression that when I was in the Outer-House—and I was Junior Lord Ordinary for a considerable period—I have on several occasions ordered trustees to produce their reports, leaving all questions as to the right of the bankrupt to obtain his discharge to be afterwards disposed of.

LORD DEAS.—In the case of *White v. Robertson* the trustee declined to make a report, and that refusal was brought under our cognisance on its merits. The question was raised and duly argued whether such refusal was reviewable by the Court. We held that it was. The Sheriff-substitute infers, and I think rightly, from that decision, that, as we reviewed that case on the merits, the present case is also reviewable, to the effect of finding whether the trustee is right or wrong in his refusal. No exception is taken to that finding. Nor is any exception taken to the soundness of the decision in *Napier v. Paterson* (13 D. 222) that the bankrupt must pay the expenses of the sequestration before he can get his discharge. It is farther conceded that the expense of the trustee's report is part of the expenses of the sequestration, and until the bankrupt pays the expense of that report no application for his discharge can be entertained. My brother, Lord Mure, concedes this, but he says the objection is premature until the discharge be actually applied for,—that is to say, the trustee must be at the trouble and expense of preparing his report, which may in many cases be a laborious document, and take his chance that the bankrupt will think it worth paying for to get presented. Apart from the precise time of enforcing the demand, I do not understand that any of your Lordships would dissent from the Sheriff-substitute's remark that "it is most unreasonable that the bankrupt should not pay the expenses incurred." The objection that the demand, although well-founded in itself, is made prematurely, seems to me in any view too hypercritical to be sustained. I think, therefore, that it is not only in accordance with the statute, but most expedient in itself, that the trustee should have the power to refuse, if he thinks fit, to give his report, otherwise the whole expense of preparing the report may be unnecessarily incurred. I cannot doubt that the Sheriff-substitute has come to the right conclusion as to the import of the case of *White v. Robertson*, which we had so recently before us. I think the first thing to be done is to consider whether the trustee is right or wrong in his refusal.

LORD SHAND.—I concur with my brother Lord Mure. The 146th section of the Act provides that "if appearance be made by any of the creditors or by the trustee the Lord Ordinary or the Sheriff, as the case may be, shall judge of any objections against granting the discharge, and shall either find the bankrupt entitled to his discharge, or refuse the discharge, or defer the consideration of

the same for such period as he may think proper, and may annex such conditions thereto as the justice of the case may require." Now, this provision of the statute, I think, states distinctly the mode in which a trustee having an objection to the bankrupt's discharge is to assert that objection. This was the course which was followed in *Napier v. Paterson*, and I do not doubt, on the authority of that case, that the trustee has only to appear and state that the bankrupt has not paid these expenses, and the discharge will not be granted. But the question is, whether the trustee has not put the matter out of proper shape by refusing to give this report, in which he has a personal interest and the bankrupt has a contrary interest. The bankrupt as a preliminary even to moving for his discharge must get the report, for it is provided "that it shall not be competent for the bankrupt to present a petition for his discharge, or to obtain the consent of any creditor to such discharge, until the trustee shall have prepared a report." And it is further provided "that such report shall be produced in the proceedings for the bankrupt's discharge, and shall be referred to by its date, or by any other direct reference, in any consent to his discharge." There is in the statute no indication of any possible ground on which the trustee may refuse to give this report. I take it that it is a statutory duty incumbent on the trustee to deliver the report on the requisition of the bankrupt. The bankrupt may be unable to pay this money now, but he may undertake and be able to pay it before his discharge. The trustee says, "No, you must pay now, and until you pay I will not give you the report." That appears to me to be an unreasonable position. I think it would be unfortunate for us to hold that the trustee has it in his power to put a compulsitor on the bankrupt to oblige him to yield to his demands. The report must be given in, and if the trustee has any objections he may state them when the bankrupt applies for his discharge.

As to *White v. Robertson*, the first remark I have to make is that the point here raised was not under discussion there; and secondly, there is no real conflict between the two cases. There was a fair ground for arguing, as was done in *White v. Robertson*, that as a condition of obtaining the report the bankrupt must give a fee for the report. This position we found to be an unsound one, although fairly maintainable, but it has really nothing to do with the general question whether the trustee may withhold his report whenever he thinks fit.

LORD PRESIDENT.—In this case the trustee states,—“The application for the pursuer's sequestration was made by the pursuer himself with the concurrence of a creditor to the statutory amount, and was made for the pursuer's own benefit. Nothing has been realised from the estate by the creditors, and the bankrupt alone has derived any advantage from the sequestration.” The trustee further states,—“The defender's remuneration as trustee has been paid, with the exception of a small balance of 10s. 9d., but there remains unpaid a balance of £32, 5s. 1d. of a law account incurred by the defender, as trustee foresaid, for the necessary expenses of the pursuer's sequestration.” Now, if the facts are as here stated, no one has suggested that there is any doubt that the bankrupt will not get his discharge till these accounts are paid. But undoubtedly there is a question of some importance in practice here raised, namely, whether the non-payment of these expenses is a sufficient reason to entitle the trustee to refuse to give his report, or whether the proper course for the trustee is not rather to give his report, and, if he thinks fit, to appear and oppose the bankrupt's application for discharge. I have had considerable difficulty on this

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I quite see with Lord Deas that some difficulty arises from the case of *White*. But, in the first place, the present question, as Lord Shand has pointed out, was not raised in that case. A more important consideration, however, is, that it might be a very good reason for the trustee refusing to give the report that he was entitled to charge a special fee for preparing that report. Because it is quite consistent with practice in other cases that it should be a condition of the delivery of any special report that the person who has prepared the report should be entitled to demand payment of his fee and of the expenses he has incurred, as, for instance, in the case of a decree-arbitral, or where a law-agent has prepared a report for a person who is not his ordinary client. In the case of *White* we held that the trustee was not entitled to make such a demand. It was quite possible, therefore, to consider that case on the merits, without considering whether in other circumstances and for other expenses the trustee was entitled to refuse to give his report. In this view I do not think that we are precluded by the case of *White* from considering whether the trustee may refuse to deliver his report on such grounds as he has at present taken up; but on the whole question, I think that the trustee has mistaken his remedy, and that he must wait till the bankrupt's petition for discharge is presented, if it ever is presented, and then oppose the granting of the discharge.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute of 24th May last, and appoint the trustee to prepare and deliver the report, as prayed for, to the pursuer, in terms of section 146 of the Bankruptcy (Scotland) Act, 1856, and decern: Find no expenses due to or by either party."

WILLIAM OFFICER, S.S.C.—HENRY & SCOTT, S.S.C.—Agents.

No. 170. REV. JAMES RONALDSON AND OTHERS (Gray's Trustees), Pursuers.—
C. S. Dickson.

July 15, 1881.
Ronaldson, &c.
v. Drummond
& Reid.

DRUMMOND & REID, Defenders.—*Pearson.*

Agent and Client—Commission—Expenses—Taxation.—When a law-agent employs an auctioneer or other person to do work on behalf of a client he is bound to credit the client with any discount or donation he may receive from the person so employed.

2D DIVISION.
M.

(SEQUEL to case June 7, 1881, *supra*, p. 767.)

When the Auditor's report in this case was enrolled for approval the defenders, Messrs Drummond & Reid, lodged the following note of objections:—"The defenders object to the report by the Auditor on the account No. 37 of process, on the following grounds:—(1) That in course of the inquiry under the remit it has been ascertained that the pursuers' agents, Messrs James L. Hill & Company, received from Mr Dowell a part of the commission charged by him for selling the furniture, and the full amount of that commission, without crediting the repayment, has been already charged and allowed against the defenders. (2) That the said account, No. 37 of process, as audited, includes charges for the full professional remuneration of the pursuers' said agents connected with the sale of the furniture, and that the discount received out of the auctioneer's commission has not been credited. (3) That the pursuers' agents, being bound to credit the said discount to the pursuers, the latter are bound to credit it to the question with the defenders. (4) The pursuers' agents have refused

to state the amount of the said commission, and say that it has not been passed through their business books. The defenders believe that the amount of this commission is not less than £35, and they claim that this sum be deducted from the amounts of the accounts as reported by the Auditor."

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The following letter from Mr J. L. Hill, W.S., whose firm acted for Gray's trustees, to the Auditor, was produced along with the report and objections:—"Dear Sir,—With reference to the taxation on Monday of the non-judicial account in this action I beg to mention that Mr Dowell allowed and paid me a portion of the commission charged by him for the realisation and sale of the furniture pointed and sold in connection with the action. This allowance was treated by Mr Dowell as a personal commission, and he made it when settling other transactions with me, and it thus does not appear in my business books, and so was not known to my clerk who charged the account and attended the taxation. . . . I may also mention that Mr Dowell, in making this allowance, did not charge any higher commission than he would have done had no such allowance been made, but only the commission usually charged by auctioneers, while the allowance is only made in some cases. I send herewith a letter from Mr Dowell on the subject.—I am, yours truly."

Mr Dowell's (the auctioneer's) letter therein referred to was in these terms:—"Messrs Hill & Co., &c.—Gentlemen,—In reply to your query, I beg to state that agents are not entitled to commission from us, or to any share of our commission for conducting sales of property or effects; but there are cases where, from a variety of transactions, and from personal consideration, we occasionally give a donation, which, of course, is directly out of our pockets.—I am," &c.

Counsel having been heard in support of the objections and in reply,—

LORD JUSTICE-CLERK.—I am rather glad that we have an opportunity of expressing our views upon a transaction of this kind; and my opinion is that the system of commissions, as they are called, being a mode by which law-agents wish to make, or are to make, more than they would be really entitled to, and to make it at the expense and without the knowledge either of their clients or of their client's opponents, is not a creditable system, and one which, so far as I am concerned, I shall always discountenance and discourage. It is a system that goes a great deal too far both in high and low transactions; and, in this case, I think, the attempt to charge the unsuccessful party more than was actually paid to Mr Dowell for the work he did cannot be countenanced. I think the objection to the report is well founded, and that that commission should be given credit for in settling the profit and loss.

LORD YOUNG.—I am of the same opinion, and concur in every word your Lordship has said. I assume that Mr Dowell was properly paid with the money which he received, and not that he gave back as a charity or an act of kindness to Mr Hill, or any other, a portion of his own proper payment. He gives discount upon receiving payment of his account, and I assume, as I have stated, that he is well and rightly paid with what he actually receives. If Mr Hill charges against his clients, and consequently his clients against their adversaries in this litigation, more than he paid, he charges so much in excess of what he is entitled to. He is remunerated for his services according to the established rules and scale of remuneration, and the law does not permit him to receive more as in a question with his clients; nor consequently will it permit their adversaries in this litigation to be charged with more. If he pockets this, he is pocketing

No. 170, so much more than he is entitled to for his professional services. His services in this business are charged and paid for according to the proper scale, and it is nothing to the purpose to say that that is a matter between him and his clients. So it is, and nobody else would be concerned if his clients were not making a charge as against these defenders as the unsuccessful parties in a litigation. They very properly take objection to such an item: "You are charging us with an account of Mr Hill's, which, to this extent, is more than it ought to have been, as being, to this extent, in excess of his just charges. He is entitled to credit for what he actually paid to Mr Dowell, and to no more. *Quoad ultra* he is properly paid and remunerated according to the usual practice."

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& Reid.

I quite agree, as I have already said, in all that your Lordship has stated in condemnation of this system, wherever it prevails—and it is matter of common knowledge that it prevails extensively. Tradesmen tip the servants in one's service; the butcher and the grocer tip the cook; the saddler tips the coachman;—indeed it is a system of tipping all round. But it is all paid by the master,—every shilling of it. These tradesmen will not, any more than Mr Dowell did here, as a matter of charity, or personal favour or kindness, give out of their own pockets these allowances; it is all charged against the customer or employer. It is his money that is in this roundabout way given to servants. It is difficult to detect it, no doubt; but where it is exposed to the Court I concur that we should in all cases discountenance and disallow it.

LORD CRAIGHILL.—I entirely concur; I concur not only in the result arrived at, but in every word used by your Lordships. I confess that when I was made aware that such an objection was to be brought forward—or rather that the parties thought there was ground for such an objection—I felt much more regret than I have experienced with regard to any occurrence for a very long time. I think a practice like that which has been brought under notice is one which is discreditable to the agents, and certainly injurious to the client. At the time when the money was said to have been received, and the account paid to Dowell, Mr Hill acted for and represented his clients, Gray's trustees, and he was bound at once to carry to their credit the sum he received; and it is really nothing to the purpose to say that one or more of Gray's trustees said they knew about this—knew everything about it. If they were prepared to acquiesce in what was being done by the agent they were doing what was contrary to their trust. For it was not a matter between them and their agent. The trustees were acting for others, and if they did not insist upon the beneficiaries of the trust receiving the benefit which was due them in this matter, instead of the party who happened to be their agent, they were content that the interests of the beneficiaries should be sacrificed. Besides, at the time this payment was made, Mr Hill and the trustees themselves had no warrant for supposing that judgment would be pronounced in favour of the trustees and against Drummond & Reid. The Lord Ordinary had pronounced judgment in favour of Drummond & Reid; but we find that, notwithstanding that fact, the action which Mr Hill upholds would have been such as, had the result been otherwise, to make the trustees debtors for the money claimed by Mr Hill, for they were the persons for whom this account was incurred. Things, as between Mr Hill and the trust, were left in the accounts as if the full sum had been paid.

On the whole matter, I am of opinion that the practice—if there is a practice,

which I must assume, after what has been said—is a most reprehensible one ; No. 170.
 and as this is, so far as I recollect, the first occasion on which this matter has July 15, 1881.
 been brought up for judicial determination, so I hope it will be the last. So far Ronaldson, &c.
 it is a matter between Gray's trustees and Mr Hill ; and so far it is between v. Drummond
 Gray's trustees and Drummond & Reid. I do not think they should have & Reid.
 chosen to claim a benefit to which they were not entitled merely for the purpose
 of increasing the burden to be put on the shoulders of Drummond & Reid. I
 think such a course is contrary to duty and to common honesty between man
 and man.

I am very clearly of opinion that the objection ought to be sustained.

THE COURT approved of the Auditor's report, under deduction of the
 amount of commission returned by Mr Dowell.

JAMES L. HILL & Co, W.S.—DRUMMOND & REID, W.S.—Agents.

A. F. C. R. BOWMAN BALLANTINE AND OTHERS, Pursuers.—

D.-F. Kinnear—Pattison—Jamieson.

DAVID STEVENSON, Defender.—*Mackay—Dickson.*

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 Ballantine, &c.
 v. Stevenson.

Lease—Constitution and proof of lease—Implied acceptance of written lease—
Rei interventus—Agent and Principal.—A subtenant of a farm, prior to the ex-
 piry of the principal lease at Martinmas 1876, entered into negotiations with
 the Edinburgh agent of the landlord (who resided in England) for a nineteen
 years' lease, at an increased rent. A lease was adjusted, and, after being signed
 by the tenant, was sent, in August 1877, by the Edinburgh agent to the London
 agents of the landlord for his signature. The lease was retained by them till
 August 1878, the tenant, in the meantime, having been in possession of the
 farm, and having made a payment to account of the increased rent.

In August 1878 the landlord repudiated the lease, and raised an action of
 removal against the tenant.

Held that, in the circumstances, implied acceptance of the lease on the part of
 the landlord had been instructed.

Opinions (*per* the Lord Justice-Clerk and Lord Young) that the landlord's
 retention of the lease, signed by the tenant, was in itself sufficient to infer
 acceptance on his part.

Opinion (*per* Lord Craighill) that *rei interventus* was necessary to bind the
 landlord.

On 27th December 1880 Andrew F. C. R. Bowman Ballantine of Ash- 2nd Division.
 grove, with consent of a Mr Atkins of Southampton, who was designed as I.d. Curriehill
 "concurring pursuer," and Mr Lamond, S.S.C., as mandatory for Mr M.
 Atkins, raised an action in the Court of Session against David Stevenson,
 designed as farmer, residing at Outerwood. The action concluded for
 decree of removing against Stevenson from the farm of Outer and Inner-
 wood on the estate of Ashgrove, in Ayrshire, and for damages in case of
 his continuing to occupy the farm.

The condescendence set forth that Mr Ballantine was heir of entail in
 possession of Ashgrove, but had, in 1857, prior to his succeeding to the
 estate, conveyed his life interest therein to Mr Atkins, and had, on 19th
 November 1880, received a reconveyance from Mr Atkins. It was stated
 that the defender, David Stevenson, was in possession of the farm of
 Outer and Innerwood vitiously, and without the leave of either Mr Atkins
 or Mr Ballantine, and that he refused to remove therefrom, and that the
 action had thus become necessary.

David Stevenson in his defences relied on a lease of the farm for nine-
 teen years from Martinmas 1876, which he averred he had obtained from

No. 171. Mr Rollo, W.S., who acted as factor for Mr Atkins, and which he, Stevenson, had signed in August 1877. This lease, he stated, had been signed by him, and his brother William Stevenson, as his cautioner, and although he admitted that it had not been signed by Mr Atkins still he averred that it had been acted on by both parties.

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The pursuers pleaded ;—(1) The pursuer, the said Andrew Fitzjames Cunningham Rollo Bowman Ballantine, being proprietor of the lands and farms libelled, is entitled to obtain decree of declarator as concluded for, and to have the defender, David Stevenson, instantly removed and ejected from the said lands and farms as a vitious or precarious possessor. (2) In the circumstances above set forth the defender, who has no legal title of possession, is not only not entitled to retain the occupancy or possession of the said lands and farms against the will of the pursuer, but is liable in all loss and damage arising to the pursuer thereby, and the pursuer is entitled to decree against him as concluded for in that respect, with expenses.

David Stevenson pleaded ;—(1) The defender being tenant of the lands in question under a nineteen years' lease, to run from Martinmas 1876, he should be assolizied. (2) *Separatim*, an agreement for a nineteen years' lease in terms of the deed signed by the defender has been constituted, and is now binding under the writings and actings aforesaid.

The Lord Ordinary allowed both parties a proof of their averments.

From the evidence led, and a voluminous correspondence and other documents produced, the following appeared to be the state of the facts :—Mr Bowman Ballantine, in September 1857, conveyed to Mr Atkins his life interest in the entailed estate of Ashgrove, and Mr Atkins was duly infeft on this conveyance. The heir of entail in possession at the time of this conveyance, a Miss Bowman, died in 1859, but on 7th June 1858 she had granted to William Stevenson—David Stevenson's elder brother—a nineteen years' lease of Outer and Innerwood at a rent of £250. This lease had barely run a year when Mr Atkins entered into possession of Ashgrove in consequence of Miss Bowman's death, and William Stevenson continued to possess under it. Mr Atkins managed the estate through his solicitors in London, Messrs Bradby & Robins, who in turn employed Mr Rollo, W.S., Edinburgh, to act for them in Scotland. There was some doubt as to the extent of Mr Rollo's power to bind Mr Atkins. The Stevensons deponed that they looked upon him as factor, with the usual powers of a factor, and that they never heard from or of any one else in connection with the management of the estate. Mr Rollo himself stated, "My professional duties in connection with Ashgrove were generally to manage the estate ; but I was in the habit of consulting Bradby & Robins before doing anything ; I consider that I never acted without their authority." Mr Atkins deponed that Mr Rollo had "no authority to conclude arrangements with any one on my behalf without consulting me through my solicitors." Mr Bradby, of Bradby & Robins, said that he looked upon Mr Rollo as land-agent. "The general duties of attending to the interests of the proprietor in matters of detail were left to him."

William Stevenson, who was also tenant of another farm on the estate of Ashgrove, continued in occupation of the farm until 1867, when he granted a sublease of it to his brother David, who, at same time, purchased the whole stock, &c. from him. This sublease and the receipt for the price of the stock were produced. The Stevensons deponed that this sublease was entered into with Mr Rollo's knowledge and consent, but Mr Rollo, although he admitted that he was aware that David and his family occupied the farm-house, could not remember anything more than that there had been communings as to a sublease.

In February 1875, when the lease of the farm had less than two years to run, the roof of the barn fell in, and Mr Rollo afterwards obtained a report from a Mr Stewart, factor to the Earl of Eglinton, as to what was best to be done. This report was dated 7th May 1875, and in it Mr Stewart recommended that the roof should be repaired, and the walls of the barn raised at the landlord's expense, the tenant being charged five per cent on the outlay. Mr Rollo sent the report to Bradby & Robins on 19th June, but received no answer from them on the point. He wrote again on this subject, on 4th January 1876, as follows:—"I must again refer to the repair of the roof of the barn on the farm-steading occupied by Stevenson. I am rather at a loss what to advise. Mr Atkins' tenure of the estate depends upon the life of Mr Bowman Ballantine. Then there is only one year of the lease to run, so that it is not worth Stevenson's while himself to be at much outlay, even although by not doing so he puts himself to inconvenience. The farm will certainly not let without the houses being repaired, and when a new lease is entered into there is every reason to suppose there will be a rise of rent. The Stevensons are most respectable men, and I think a good deal of the younger brother, who occupies this farm. How would it do to enter into an agreement with the Stevensons that Mr Atkins will repair the barn, the Stevensons paying say six or seven per cent till the present lease runs out, and then, if Mr Atkins is still in possession, that they will retake the farm on a new lease, and let us have the farm revalued to see what the increase of rent would be? It is quite evident that when the lease does run out the steadings must be repaired. I will be glad to hear from you."

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On 5th February 1876 Messrs Bradby & Robins wrote:—"In reply to your letter of the 4th we beg to say that we have been waiting to confer with our client.

"We think your suggestion to repair the barn, Stevenson paying £7 per cent on the outlay, and agreeing to retake the farm at a rent to be ascertained by a revaluation, should be adopted. . . . Please do what is right according to the respective obligations of the landlord and tenant, and not expending more than is absolutely necessary."

About this period Mr Rollo had some conversations with the Stevensons as to a renewal of the lease. He afterwards obtained another report from Mr Stewart as to the letting value of the farm, &c., and on 5th June 1876 wrote Bradby & Robins—"As I sometime since wrote to you, Stevenson's farm of Outerwood runs out this Martinmas, and I now enclose report by Mr Stewart as to what he proposed should be done in the event of a new lease being entered into. The rise of rent is considerable, but then there is the required outlay. Whitehirst also runs out this November, and, as you will observe, Mr Stewart proposes the two farms should be joined. The change of steadings, however, will be a very serious matter as to expense. Considering the tenure upon which the estate is held, depending upon Mr Ballantine's life, the repairing of steadings is a matter attended with difficulty, and requires some consideration."

Mr Stewart in his report, which was dated 10th April 1876, recommended that the rent be increased from £250 to £285, on condition of the landlord repairing the barn roof and raising the walls. If these repairs were executed by the tenant he advised an allowance of 7½ per cent on the tenant's outlay, which he estimated would reduce the rent to £270.

Some question having arisen as to Mr Atkins' power to grant leases, Mr Rollo took the opinion of counsel (Mr Kinnear) upon the point, and on 7th September 1876 wrote as follows:—"I now enclose copy of the

No. 171. memorial which I laid before counsel as to these matters, from which you will find that he considers Mr Atkins has the power to grant leases on the usual terms, not exceeding nineteen years, and that the guardian of the next heir has no title to make the claim he has done. . . . I can see no reason why we should not enter into a treaty with Mr Stevenson for a new lease of the subjects."

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On 9th September Bradby & Robins answered—"We beg to acknowledge the receipt of your letter of the 7th instant, enclosing copy of statement laid before counsel, and of his opinion thereon, and which seems satisfactory."

In the meantime Mr Rollo had been in communication with William Stevenson as to the proposed new lease, and had based his suggestions upon Mr Stewart's report. On 3d November 1876 Mr Rollo sent William Stevenson a draft lease of the farm for his consideration. This draft had previously been gone over by Mr Stewart, who had inserted a provision that the repairs to be executed by the tenant should be completed within two years of the entry.

After meetings with the Stevensons the draft lease was agreed upon. The lease as finally adjusted was in name of David Stevenson as tenant, with William Stevenson as cautioner.

On 22d August 1877 the extended lease was sent to the Stevensons for signature, and on its being returned by them, duly signed, Mr Rollo, on 28th August 1877, wrote to Bradby & Robins—"I now enclose for the signature of Mr Atkins the lease to Mr Stevenson of the farm of The Wood."

No notice was taken of this letter, but in the meantime an action had been commenced in the Court of Session at the instance of Mr Ballantine's trustee against Mr Atkins, with a view to the reduction of the conveyance of the life interest in Ashgrove.

Messrs Bradby & Robins, on 26th October 1877, wrote—"Our client thinks he ought not to sign any new lease pending the litigation which has been commenced against him."

On 11th December 1877 Mr Rollo wrote urging that the lease be completed. Messrs Bradby & Robins replied on 31st December 1877—"With regard to Stevenson's lease we are instructed to say that our client does not think of renewing it. We conclude that you have not agreed to any renewal."

They wrote again on 9th January 1878,—“Mr Atkins intended to have the farm revalued before granting any new lease, and will not grant a new lease on the old terms.” On 26th February 1878 they wrote,—“Our client trusts he is not committed to a renewal of Mr Stevenson's lease.”

They wrote again on 9th March 1878—"We shall be glad to hear whether the arrangement with Stevenson is obligatory on our client, as he is not desirous of granting a new lease on the present terms. No valuation has taken place for fifty years. It is not, therefore, simply a question of the right or power of our client to grant the new lease, but he does not wish to do so." And on 16th May 1878—"Will you be so good as to inform us by return of post what is Mr Stevenson's position? We conclude he is now only a tenant at will, or at most a yearly tenant."

Mr Rollo, on 17th May 1878, wrote in answer—"As to Stevenson, we have no such thing in Scotland as tenants of farms at will or even yearly tenants. The renewal of the lease and its terms were fully considered, and on referring back to the correspondence you will find such to be the case, and that it was not gone into until the opinion of counsel was taken, a copy of which was sent to you. . . . Stevenson having signed

the lease, and continued in possession, besides making a payment to account of rent, must be considered as the tenant for the duration of the lease. As he, however, was to lay out a certain sum in repairing the barn, as you will find on referring to the lease, I have little doubt that if a change of arrangement was wished he would agree to anything reasonable.

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Messrs Bradby & Robins wrote on 10th June 1878—"With respect to the proposed new lease to Mr Stevenson, our client will not grant it on the old terms, should he be disposed to grant it at all. Mr Stevenson should, without delay, be made to clearly understand that our client has never agreed to grant him a new lease."

Mr Rollo, on 14th June 1878, answered,—“With reference to the lease with Stevenson, the same was arranged on the report of Mr Stewart, factor for the Earl of Eglinton, who is well qualified to value farms such as this. Stevenson's former rent was only £250, and the rent under his new lease is £270, with an obligation on him to expend the sum of £200 in repairing the barn, &c., which is equal to at least other £12 of rent, and this is a considerable rise considering the state of agricultural matters. As I have stated before, there is not such a thing in Scotland as a yearly tenant of a farm such as Stevenson's, and you are aware the matter was not gone into until the opinion of counsel was taken, and with which you expressed yourself satisfied.”

On 20th June 1878, Messrs Bradby & Robins again wrote, repeating the statement that Mr Atkins had never consented to grant a new lease, and requesting Mr Rollo to inform Stevenson that no lease would be granted.

To this Mr Rollo answered, on 25th June 1878, as follows:—“As the former lease expired on Martinmas 1876, there was no time to lose, and I proceeded to arrange with Stevenson, adopting the alternative of Mr Stewart's report of Mr Stevenson being taken bound to lay out £200 upon the barn, and to pay £270 of rent, which was most advantageous for Mr Atkins, as it saved him laying out the money. Of course Mr Stevenson would not lay out the money without a lease, and no new tenant would take the barn as it now stands. Mr Stevenson has not yet commenced to the barn, and if Mr Atkins desires to change the arrangement, I can make an overture to Mr Stevenson upon the subject.”

Messrs Bradby & Robins replied, on 6th July 1878,—“We have looked through the letters and papers referred to in your letter of the 25th ulto., and do not see that our letters convey any instructions from our client to renew Mr Stevenson's lease. Our client trusts that you have not pledged him to do this. If you will kindly refer to our letters for some considerable time past, you will, we think, see the anxiety of our client to ascertain the exact position of the matter. Please let us hear distinctly, for the information of our client, what is the legal position of the matter.”

On 9th July 1878, Mr Rollo wrote in answer recapitulating the correspondence, specially referring to the letter from Bradby & Robins of 5th February 1876, and to the fact of the lease executed by the Stevensons having been sent on 28th August 1877. Several letters, to a similar effect, passed between Mr Rollo and Messrs Bradby & Robins, and on August 1st 1878 the latter wrote positively declining, on behalf of Mr Atkins, to grant a lease. Mr Rollo, in answer on 5th August 1878, wrote enclosing his accounts for the estate up to 30th June, in which he gave effect to the increased rent under the new lease. On August 6th 1878, Messrs Bradby & Robins wrote, stating that to their minds the alleged increase of rent had not been paid. Mr Rollo, on 7th August 1878, wrote,

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pointing out that the increased rent, or a part thereof, had, in fact, been paid by David Stevenson and accepted; and on 13th August 1878, Bradby & Robins admitted that this money had been received, but explained that no part of it had been received until Mr Atkins' intention not to grant a lease had been communicated to Mr Rollo. They also instructed Mr Rollo thenceforward only to remit the old rent, and not the increased one.

Mr Rollo had, on 7th August 1878, written to David Stevenson, informing him that Mr Atkins was not at that time prepared to sign the lease, but that was the first intimation sent Stevenson of the position of affairs.*

In April 1879 the agency was taken from Mr Rollo and given to Messrs Campbell & Lamond, C.S., and, on 19th April 1879, Messrs Bradby & Robins wrote two letters, one to each of the Stevensons, directed to their respective farms, giving them notice to pay no more rent to Mr Rollo.

Mr Bradby deponed that he had all along understood that William Stevenson was the person about whom the correspondence had been conducted, and that although he had noticed David Stevenson's name occasionally, he had not realised that he was another person from William.

On 20th September 1880, prior to the raising of this action, Mr Atkins, with the concurrence of Mr Ballantine, raised an action of removing in the Sheriff Court at Ayr against William Stevenson, which he defended, and in which he admitted he had no title to occupy the farm, and stated that he was not in occupation thereof, but that David Stevenson was so, in virtue of the lease from Mr Atkins.

The Lord Ordinary, on 2d June 1881, found (1) "that the defender, David Stevenson, is in the possession and occupation of the farm of Outerwood and Innerwood,—part of the estate of Ashgrove belonging to the pursuer—as a yearly tenant, until the term of Martinmas next (1881) as to the arable lands, until Candlemas 1882 as to the yards, and until 1st May 1882 as to the houses, grass, and other pertinents, at the yearly rent of £250 sterling, payable in equal proportions at the term of Martinmas 1881 and Whitsunday 1882 respectively; and (2) that the said David Stevenson is bound to remove from the said farm and other premises as follows, viz., from the arable lands at the said term of Martinmas 1881, from the yards at Candlemas 1882, and from the houses, grass, and other pertinents, at 1st May 1882; and with these findings, appoints the case to be enrolled for further procedure, reserving all questions of expenses: Grants leave to both parties to reclaim, if so advised."†

* Up to this date David Stevenson had not executed the repairs, &c., stipulated for in the lease.

† "NOTE.—The pursuer, Mr Bowman Ballantine, is heir of entail in possession of the estate of Ashgrove, in Ayrshire. Although he succeeded to that estate in 1859, on the death of his predecessor Miss Bowman, he did not come into the actual possession of the estate until 1879, in respect that in anticipation of his succession he sold his life interest to Mr Edward Atkins of Southampton, who remained in possession until a year or two ago, when he resold the interest to the pursuer. During his possession Mr Atkins granted leases of the farms, and exercised all the rights of owner.

"In 1876 the lease of the farm of Outerwood and Innerwood, which had been held by William Stevenson for at least one term of nineteen years, expired, and negotiations took place for a renewal thereof. Mr Atkins at no time took any personal part in the management of the estate, but left the whole administration in the hands of Mr Bradby, a London solicitor, and the firm of Bradby & Robins, of which he was for some time a partner. These gentlemen employed Mr Hugh James Rollo, W.S., of Edinburgh, as their local agent and factor, and entrusted him to a large extent with the details of the management. In 1877 Mr Rollo prepared a lease of the said farm for nineteen years from Martinmas 1876

Stevenson reclaimed, and argued;—Mr Rollo had the power to bind his principal in a lease, and consequently this lease, even though as yet

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in name of David Stevenson, a younger brother of William Stevenson (William Stevenson being bound as cautioner), and on 28th August 1877, he sent it, duly executed by these two persons, to Messrs Bradby & Robins for Mr Atkins' signature. Mr Atkins never signed the lease, but David Stevenson has been in possession of the farms on the footing that he had been accepted as tenant under the lease. The pursuer now repudiates the lease, and has brought this action against David Stevenson to have it declared that he has no right or title to possess the farm, to have him immediately removed from the premises, and to have him ordained to pay £1 per day from the date of citation, as damages for alleged illegal occupation.

"The question between the parties depends mainly upon the extent of Mr Rollo's authority. In the first place, it is certain he had no direct authority from Mr Atkins to enter into leases with tenants, but he may have had authority from Messrs Bradby & Robins, who had full power to bind Mr Atkins in the matter. Mr Atkins, on this point, says,—'Mr Rollo had no authority to conclude arrangements with any one on my behalf, without consulting me through my solicitors. The amount of his authority must be judged by what passed between him and my London solicitors.' In the next place, it is certain Mr Rollo had no general authority from Messrs Bradby & Robins to enter into leases on behalf of Mr Atkins—each transaction required their special sanction. Indeed, this was frankly admitted by Mr Rollo himself, for he says,—'My professional duties in connection with Ashgrove were generally to manage the estate; but I was in the habit of consulting Bradby & Robins before doing anything. I consider that I never acted without their authority. The authority I had with regard to this lease was their letter of 5th February (1876), which I got in reply to my letter of 4th January.'

"It thus becomes necessary to examine carefully, not only the two letters referred to by Mr Rollo, but the whole subsequent correspondence, in order to see whether he had any authority, express or implied, to enter into the lease now in question.

"It appears that in 1875, while William Stevenson was tenant of the farm with a year and a half of his lease still to run, the roof of the barn had fallen in, not from any fault of the tenant, but from sheer natural decay. Mr Rollo obtained a report on the subject from Mr Stewart, factor to the Earl of Eglinton, dated 7th May 1875, suggesting that the landlord should renew the roof, and raise the walls of the barn, and charge the tenant interest on the outlay. This report was sent by Mr Rollo to Messrs Bradby & Robins on 19th June 1875, but no answer having been returned, Mr Rollo wrote to them on 4th January 1876 the letter referred to in Mr Rollo's deposition, and as its terms are most material to the present issue, it is desirable to quote them at length:—(quoted in narrative).

"It is important to observe with reference to this letter (1) that it calls the attention of Bradby and Robins to the fact that, as Stevenson's lease was about to expire, it was not worth his while to lay out money in repairing the barn unless on the footing of the lease being renewed; (2) that although the 'younger' Stevenson here referred to is undoubtedly David Stevenson the defender, his name is not mentioned, and there is no reason to suppose that Bradby and Robins had ever heard of him previously, although he had *de facto* been in possession of the farm for some time as subtenant of his brother William; and (3) that Mr Rollo's proposal is to let the farm on a new lease to 'the Stevensons,' i.e., the two brothers, on condition of their paying six or seven per cent on the landlord's outlay for repairs at an increased rent to be ascertained by revaluation of the farm. To that letter Bradby and Robins reply, on 5th February 1876, as follows":—(quoted in narrative).

"Now, if I rightly construe this letter, Mr Rollo's suggestion as to the younger Stevenson is ignored, and a renewal in favour of William Stevenson alone is what is contemplated by Bradby and Robins, but they approve of such

No. 171. unexecuted by the landlord, was a valid and effectual one.¹ Even if he had not had that power originally the lease had now been made effectual

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a lease being granted to him, at a rent to be ascertained by revaluation; all the details being left to Mr Rollo, who is empowered to make the best bargain he can for the landlord. Mr Rollo, in consequence, procured from Mr Stewart a revaluation of the farm, dated 10th April 1876, in which it was suggested that the rent, which had hitherto been £250, should be fixed at £285, on the footing that the landlord should expend £200 on additions and repairs, but that a deduction of $7\frac{1}{2}$ per cent should be allowed if the outlay on repairs should be undertaken by the tenant, in which case the rent would be £270. On 5th June 1876 Mr Rollo wrote to Bradby & Robins as follows":—(quoted in narrative).

"About this time some difficulty seems to have been started in London as to the power of Mr Atkins to grant leases at all. Mr Rollo, however, by the instructions of Messrs Bradby and Robins, consulted Mr Kinnear on the subject, whose opinion was in favour of Mr Atkins' power. This opinion was communicated to Bradby & Robins by Mr Rollo in a letter of 7th September, in which he says,—'I can see no reason why we should not enter into a treaty with Mr Stevenson for a new lease of the subjects.' Reading that letter, as I think it ought to be read, in connection with the previous correspondence, I think the fair meaning of it is that Mr Rollo should, if Bradby & Robins were at length satisfied that Mr Atkins had power to grant leases, he (Mr Rollo) should now negotiate a new lease on the footing of the instructions in Bradby & Robins' letter of 5th February 1876, giving effect to Mr Stewart's revaluation, and making the best arrangements in his power as to the repairs.

"Messrs Bradby & Robins reply on 9th September as follows:—

"We beg to acknowledge receipt of your letter of the 7th inst., enclosing copy of statement laid before counsel, and of his opinion thereon, and which seems satisfactory.'

"Now, it appears to me that if Bradby & Robins disapproved of Mr Rollo going on to transact the renewal of the lease with Stevenson, or were not yet prepared to advise their client that he might safely grant the lease, or had any other objection to granting a new lease to Stevenson on the terms proposed, they were bound to have said so explicitly to Mr Rollo. They knew that Stevenson's existing lease would expire within two months; that he was anxiously awaiting the decision of his landlord as to the renewal; they had already, on 5th February 1876, with their client's approval, authorised Mr Rollo to conclude a new lease with Stevenson; rents, &c., to be fixed by revaluation; that revaluation had been made and communicated to them, and apparently the new lease would have been granted in May or June but for the difficulty as to Mr Atkins' powers, which was now satisfactorily obviated by Mr Kinnear's opinion. In my opinion, therefore, Mr Rollo was fully justified in holding that from and after 9th September 1876 he was authorised by Bradby & Robins to enter into the new lease with Stevenson on such one of the alternatives suggested by Mr Stewart as he might think best for the landlord's interests. Acting in this belief, therefore, and selecting the alternative (unquestionably favourable to Mr Atkins) by which the tenant was to spend within two years £200 in raising the walls and renewing the roof of the barn, and in making other repairs and additions, Mr Rollo, on 25th September, wrote to William Stevenson proposing a new lease on these terms, and he shortly thereafter arranged to relet the farm to Stevenson for nineteen years from Martinmas 1876 as to the arable lands, from Candlemas 1877 as to the yards, and from 1st May as to the houses, grass, and pertinents. The draft lease was accordingly prepared in name of William Stevenson, giving effect to these terms, and was sent to him for revision; and if it had been written out and signed by William Stevenson, and if he had thereafter continued to occupy the farm, I should have had little difficulty in holding

¹ Lady Moray v. Stewart, July 23, 1772, M. 4,392, H. L.; Stewart v. Countess of Moray, March 24, 1778, 2 Pat. App. 317; Storey on Agency, p. 256.

by the landlord's acquiescence and by the *rei interventus* which had followed upon it.¹ This was the only view on which the tenant could

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that Mr Rollo had let the farm to him with the authority of the landlord (Mr Atkins), and his responsible London solicitors, Messrs Bradby & Robins.

"The lease however, was not made out in name of William Stevenson, but in favour of his brother David Stevenson, William being merely cautioner. This alteration was made apparently at the request of both brothers when they saw Mr Rollo in Edinburgh in November or December 1876, but unfortunately the proposed change of tenant was not communicated to Bradby & Robins, Mr Rollo having apparently thought this unnecessary, as he had in his letter of 4th January 1876 suggested a joint lease to the two brothers. But he had evidently overlooked the facts (1) that Messrs Bradby and Robins had entirely ignored that suggestion, and (2) that in all his subsequent correspondence with these gentlemen and with William Stevenson, it was William, and William alone, who was contemplated as the new lessee. I assume that David Stevenson is in every way an unexceptionable tenant, but that is not enough. The *delectus persone*, which is the right of a landlord, would be rendered of no avail if, after he had agreed to let his land to A, his agents were, without his authority, to let it to B, even although B was entirely unexceptionable, and although A were, as in the present case, to be cautioner for B.

"In my opinion, therefore, authority, either express or implied (assuming such to be proved), to enter into a lease with William Stevenson, cannot be held to be sufficient authority to enter into a lease with a third party, for in that light David Stevenson must be regarded in a question with Mr Atkins and his London solicitors.

"It is said, however, that the lease has been adopted or rendered binding by *rei interventus*. The facts are that the lease was signed by David Stevenson in August 1877, and was on 28th August sent by Mr Rollo to Bradby & Robins for the signature of Mr Atkins. Unfortunately Mr Rollo did not in his letter which accompanied the lease call their attention to the fact that David Stevenson was made tenant instead of William Stevenson, who had been the previous tenant. Messrs Bradby & Robins seem to have laid the lease aside without looking at it, partly because it was the long vacation, and partly because Mr Atkins had a difficulty about granting any lease at the time, there having been some question as to leases generally between him and the present pursuer, who was then contemplating the re-purchase of the estate. Whatever the cause may have been, Bradby & Robins did not seem to have looked at the lease, or become aware that David Stevenson was made tenant, for about a year after it was sent to them. That, however, is only one circumstance in the case, and if it had happened that David Stevenson on the faith of the lease had not only entered into possession of the farm, but had made outlays upon it in executing the extensive repairs which the lease bound him to make, and had paid the increased rent stipulated by the lease, and if that rent had been accepted without any observation or objection by Bradby & Robins, I think it would have been extremely difficult for Mr Atkins, or for the pursuer, to maintain that the lease, though unsigned by Atkins, was not now a binding lease. But, then, the state of the facts is quite different. In October, or sometime towards the end of 1877, Bradby and Robins wrote to Mr Rollo that Mr Atkins was not to grant any lease, and in the course of the following year they repeated that statement again and again, always expressing their hope that Mr Atkins was not committed to any lease. And on, at least, three occasions, viz., 10th June, 20th June, and 6th August 1878, they desired Mr Rollo to communicate to Mr Stevenson that no lease would be granted. Now, up to this time, in point of fact, Bradby & Robins seem not to have known that the lease was in favour of David Stevenson, and it was only on 13th August 1878 that they became aware of this. On the

¹ Graham v. Gowans, Nov. 20, 1792, Hume's Dec., 784; Macrorie v. M'Whirter, Dec. 18, 1810, F. C.; Macpherson v. Macpherson, May 12, 1815, F. C.; Forbes v. Wilson, Feb. 22, 1873, 11 Macph. 454, 45 Scot. Jur. 276.

No. 171. be held to occupy the farm, as tacit relocation could not follow on a sub-lease,¹ which had been the present tenant's only title before he got this lease.

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other hand, I think that so soon as Mr Rollo heard from Bradby & Robins that no lease would be granted, he ought to have informed David Stevenson of the fact, and ought not to have delayed his intimation till 7th August 1878. Still, his failure to make such communication could not have been founded upon by the defender, as in a question with Mr Atkins, whatever claim it might have given to him against Mr Rollo. But, in truth, there seems to be no ground whatever upon which any such claim can be supported, or any case of *rei interventus* which can be made out. It is quite plain from the evidence of the defender himself that the result of all his communings with Mr Rollo was that he quite understood that, until the lease should be signed by Mr Atkins, he had no security that his tenancy would be permanent. Indeed, he says very candidly when asked about Mr Rollo's letter to him of 7th August 1878,—‘Up to that time I did not think there was anything wrong with the lease, and I had written to see if we were to get a copy of it, so that we might go on with the repairs.’ It is thus very plain that for twelve months after he had signed the lease, and up to the time when he was definitely informed that the lease would not be signed by Mr Atkins, the defender thoroughly understood that unless the lease was executed by Mr Atkins, and he was certiorated of the fact by getting a copy of the completed lease, he would not be in safety to proceed with the execution of any of the repairs which he had undertaken to make.

“Now, as to the alleged facts upon which the defender founds as amounting to *rei interventus*, viz., possession, payment of the increased rent, and execution of the repairs, the proof negatives all of these allegations. In the first place, the possession of the defender is not to be attributed to the lease now in question; it had begun long before that lease was ever thought of; he had for years previously been his brother's subtenant, and he just continued, after Martinmas 1876, to occupy and labour the farm as before. In the second place, in point of fact he did not pay the increased rent, at all events until sometime after he had been informed that the new lease had been repudiated by Mr Atkins. Indeed, he seems to have been generally in arrear. And in the third place, he did not until 1880, shortly before this action was raised, and long after he knew that the lease was repudiated, execute any repairs upon the steading. It is thus impossible for the defender to maintain either that the lease was adopted or homologated by Mr Atkins or his solicitors, Bradby & Robins, or that anything has been done by him (the defender) on the faith of the lease which he would not have done if the lease had never been even proposed. In short, there has been no *rei interventus*.

“From what has been said, it follows that, in my opinion, the lease cannot be founded on by the defender as a title to possess the farm as tenant for nineteen years from Martinmas 1876. But, while that is my opinion, I think there is enough in the proof to shew that, *de facto*, the defender has been recognised both by Mr Atkins and by the pursuer, for some time before this action was raised, as a yearly tenant of the farm. He was allowed by Mr Atkins to remain in possession and occupation after it was known that he, and not William, was *de facto* occupying the farm, and a certain amount of rent was accepted from him each year. And, by the pursuer's own agents, he was entered in the valuation-roll for 1879-80 as tenant of the farm without a lease, at the rent of £250. I do not know whether, or in what character, he was entered in the roll for 1880-81, but, in point of fact, he was allowed to begin a new year's tenancy at Martinmas 1880 without objection, for this action was not raised against him till 27th December 1880. It is impossible, therefore, for me to pronounce decree of declarator in the terms sought by the pursuer, viz., that the defender has no right or title to occupy or possess the farm. But I propose to find that the defender is in possession as a yearly tenant until Martinmas 1881 as to the

¹ Ersk. Inst., ii, 6, 36.

Argued for Ballantine and others ;—The lease being *ultra vires* of Mr Rollo to grant, and never having been approved of or signed by the landlord, was ineffectual. The defender was, therefore, in occupation of the farm without any habile title. There had been no change of possession or expenditure on repairs, &c. so as to give rise to the plea of *rei interventus*. The occupation could easily be attributed to other causes than the alleged new lease. The landlord had never with his knowledge and consent taken any increase of rent.

At advising,—

LORD JUSTICE-CLERK.—This is an action which has been carefully argued, and which raises some difficult and important questions.

The substance of the decree which the pursuer asks is, that the defender, David Stevenson, shall be forthwith removed from the farm of Outerwood, which, he says, is his property ; and the ground upon which the demand is made is, that it is not let to David Stevenson, and that he has no right of occupation of any kind.

The defence which is made by Mr David Stevenson, who is the principal tenant according to his own statement, is that he is possessing, and has possessed since 1877, under a lease signed by himself as principal tenant, and by his brother William Stevenson as his cautioner, and that consequently he is entitled to run out his term. The lease has been produced out of the hands of Mr Rollo, who acted as agent for the landlord, and it is signed by both the Stevensons, and is dated in August 1877. But it is not signed by the landlord. The contention between the parties is this, on the one hand the pursuer says that the defender has not a lease which authorises possession, because the document is incomplete ; on the other hand, it is said that that is wholly immaterial when the landlord, who could have signed at any time, has not chosen to do so, because his retention of the lease, and his suffering the possession by the defender to continue under it, implies an acceptance of the terms specified in the lease on the part of the landlord, and is equivalent to his signature.

These are, shortly, the questions that arise in this case, which has some features, I think, altogether peculiar to itself. I have never seen a case precisely of the same kind, although the category of cases to which it belongs is one of the commonest in the law of landlord and tenant. The condition in which this lease—the uncompleted lease—stands is this : William Stevenson, the brother,

arable lands, and until Candlemas 1882 as to the yards, and until 1st May 1882 as to the houses, grass, &c., and that he is bound to remove from the several premises at these respective dates. As to the rent, I think it would be unreasonable to hold the defender bound to pay the increased rent which he was willing to pay only in respect of a nineteen years' lease, and I therefore think the rent of £250 (the old rent) is a fair and reasonable rent to fix, the more so as it is the rent entered by the pursuer himself, or by his instructions, in the valuation-roll. In this view of the case, of course, the pursuer's claim of damages for illegal occupation falls to the ground, the defender, on the other hand, being bound to pay the rent. It was very fairly stated at the debate by the counsel for the pursuer that the pursuer would give the defender credit for any outlay which he could establish as having been made in substantial repairs and meliorations.

“Decree of removing as at Martinmas, Candlemas, and 1st May, all next, has not been pronounced, but the pursuer will be entitled to such decree should he find it necessary to press for it. But I do not anticipate that such a step will be necessary. The case is ordered to the roll that this question, as well as the question of expenses, may be discussed.”

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No. 171. who appears in the written instrument as cautioner, was the principal tenant both of this farm and of another, and his brother David Stevenson was his subtenant in the particular farm in question. That state of matters had continued until 1876 under a written lease for nineteen years. The lease expired at that time, and in 1876, therefore, it was necessary to consider what course the tenant and landlord were to follow. The landlord at that time was Mr Atkins, who is here for his interest, and is in reality a creditor of the real proprietor, but holding, I fancy, a disposition of his life interest, or his interest, whatever it was, and entitled, if he chose, to let the farm. Messrs Bradby & Robins, solicitors, London, acted both for the money-lender and for the proprietor, and were entitled, as such persons are entitled in matters of that sort, to let the lands. It seems that Mr Hugh Rollo acted as agent in Scotland for these parties.

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Now, the farm buildings having gone into disrepair, and there being considerable difficulty and question as to the title of the real and radical proprietor, it became necessary to take some measures to have them repaired, and Mr Rollo's advice was that a new lease for nineteen years was the only way of doing that satisfactorily; and he wrote at the same time to say that he had a very good opinion of David Stevenson, the brother of the former tenant.

The result was, that after some question as to Mr Atkins' power Mr Rollo recommended that a lease should be granted, and granted to Stevenson. It was revised by Mr Stewart, the factor to the Earl of Eglinton, in whose opinion in such matters Mr Rollo had confidence, and there was an obligation inserted in the draft lease which Mr Rollo submitted to the tenants about the improvement of the farm, and the payment of an increased rent. And after all that had been done, Mr Rollo, on the 28th of August 1877, enclosed for the signature of Mr Atkins the lease to Mr Stevenson of the farm of Outerwood. Mr Rollo then concluded that everything was settled, and David Stevenson, the tenant, was in possession of the farm. He had been his brother's subtenant in the prior nineteen years' lease, and by tacit relocation he had possessed from Martinmas 1876, when that lease ran out. Mr Rollo was of opinion then, and expressed himself so in his letters, that that bargain was completed, and the lease executed by David Stevenson as principal tenant and by William Stevenson as cautioner was thus handed to the landlord in August 1877. The Stevensons never heard a word, according to the evidence and according to my opinion, of the objection to that lease or repudiation of it until the month of August 1878, being a full year after the execution of the new lease by them. Then Mr Rollo was asked by the landlord or by the agents of the landlord to repudiate the whole transaction.

Now, that is the feature which I mentioned as being wholly peculiar to this case. I have never seen a case where the landlord, after getting a regularly executed instrument to which his tenant and his cautioner were conclusively bound, and which he could have made effectual at any time, sought at the distance of twelve months to repudiate such an instrument.

I am of opinion in this case that he cannot be allowed to do so.

The law upon this matter is not in the slightest degree either doubtful or matter of rare occurrence or decision. It is perfectly well settled in numberless cases. I refer the parties to an analogous instance, stronger in some respects for the tenants, and weaker in others, and of so recent date as the year 1872—the case of *Forbes v. Wilson* (Feb. 22, 1873, 11 Macph. 454) in this Division. That case was substantially a case of this description. There was an

application by Mr Wilson, a factor, to be allowed to lease a piece of ground that was the subject of an excambion—a current excambion between Mr Forbes of Callander and his neighbour. Mr Wilson wrote a letter to the landlord, Mr Forbes, offering to lease the ground at 15s. per annum. Mr Forbes sent no answer whatever to that, but Mr Wilson, assuming that this implied an acceptance on the part of the landlord, proceeded to execute the work which he intended to do on this piece of ground. Then after the lapse of some time Mr Forbes said—“Oh, there is no lease here. I never consented to the lease. I never heard of it. You may have arranged it with my agent, but I knew nothing about it.” But the Court would not have that from him. Lord Cowan, after recounting the facts of the case, says this—“Mr Wilson entered into possession even before the late Mr Forbes’ death, which occurred soon after the date of the offer referred to, and laid out a large sum of money in forming an avenue to his house of Bantaskine through the strip of ground, the formation of which was the very object of the excambion, the excambied ground being used for that purpose. There was thus fixed on the late Mr Forbes an obligation to give effect to this lease. Nothing is better established than that such a conjunction of circumstances is quite sufficient to constitute a valid and binding contract of lease.” Then, in the same case, Lord Neaves observes—“It may be that Mr Forbes is quite correct in stating that he had no personal knowledge of what had been arranged, and of what operations were going on in respect to the strip of ground in dispute; but I must hold that every proprietor, whether he mismanages his estate or not, is presumed to know all about what goes on in connection with it, and especially what passes with the full knowledge of his own servants.”

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Now, here we have the fact that the landlord has held for a whole year an obligation on his tenant which he could have enforced at any time during that period, and the question is, whether he is entitled at the end of that period to repudiate the counter obligation.

Now, undoubtedly, I should not have been inclined to think that an acceptance on the part of the landlord was to be presumed from the construction of the document itself if the parties had refrained from acting on it—that is to say, if this had been the lease of a subject which David Stevenson did not occupy, and the term of entrance to the land had arrived, and nothing had been done. That might undoubtedly have altered the circumstances. That might have shewn that the tenant was not in any better position than the landlord. But I think there are two grounds on which the tenant here is entitled to continue his possession under the lease. The first is an implied acceptance by the landlord of the terms which had been signed by the tenant and his cautioner, although he himself did not sign the instrument that was in his own hands, which implied acceptance necessarily arises in a year to year tenancy. And I state that separately, because I am by no means prepared to say that any specific kind of *rei interventus* would be required to validate that implied acceptance. It is a question of contract, and if there is ground to infer from the legal actings of one of the parties that he has assented to the contract—the written contract of the other—I am far from being prepared to say that that would not by itself go a long way; but it is unnecessary that I should found any part of my judgment here upon that, because I am quite clear that this contract was acted upon as far as circumstances would permit, and that in the knowledge of the landlord. It is perfectly true that David Stevenson was in possession before the commence-

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ment of this new lease, and therefore there could be no change of possession when he went on under the new arrangement. That is quite true; but there is one question there which is not so much a question of fact as of legal right. Was David Stevenson entitled to attribute his possession from the date when he sent this instrument to the landlord to the lease itself? I am of opinion that he clearly was, and for this plain reason, that he could not help himself in regard to the obligations undertaken. As far as his brother was concerned, he could no longer remain as his subtenant; clearly he could not. And with regard to the landlord he was not entitled to say—"My creditor is my brother, and not you." That would never do. The landlord could have compelled David Stevenson to pay the rent for which he had stipulated; and I have no idea that a landlord can hold a lease over the head of a tenant on these terms with an intention—for I rather think it comes to that—of saying at some time that he may select whether it is more profitable for himself to hold it a concluded bargain or not. But that, however narrowly we scan it, is the position of this case. Mr Bradby, the solicitor in London, admittedly had the power to accept or reject, and he tells us in the plainest terms in his evidence that he retained the lease, which he was bound to have returned at once if it was not to be acted upon, in order to see what would turn up—a profitable view for his client. He says, for instance—"I did not think it proper to cause intimation to be made to the Stevensons that the lease was not to be carried out; it was better to leave it in abeyance, because it might in the end have been arranged that the lease should be carried out." And therefore there never was a decided resolution not to accept the lease until August 1878. I think that is quite conclusive of the case, for if the landlord did not reject the lease he accepted it. There were not two ways of it, and he did not reject. My own opinion is he never intended to reject. I think Mr Bradby acted upon his own opinion that the lease was a good and profitable lease. That he had trouble with his two clients, who were at law together, is perfectly true; but if we go through the correspondence I think there are obvious indications that Bradby was not prepared, at least during that year, to take the responsibility of throwing over the respectable tenant he had got.

I shall close the observations I have to make with a few remarks on the correspondence as bearing on the question of *rei interventus*. On the 4th of January 1876 Mr Rollo writes that the best way would be to see if the Stevensons (both of them) will retake the farm on a new lease, having it re-valued. Bradby writes on the 5th February 1876—"Please do what is right according to the respective obligations of the landlord and tenant, and not expending more than is absolutely necessary." Mr Rollo accordingly submits the matter to Mr Stewart for a re-valuation, which he obtains, and he writes that he has got it on the 5th June 1876. He writes again on the 7th September as to Mr Atkins' (the creditor's) power. There he quotes Mr Kinnear's opinion, and says—"I can see no reason why we should not enter into a treaty with Mr Stevenson for a new lease of the subjects." Did Mr Bradby see any reason why they should not enter into a new lease? Not the least. He writes on the 9th September—"We beg to acknowledge the receipt of your letter of the 7th instant, enclosing copy of statement laid before counsel, and of his opinion thereon, and which seems satisfactory."

Mr Rollo then proceeded to have the draft prepared. I quite grant that he might have no authority, as agent of the parties, to conclude and make leases of

the land, but it is a different matter when it comes to Bradby saying—"Do what you think right and proper;" and Rollo says—"I think it right and proper that there should be a new lease of the subjects;" and Bradby writes in answer—"Your letter is satisfactory." I think a very little adoption by the landlord, or sanction by the landlord in thus acting for him—sanction of things done under an authority of that kind—would be sufficient to validate the transaction and to bind the landlord. And accordingly on the 28th of August Mr Rollo writes—"I now enclose for the signature of Mr Atkins the lease to Mr Stevenson of the farm of The Wood." And there it rests. As I have already said, that, as far as the tenant is concerned, is the lease. No. 171.
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Now, it is quite true that two months thereafter, and more, Mr Bradby, who had made no sign whatever up to that time, writes—"Our client thinks he ought not to sign any new lease pending the litigation which has been commenced against him." It is plain, I think, that Mr Bradby's judgment went the other way; but his client had been troublesome. He does not send the lease back to his tenant, however, but writes to his own agent. And accordingly Mr Rollo says—"I have had a conversation with counsel as to the lease;" and he adds that he will be glad to hear from him. Mr Bradby says on the 31st December—"We conclude that you have not agreed to any renewal." How he could conclude that when he had the lease in his hands it is impossible to comprehend. It is perfectly certain that Bradby had Rollo's letter. To allow him to say he did not read it is to allow him to say what no Court of law can take off his hands. We must hold that he read Mr Rollo's letter, and what that letter told him was that the new lease was sent up for signature. It was in vain for him to write four months after—"We conclude you have not agreed to any renewal." If Mr Rollo had power to conclude or to agree to it, he certainly had done so, and Mr Bradby knew that perfectly well. Then he writes on 9th January—"Mr Atkins intended to have the farm, &c., valued before granting any new lease, and will not grant a lease on the old terms." On the 26th February 1878 he says again—"Our client trusts that he is not committed to a renewal of Mr Stevenson's lease." Thus, in his opinion at all events, Mr Rollo might have committed his client, but he hopes he is not committed. Then he writes, again, on the 9th March 1878—"We shall be glad to hear whether the arrangement is obligatory on our client, as he is not desirous of granting a new lease on the present terms;" and in the next letter, dated May 16th, he says—"Will you be so good as to inform us by return of post what is Mr Stevenson's position. We conclude he is now only a tenant at will, or at most a yearly tenant." Then we have Mr Rollo's letter of 17th May, in which he says—"Stevenson having signed the lease and continued in possession, besides making a payment to account of rent, must be considered as the tenant for the duration of the lease."

Now, I have read these things as pointing the effect on the question of *rei interventus*. Whether the tenant was entitled to attribute possession to the instrument he had signed or not is one thing, but that he did attribute his possession to that instrument—and Mr Bradby for the landlord knew that all the time—was perfectly certain, because these letters of Bradby saying, "I hope there is no bargain with the Stevensons," followed by a letter from Mr Rollo saying, "There is certainly a bargain, and they will hold by it," certiorated Bradby that at all events the tenant and his cautioner were doing what they were entitled to do, and that they were attributing possession to the written instrument. The only other thing I think it necessary to make any remark

No. 171. upon is, that on the 10th of June Bradby says—"With respect to the proposed new lease to Mr Stevenson, our client will not grant it on the old terms, July 15, 1881. should he be disposed to grant it at all. Mr Stevenson should, without delay, Ballantine, &c. v. Stevenson. be made to clearly understand that our client has never agreed to grant him a new lease." Mr Rollo will not stand that, and he says in effect that Mr Bradby was cognisant of all the circumstances, and that long before he let him know the whole facts. After further correspondence upon that matter, in which Mr Rollo explained the position very clearly, Mr Stevenson is informed that there is an objection for the present to sign the lease.

In the last place, there was a payment of rent under the new lease accepted by Mr Rollo, and therefore accepted by the landlord, for Mr Rollo had acted for him. It went into the coffers of the landlord. Bradby at first thought it was not a payment to account of the rent, but there can be no doubt it was.

Now, I am of opinion that as the tenant who signed this lease was himself in possession, he substantially did all that he could—all that a tenant in these circumstances could do—to validate the lease, by acting on the lease, the instrument which he had himself signed. I think the landlord throughout retained, in his own hands, the power of enforcing the lease, which he could only do upon the condition of being a party to it, and merely by refraining from at once throwing it up and returning an obligatory document he is not entitled to say he is not bound.

And I am farther of opinion that the condition of possession necessarily was that the tenant was possessing under the instrument which he had signed as tenant, and that unless he could have got free, if sued by the landlord, on the pretext that he was not—he not knowing whether he had signed it or not—the tenant must be held to have possessed under the lease. The Lord Ordinary thought, and I think rightly thought, that if William Stevenson was the tenant the case would be much more easily disposed of, because it is easier to renew a current lease, and the proof of the renewal is not nearly so stringent as required by law where there is an original lease. That is quite true; but I think the Lord Ordinary has given far too little effect to the fact of the retention of the lease by the landlord—the deliberate and intentional delay on the part of the landlord in making up his mind as to the clear unquestioned view of the tenant, corroborated by Mr Rollo's own statement that the lease was perfectly binding, and that therefore he was possessing under it. I am of opinion that both law and justice require that we should alter this judgment, and that we should give effect to the instrument in question, and assoilzie the tenant from the conclusions of the summons.

LORD YOUNG.—I concur in your Lordship's judgment.

LORD CRAIGHILL.—I also concur in the result at which your Lordship has arrived. As has been stated, the case is one of great importance in the law of landlord and tenant, and while I concur in your Lordship's observation that the case is so far peculiar, inasmuch as the lease that was signed by the tenant was kept by the landlord, for the period of a year, without any intimation to the tenant that he was not to consent to that lease, yet I should not be prepared to hold that this is in truth the principle upon which the present case has to be decided.

The pursuer brings his action against the defender Stevenson on the ground that the defender has no right or title to remain for a single day in possession

of the lands in question. I think it is obvious that there might have been two defences to this action—one that whether or not the defender was entitled to remain for nineteen years from Martinmas 1876, it was plain that, at least for the year that was current when the action was raised—namely, December 1880—he could not be removed, because his brother had been tenant upon a nineteen years' lease down to Martinmas 1876. David Stevenson had been his brother's subtenant from 1867, and he continued in possession after the expiry of the lease for nineteen years at Martinmas 1876. It would be in vain therefore for the pursuer to say that David Stevenson, who had paid rent to the landlord as his brother's subtenant not only prior to Martinmas 1876, but subsequent to that time, in respect of possession down to Martinmas 1876, could be dealt with by the landlord as one who was in possession without any right or title granted by the landlord.

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The main defence, however—and the only one in principle with reference to which there has been any contention between the parties—is this, that at the time of the action the defender was entitled, by virtue of a right which was granted to him, to continue in possession, not only till the close of the year then current, but that he was entitled, in virtue of that which he said was a lease affecting the landlord, and from the obligations of which the landlord could not escape, to remain in possession, as tenant, for a period of nineteen years.

Now, it was incumbent on the defender maintaining that defence to shew that he had a written title, for consent given in any other way than writing would not be a consent sufficient to establish the liability of the defender's antagonist. The defender accordingly produces, as his title, a written lease, which he says was granted to him, and which he signed as tenant, and which his brother signed as his cautioner. He also says that after the lease had been so signed it was transmitted to the landlord and retained by him for a year without any objection being offered to its terms, and more than that, that in the interval between the time when the lease was transmitted to the landlord, and the time when the landlord intimated an intended repudiation, the lease had been acted upon by both parties, and for that reason had become as obligatory against the landlord as it was obligatory against the tenant, in respect the landlord had taken benefit from the lease, and in respect further that the tenant had fulfilled his obligation under the lease.

Now, it is upon the construction of the evidence affecting this question that I have come to the conclusion that the defender is entitled to be assoilzied.

That those who represented the landlord here were in default in the way in which they dealt with the lease after it had been transmitted in August 1877, is, I think, a view in which all will agree. The conduct of the London solicitors who acted as agents for Mr Atkins was not only inconsistent with the ordinary principles and practice of men of business, but, I think, was in the last degree discourteous to those with whom the transaction was to be concluded, and was a course which might have wrought difficulties by which serious results might have been incurred. But I am not prepared to hold that though this lease had been signed for a long time, if nothing had been done by the landlord which could be described as homologation, and if nothing had been done by the tenant which could be described as *rei interventus*, the landlord would have been bound. No doubt it was a strange thing—all the stranger because his conduct might give rise to misapprehension—that he should keep the lease, and should remain as

No. 171. it were uncommitted for this long period. If the tenant was anxious on the subject, as he ought to have been I think, then the course for him to have followed was to have categorically inquired whether the lease had been signed or not, or whether it was to be signed or not, and if he did not receive satisfactory intimation to the effect that the lease was to be accepted, then he could have declared that by his signature to the proposed lease he would not be any longer bound. But the tenant acquiesced in the situation of affairs, and did not put it to the landlord that he should declare his purpose; and so it came to pass that in August 1878, one full year after the lease had been delivered signed by the tenant to the agent of the landlord, there was given to the tenant an intimation that the landlord would not sign the lease which had so long before been transmitted for his signature. If anything had occurred in the interval, it might have been, no doubt, matter of great hardship to the tenant, but the tenant would have been in default as to his own duty for his own protection. If he sent in the lease to be signed by the landlord, it was his duty in a reasonable time to inquire whether that had or had not been done, by which the obligation of the landlord would unquestionably have been established. According to my reading of the authorities this is the true view of the law. It is not mere lapse of time that will suffice to make up an equivalent for the necessity of signing so as to complete the contract. It is the acceptance of the one party, or of both parties, or the performance by them of what is equivalent to acceptance. What is equivalent is this—where one of the parties takes benefit from the proposed contract, and where another party has fulfilled some obligation which was incumbent upon him only if the contract were a completed contract; and if this last is done with the knowledge, and presumably with the consent, of the other party to the contract, then both are bound. When once it is reduced to this, that both parties act as if the contract were completed, then both are bound by that as a completed contract.

Now, with regard to the question whether or not there was that done here which was equivalent, as regards the obligation of the parties, to the signature of both parties to the contract, my own opinion is that the Lord Ordinary has misapprehended the import of the evidence. I agree with him in thinking that in regard to any possession following upon this it could not be said there was possession given to David Stevenson upon his contract. See how the matter stood in August 1877, when the contract was signed by David Stevenson and his brother as cautioner and then sent to the agents in London. At that time the contract had not been concluded; both parties had not concluded it. It was signed by the tenant, who previously to that signature was under no obligation to continue. Then, what passed at the term of Martinmas 1877? It was sent to the landlord for his signature, and if he had intimated he was not to sign he would not have been precluded from giving warning to the tenant to remove at the ensuing term of Martinmas. But at this time Stevenson was in possession under that tacit relocation which had for some time existed. Things were allowed to remain as they were after the expiry of the former lease for nineteen years. The tacit relocation was William's title—his principal title—and it was also David's principal title as subtenant. This was the state of matters down to Martinmas 1876—down to the signing of the lease by the tenant—and also I think, from that time onwards until the time when the landlord became bound. Consequently up till that time, I think that the possession which was enjoyed by the tenant was not possession under the new lease so much as possession attribut-

able to the previous title, namely, the title originally granted, the lease for nineteen years, continued, as it was, by tacit relocation. It is perfectly true that, if the parties became bound by the lease, the lease became the title of possession—aye, and more than that, that retrospectively, as between the parties, the tenants were to be held as having possessed from the term of entry specified in the lease, namely, Martinmas 1876. But it is only after the new lease becomes operative against one of the parties that we find there is a change upon the title of possession deducible from the contract, which has become obligatory by that time.

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Now, the Lord Ordinary finds, in the first place, that there was no change of possession. I agree with the Lord Ordinary in that. But he finds, in the second place, "in point of fact he did not pay the increased rent, at all events until some time after he had been informed that the new lease had been repudiated by Mr Atkins." Now, I think, in the first place, he is wrong when he categorically finds there was no payment of increased rent. I think he is also wrong in saying that if increased rent had been paid at any time, it was not paid until after intimation was given to the tenant that the landlord was not to be held bound by the lease. According to the evidence, which I shall endeavour to look at as briefly as I can, I think there was payment of increased rent—that is, rent, the payment of which was obligatory only if the lease was operative; and I further think that rent was paid by the tenant, and the payment was accepted by the representative of the landlord, Mr Rollo, and by those who represented the landlord in London, namely, Bradby & Robins, before any intimation had been given to the tenant that the landlord was not to be bound.

Your Lordship has gone over the earlier portion of the proof on this matter, and I do not think it is necessary to go over the field which has been already traversed. As regards the parole testimony, there is a conflict between Mr Rollo and Mr Bradby, but I think the testimony of the two is to be reconciled in this way, that Bradby is not speaking for or of all those who may be members of his firm. He is speaking of that only which falls within his own individual knowledge.

If his testimony is to be taken as meaning this, that there was nothing paid in the way of increased rent up till August 1878, then I think he was committing himself to an opinion entirely inconsistent with that which is established in the correspondence which passed betwixt himself and Mr Rollo.

The term when this payment of rent was made as payment of increased rent is reached only inferentially; but I think we have evidence in the letter of 17th of May 1878 that the payment must have been made earlier than that, because on that date Mr Rollo says to Bradby & Robins—"Stevenson having signed the lease and continued in possession, besides making a payment to account of rent, must be considered as the tenant for the duration of the lease." Two things are there set forth, first the signing of the lease, and in the next place the payment of the rent. He does not there say "increased rent," but it is plain it must have been increased rent that was referred to, because unless the payment was connected with the lease which had been signed then the value of the payment as doing that which was required, in the absence of the landlord's signature, to complete the contract would have been very small indeed, and would not have been referred to by Mr Rollo as one of the things which established the tenant's position.

That was on the 17th of May, and what we find resulting from that is this,

No. 171. that on the 1st of August Messrs Bradby & Robins write to Mr Rollo—"We have submitted to our client the correspondence which has passed between you and us relative to the granting of a new lease to Mr Stevenson, and our client instructs us that he declines to grant such lease without having considered and approved of terms. We shall be glad to receive a statement of account and remittance, as our client has again called our attention to the lapse of time since he has had an account or remittance." That is on the 1st of August, and on the 5th of the same month Mr Rollo replies—"I have your note of the 1st, and can only refer to the correspondence as to the terms of the lease with Stevenson. I now enclose my account to 31st December last, and also one bringing it down for the half year to 30th June, in which I have given effect to the increased rents, the balance on hand being £471, 9s. 8d., subject, of course, to the account of expenses in the litigation." Here is a distinct intimation given by Mr Rollo, who represented the landlord, that increased rent had been paid by the tenant, and paid by the tenant to him, and further than that, that credit was given to the landlord in the account which was then transmitted for those increased rents. And what do Bradby & Robins say on the 6th of the same month of August—"With respect to Mr Stevenson's rent, it appears that the increased rent proposed to be paid by him has not really been paid at all. We are glad to find that our client has not therefore been compromised by the acceptance of increased rent as upon a supposed agreement for a new lease. Mr Stevenson should be informed of our client's decision at once." He thought it was high time then. He was alarmed a little that Mr Rollo had made the communication to the effect that an increased rent had been paid, and that the sum for which Mr Rollo rendered the account was a sum for increased rent from Stevenson, but he seems to have satisfied himself somehow that upon a readjustment of the account nothing had been paid on account of increased rent, and so he writes to Mr Rollo in the terms I have mentioned, and very much to his own relief seemingly, for he makes Mr Rollo aware of what would have been the consequence of payment of increased rent—the compromising of the landlord—compromising him in this way, that while he was proposing to repudiate the lease his agent was taking rent at the same time to which he would only be entitled if he was to be bound by the lease which the tenant had signed, and under which he was paying.

Mr Rollo answered on the following day, August 7—"I am favoured with your letter of yesterday's date. You are under a misapprehension in supposing that the increased rent by David Stevenson has not been paid, for although there is an arrear of £12, 4s. 1d. as at 30th June, he has paid for the whole year £258, whereas the old rent as paid by his brother would only have been £250, irrespective of the fact that he is in possession and signed the lease which was sent to you on the 28th of August 1877." And the question is not whether it was much or little. That is not the question at all. The question is, whether there was an amount of rent due and paid, and paid only if the lease was to be looked upon as obligatory both upon landlord and tenant? Mr Rollo accordingly told him that there had been this payment. Then upon the 13th of August Bradby & Robins write to Mr Rollo to this effect,—and I refer to this, because it seems to me to be conclusive, in the first place, of the fact that there had been at that date increased rent paid, and, in the next place, that this had been a fact which, prior to any repudiation, came to the knowledge of Bradby & Robins. What they write on the 13th of August is this—

"We are in receipt of your letter of the 7th inst. We appear to have looked No. 171. at the wrong account in reference to the payment of the increased rent. However, it appears, on carefully looking at the accounts, that no part of the increased rent was received until long after our client had intimated his intention not to grant a new lease, and we had communicated this to you." It is not pretended that the demand had been made before, that any communication should be made to the tenant; Mr Bradby could hardly have written to that effect, because the last sentence of his letter of 6th August is—"Mr Stevenson should be informed of our client's decision at once." So it was the fact, that this payment of increased rent had been made months before. But in this letter of 13th August Mr Bradby does not contemplate that the payment of increased rent, which he now admits had been made, was a payment that was made by the tenant and received by the landlord before there was any intimation to the tenant of an intention to repudiate. No doubt the letters to which your Lordship referred passed between Bradby & Robins and Rollo, but that amounted to no more than this, that the landlord was communicating with himself or his own agents. He might say anything he chose in that way as regarded his intentions; but if these intentions were concealed from the tenant, and if the tenant was left to suppose that he was under an obligation to pay, and paid rent under a sense of this obligation, and if the amount which was paid was received by the landlord just as if it had been due under a lease to which he, the landlord, put his name, the landlord could not turn round on the tenant and say, "I am not bound by this, because I have not signed"; such conduct at once shews that he looked on the contract as concluded; and the landlord, in receiving what was offered, received that which was the same as he would have received had the landlord in the interval put his name to the same paper which the tenant signed.

Upon these grounds I entirely concur with your Lordships, and am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

LORD YOUNG.—I should, if your Lordships will allow me, like to say a word or two on one or two questions that have been referred to in the course of your Lordships' observations, and specially in regard to the position of William Stevenson in this matter, which I think has been somewhat misapprehended by the Lord Ordinary. This action is not directed against William Stevenson at all. He is no party to it, and the lease of 1877—I mean the deed which he signs as a cautioner for his brother David—is ignored and repudiated by the pursuer altogether. And so William Stevenson is not called as a party to any deed, nor is he called as a party possessing the farm by tacit relocation. In short, he is not here. It has been assumed that he possessed by tacit relocation after Martinmas 1876; but he is not here.

Jameson, for the pursuers.—There was an action raised against him in the Sheriff Court, in which he put in defences to the effect that he had no title to the farm. The action was directed against him in the Sheriff Court on the footing that he was still in possession of the farm.

LORD JUSTICE-CLERK.—Is that referred to on the record?

LORD YOUNG.—It has not been noticed here.

LORD JUSTICE-CLERK.—You say he continued to possess?

Jameson.—Yes.

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No. 171. LORD YOUNG.—What is the date of the Sheriff Court action.

July 15, 1881. *Jameson*.—20th September 1880.
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LORD CRAIGHILL.—That is three months before this action?

Jameson.—Yes.

LORD YOUNG.—Then the landlord maintained at that time tacit relocation with William Stevenson, and put an end to it, or brought an action in the Sheriff Court of Ayr to put an end to it, in 1880. Now, it appears to me that there is no room whatever, and never was any room, for tacit relocation with William Stevenson. I quite assume, with your Lordship, that Mr Rollo's agency did not include a power to let on leases. But he was the landlord's agent, and the landlord's agent in this country for the management of his property and to look after his tenants, and his knowledge of the true state of matters at any time was the landlord's knowledge. The landlord was abroad. Perhaps I am speaking with undue strictness; but what I mean is, he was not in Scotland, and, like other sensible landlords, he appointed an agent upon the spot, and although that agent had no power to let leases, he had power to know, and it was his duty to know, the state of matters at each of the farms, and his knowledge was, I do not say for all purposes, but for most purposes, the knowledge of the landlord.

Now, what was the state of matters at this farm? The lease that expired at Martinmas 1876 was indeed to William Stevenson. Ten years before its expiry William sublet the farm to his brother David, and he himself removed from it. Even if there had been no arrangement with Mr Rollo, the landlord's representative, on the subject, I should assume that he was aware of that fact, which he had acted upon for ten years. But he was aware of it. For William, before subletting the farm to David, went to Mr Rollo, and arranged that it should be permitted, and it was accordingly done. William went away, and put David in his place, with Mr Rollo's knowledge and consent. Now, his knowledge was the landlord's knowledge—it must be imputed to the landlord for knowledge in such a matter. And even if he had not the landlord's authority to consent to a sublet—if there was no notice taken of it for ten years—the landlord would be too late to object that his agent had done an unauthorised thing.

Therefore the position of matters as regards the years prior to Martinmas 1876 was that the landlord knew that William was away from the farm. He might have been out of the country, but there was no doubt about his being away from the farm. And there was thus no room whatever for a tacit relocation with him in point of fact. Tacit relocation is an agreement which the law on reasonably good grounds imputes to the parties as a real agreement between them. Mr Hunter, in his well-known work, says:—"Tacit relocation is a presumed renovation of the lease for an ensuing year upon the same terms as those of the preceding year, operating under a lease, either verbal or written, and arising from the implied consent of the parties, when neither the lessor warns the lessee to remove nor the lessee renounces in due time." Now, there is no room for such an implied assent with respect to William, and if, say in 1877 or 1878, the landlord—allowing David to remain, and knowing that William was away—had brought an action against William for the rent on the ground of an implied lease with him—William being then in England or anywhere else—I should say his answer would have been conclusive—"There was no room for tacit relo-

cation with me; you knew I had sublet to my brother, and I was away from the farm, and you could never have imagined for a moment—there was no room to imply it—that there was in respect of my silence a renewed lease by me.”

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But the importance of that is, that putting (as it does put) William out of the case altogether, it brings the question with the landlord to David, who alone is sued here. Now, what was his title to possess after William's lease terminated? William's lease certainly terminated, and was certainly not renewed by tacit relocation, if what I have said be right. Then what was David's title of possession? All parties were alive to the necessity of giving him a title, and accordingly he applied to have a lease granted to him. Mr Rollo, although he had no power to grant such a lease, had the knowledge of his (David's) possession, and knew that he was actually in possession of the farm and cultivating it, and that William was out of possession, and Mr Rollo having that knowledge had the power to communicate these facts to his constituents or to call their attention to them. His knowledge of the state of the facts would be their knowledge. He does direct their attention to the matter, and says—"It will be proper to negotiate a lease with David. He is a very respectable man, and his brother William, who is out of possession, will be cautioner for the rent." Well, the negotiations with David are before the expiry of William's lease, Mr Rollo concludes the negotiations with him subject to the landlord's approval, has the farm valued, gets David to agree to the increased rent according to the valuation, and gets him also to request William to agree to give his obligation as a cautioner. The footing of possession is thus arranged. David possesses upon that footing, or he has no title of possession at all. No doubt Mr Rollo having no power to let, the landlord, when what Mr Rollo had provisionally arranged was brought under his notice, might have said—"No, I don't agree to that, and David must go."

But the landlord was bound to take his course. He was bound to do something if he did mean to repudiate. The thing had been arranged and negotiated provisionally as to the title of a man who had no other title of possession at all, and a landlord is not entitled just to fold his hands and say—"Well, I am just keeping my hand upon the lease and letting things slide to see what comes of it." That is not a position which anybody is entitled to take.

But the importance of any remarks that I have to make, if they be well founded otherwise, is that from the first this lease was David's title of possession—that it is to mistake the case altogether to say that there was a current lease as by tacit relocation with William, for he was a tenant no longer. I think there was no tacit relocation, and that the negotiations between Rollo, as representing the landlord, and David, were upon that footing.

I make these observations in addition to what your Lordship has said, and what Lord Craighill concurs in, as to the grounds of judgment otherwise, which I think are sufficient *per se*.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against; assoilzie the defender from the conclusions of the action, and decern."

J. A. CAMPBELL & LAMOND, C.S.—W. G. L. WINCHESTER, W.S.—Agents.

No. 172.

THOMAS BAIRD, Pursuer.—*Strachan*.
WILLIAM CORNELIUS, Defender.—*Lang*.

July 16, 1881.
Baird v.
Cornelius.

Process—Jury Trial—Abandonment by not proceeding to trial within twelve months of issues being adjusted—Question, Whether A. S., Feb. 16, 1841, sec. 46, is still applicable—13 and 14 Vict. c. 36 (Court of Session Act, 1850), sec. 40.

2D DIVISION.
Lord Fraser.

In this action issues were adjusted on 16th May 1880, and the case was set down for trial on 16th July 1880. On 8th July the order for trial was discharged, by reason of the Lord Ordinary who was to preside at the trial being required to attend the trial of an election petition in the country. No step was taken in the case by either party until 14th July 1881, when the defender gave notice of a motion that in terms of the 46th section of A. S., Feb. 16, 1841,* the pursuer should be held as confessed, in respect he had not proceeded to trial within twelve months from the adjustment of issues, and that decree of absolvitor should be pronounced.

The pursuer then, on 15th July 1881, gave notice of trial for the next Christmas sittings.

The Lord Ordinary, according to the practice under the A. S., Feb. 16, 1841, reported the motion for absolvitor to the Second Division. At the same time the pursuer moved the Court to fix a day for trial in terms of his notice.

The defender maintained that the Act of Sederunt was still in force, notwithstanding the provisions of the Court of Session Act, 1850, as to jury trials, and that it had received effect in *Wilson v. Haggart*,¹ and other cases since the passing of that Act.

LORD JUSTICE-CLERK.—The Act of Sederunt is not applicable in the present case, where the trial was not postponed by the pursuer countermanding his notice for trial, but by reason of the engagements of the Judge. How far the Act of Sederunt may be applicable nowadays in other cases I do not think it necessary to decide. But the 40th section of the Act of 1850 has introduced a considerable change by abolishing the system of leads in jury trials, and giving either party the right to move the Lord Ordinary to appoint a time and place for the trial of the issue. The defender therefore suffers no prejudice by the pursuer's supineness, because he is not now prevented by the pursuer's lead from getting the case enrolled with a view to trial. I am clear that there is no reason why we should not proceed to fix a day for trial.

LORD YOUNG and LORD CRAIGHILL concurred.

JAMES BARTON, S.S.C.—J. & W. C. MURRAY, W.S.—Agents.

No. 173.

LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF EDINBURGH
(Locality of St Cuthbert's), Petitioners.—*Mackay*.

July 18, 1881.
Lord Provost
and Magis-
trates of Edin-
burgh (Lo-
cality of St
Cuthbert's).

Teinds—Process—Citation—A.S., July 5, 1809.—A rectified scheme of the locality of St Cuthbert's parish, Edinburgh, having been approved as

* A. S., Feb. 16, 1841, sec. 46, provides "that if it shall be made to appear to the Court that a party has abandoned his suit, or if the pursuer, or party appointed to stand as pursuer, shall not proceed to trial within twelve months after issues have been finally engrossed and signed, the Court shall proceed therein as in cases in which parties are held as confessed, unless sufficient cause be shewn for the delay to the satisfaction of the Court."

¹ July 15, 1863, 1 Macph. 1115, 35 Scot. Jur. 666.

TEIND COURT.
Teind Clerk.

final, the Lord Ordinary approved of the Auditor's report, and decerned No. 173. for expenses. After extract had been issued it was discovered by the teind-clerk that certain lands belonging to the city of Edinburgh had been entered and localled upon twice under different classifications. The Lord Provost and Magistrates, when this error was discovered, prepared a summons of reduction of the said final decree of locality, and, as preliminary to raising the action, petitioned the Court to dispense with the ordinary mode of citation of the heritors of the parish (1075 in number), on the ground of expense, and instead thereof to allow citation by means of notice given in the kirk by the precentor, written notice on the kirk door, and subsequent newspaper advertisements in the manner prescribed by the Act of Sederunt July 5, 1809, for the raising of actions of augmentation. The expenses of citation in the ordinary way were estimated at about £250, besides agent's fees and other expenses. The Court, in the circumstances, granted the prayer of the petition.

W. WHITE-MILLAR, S.S.C.—Agent.

GEORGE B. M. WYSE, Petitioner.—*Robertson—Darling.*

No. 174.

Mrs E. F. WATSON OR ABBOTT AND ANOTHER, Respondents.—*Jameson.*

Trust—Assumption of new trustees.—In a trust which consisted of three trustees, two of them, as a quorum, executed a deed of assumption of two additional trustees without giving any notice to their co-trustee. *Held* that the deed of assumption was invalid. July 18, 1881.
Lord Provost
and Magis-
trates of Edin-
burgh (Lo-
cality of St
Cuthbert's).

MR GEORGE B. M. WYSE, Mr Cranfield W. J. Abbott, and Dr R. T. 1st Division. Abbott, were, in November 1880, the acting trustees under the settlement of the late Mrs E. Cranfield or Abbott. C.

On 18th and 20th November 1880, Mr Abbott and Dr Abbott, as a majority and quorum of the trustees, executed a deed of assumption, whereby they assumed as additional trustees Mr Abbott's wife, Mrs Elizabeth Fraser Watson or Abbott, and Mr Robert Macdonald, S.S.C., a member of the firm of Boyd, Macdonald, & Co., who acted as law-agents of the trust. No notice of the intention to make the appointment was given to the other trustee, Mr Wyse, and he did not know of it till about six months after. The reason alleged for not giving him notice was that he had refused to sign a transfer of stock which was necessary for the conduct of the trust, and was not on friendly terms with his co-trustee, Mr Abbott.

Mr Abbott resigned his office of trustee on 7th March 1881, and Dr Abbott died on 11th April 1881.

Mr Wyse, who maintained that the assumption of Mrs Abbott and Mr Macdonald was ineffectual, and that he was the sole trustee, presented this petition, praying the Court to find that Mrs Abbott and Mr Macdonald "are not, and never have been, trustees and executors" of the late Mrs Abbott, or otherwise to remove them from their offices; and further, for the appointment of a judicial factor on the trust-estate, and upon such appointment being made, to find that the petitioner was entitled to resign, and that upon his accounting for his intromissions he was entitled to a discharge.

Mrs Abbott and Mr Macdonald lodged answers, in which they stated the disputes which had arisen between Mr Wyse and his co-trustees, and maintained that under the Acts 24 and 25 Vict. c. 84, sec. 1, and 30 and 31 Vict. c. 97, sec. 11, a quorum of trustees were vested with the power of assuming new trustees.

Argued for the petitioner;—Although a quorum of trustees might assume new trustees they were bound to give notice to their co-trustee of their

No. 174. intention to do so. Such a trust act could not be effectually done behind the back of one of the trustees.¹

July 19, 1881.

Wyse v.
Abbott, &c.

LORD PRESIDENT.—In November 1880 the trustees upon this estate consisted of Mr Abbott, Dr Abbott, and Mr Wyse. At that time two of the three, viz Mr Abbott and Dr Abbott, executed a deed by which they assumed two persons as additional trustees, and afterwards Mr Abbott resigned. The result was intended to be that the trust should consist of four persons, viz Mr Abbott's wife, and Mr Macdonald, the law-agent of the trustees, Dr Abbott and Mr Wyse. Dr Abbott died, and thereafter the trust was intended to consist of three persons. Now, all this was brought about by the execution of a deed of assumption in November 1880 without any intimation to Mr Wyse, and without its being brought to his knowledge till six months after. The question we have now to decide is whether this is a good nomination, and I have no doubt that it is bad. No two trustees can do a trust act without consultation with their co-trustee. It is of the essence of the duty of a body of trustees that they should meet and exchange views on the trust affairs. The trustees were bound to see that Mr Wyse had notice of their intention to nominate co-trustees, and an opportunity of stating his views. Their excuse was that he had been disagreeable, and had refused to sign a deed of transfer. That rendered it more imperative that he should have an opportunity of stating his views. The omission of notice, and the want of consultation, are enough to make the appointment illegal. The case cited by Mr Robertson may, with great advantage, be referred to as of universal application. The report bears,—“At advising, it was observed by some of their Lordships, that in the administration of the trust, and especially in the exercise of so important a power as assuming new trustees, it was essential that the utmost fairness and openness should be observed towards each other, that ample time and opportunity for deliberation should be afforded, and that if any concealment or underhand dealing, or any misleading or deception, in order to carry a measure by surprise should appear, the Court, as a Court of equity, would be entitled and bound to control and restrain trustees in such abuse of their powers.” This seems to me directly applicable to the present case. If the consequence be that the trust cannot go on because Mr Wyse is the sole trustee, and he does not desire to act because some of the parties connected with the trust have not confidence in him, the only remedy seems to be the appointment of a judicial factor. It is suggested that such an appointment would be a heavy burden on the trust. That may be avoided if the parties can agree; but failing their agreeing, I fear there is no other course but the appointment of a factor.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT pronounced this interlocutor:—“Find that the respondents have not been validly assumed as trustees under the trust-disposition and settlement of the deceased Mrs E. Cranfield or Abbott; nominate and appoint Mr Robert Cameron Cowan, C.A., to be judicial factor on the estate of the said deceased Mrs E. Cranfield or Abbott, with the usual powers, he finding caution before extract, and decern: Find the respondents liable in expenses hitherto incurred by the petitioner, allow an account,” &c.

H. B. & F. J. DEWAR, W.S.—J. H. JAMESON, W.S.—Agents.

¹ Reid v. Maxwell, Feb. 6, 1852, 14 D. 449, 23 Scot. Jur. 606.

DAVID P. MACDONALD, Petitioner.—*C. S. Dickson.*
 MRS MARY HUME OR MACDONALD, Respondent.—*Baxter.*

No. 175.

July 19, 1881.

Process—Petition—Restriction of Aliment.—It is competent for a person *Macdonald v. Macdonald.* against whom a decree for aliment has been pronounced to present a petition praying the Court to restrict the amount of future aliment.

THIS was a petition by David P. Macdonald, tailor, Glasgow. On 1st 1st Division. September 1876 his wife had obtained decree of separation and aliment B.
 at the rate of £40 a-year.

The petitioner stated that his business was in a depressed condition, and that he was unable to pay aliment at the rate of £40, and that, in respect of his failure to pay, his wife had caused him to be imprisoned in Glasgow prison.

The prayer of his petition was "to allow the petitioner a proof of his averments if that should be found necessary, and to restrict the aliment to be paid by the petitioner to his said wife to £15 per annum as from and after Whitsunday last, and to find that the petitioner is only bound to pay aliment at said rate as from and after Whitsunday last, and to grant warrant for liberating the petitioner, reserving right to the petitioner or his said wife to apply to the Court to alter the rate of aliment if any change of circumstance should supervene; and to find the said Mrs M. Hume or Macdonald liable in expenses in the event of her appearing to oppose the prayer hereof; or otherwise to order the Deputy Clerk Register, or other custodier thereof, to transmit the process in said action of separation to the clerk at Lord Rutherford Clark's bar, and to remit this petition to Lord Rutherford Clark to proceed further herein as may be just, and meantime to grant interim warrant of liberation, and to decern, or to do otherwise," &c.

Mrs Macdonald lodged answers, and stated that her husband was able to pay aliment at the rate of £40.

LORD PRESIDENT.—At first I had some doubts as to the competency of the present proceeding. It is undoubtedly the practice to proceed by way of suspension of a decree for aliment, but in the old case of *Maclachlan v. Campbell*, May 25, 1809, F.C., the question was raised whether a petition was not the proper form. In that case a wife used caption against her husband for arrears of aliment. He presented a bill of suspension, which was refused on the merits. The report bears,—“The petitioner likewise pleaded that his funds had turned out much less than was supposed at the time of modifying the aliment, and that he was unable to pay it. The Court did not think that that appeared from his statement, and, besides, were of opinion that it could not competently be pleaded as a ground of suspension to an ordinary in the Bill-Chamber, but that it should have been brought forward by a petition to the whole Court, which it was open to the suspender to give in, since the decree of aliment was only *in hoc statu*.” Every decree for aliment is only granted *in hoc statu*. I am therefore happy to come to the conclusion that the present petition is a competent proceeding.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE respondent having consented to interim liberation on caution the following interlocutor was pronounced:—“In respect of the bond of caution now lodged, grant interim liberation of the petitioner, as craved, and decern; and remit to John C. Reid to examine into the circumstances of the parties, and report.”

J. & J. ROSS, W.S.—ANDREW FLEMING, S.S.C.—Agents.

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Boswell v.
Magistrates of
Edinburgh.

ALEXANDER BOSWELL Junior, Appellant.—*Pearson—Dickson.*
THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF
EDINBURGH, Respondents.—*Traegner—Mackay.*

Property, restraints on use of—Questions between proprietors of flats—Servitude—Light and air.—A lot of building ground, extending from the street in front to a meuse lane at the back, having been feued out, the feuar erected on it a tenement, consisting of a main-door house and two flats and attics opening from the common stair. He afterwards sold part of the house, “consisting of the ground and street storeys of the tenement lately erected” by him, “with the area at the back of the said tenement,” &c. to one purchaser, and the common stair houses, with certain rights in the cellarage and front area, but with no express right to or in “the area at the back of the said tenement,” to others.

The proprietor of the street and sunk floor, having converted them into a shop, proposed to extend his premises by building a saloon the height of his street floor terminating in a building at the back facing the meuse lane, and rising to a height of 19 feet 9 inches at the ridge of the roof, and 8 feet 9 inches at the wall head above the level of the top of his street floor. This building was to be brought within 21 feet 6 inches of the back wall of the street floor and of the common stair floors above.

Held that there was no limitation on the right of the proprietor of the street floor and back area, and, as no injurious diminution of light and air to the flats above was to be apprehended, warrant granted subject to conditions.

2D DIVISION.
Dean of Guild
Court, Edin-
burgh.
I.

ALEXANDER BOSWELL junior, portmanteau and trunk manufacturer, was proprietor of the street and sunk flat of the tenement No. 8 Hanover Street, Edinburgh, and of the back ground and buildings behind the same. The Magistrates of Edinburgh were proprietors of the second, third, and attic storeys, being the remainder of the same tenement, access to which was obtained by what was formerly the common stair No. 10 Hanover Street. The second storey was occupied as the Lands Valuation Office of the City of Edinburgh.

The ground on which these whole subjects were built had been feued out in 1784 by the city of Edinburgh to John Sutter, and in 1786 the Magistrates granted to his trustees a feu-disposition, in which it was described as “All and Whole the before-mentioned piece of ground within the extended royalty of the city of Edinburgh, on the west front line of Hanover Street, measuring 47 feet 8 inches in front, and marked on the feuing-plan letters I I, whereon there is now built a house consisting of four storeys and garrets, bounded, the said piece of ground and house, on the north by the said Richard Cockburn’s feu, on the south by a house built by the said Claud Cleghorn, on the east by Hanover Street, and on the west by the meuse lane, with the cellarage now made on the front of the said house and communication with the common sewers.”

The tenement built by Sutter was originally a common stair tenement of the kind ordinarily met with in Edinburgh. It consisted of a street and sunk storey forming the main-door house No. 8 Hanover Street, and of the second, third, and attic storeys, each storey forming a separate house, and opening off the common stair No. 10 Hanover Street.

Sutter’s trustees sold the main-door house and the three flats above to four separate purchasers.

The main-door house, being the subjects afterwards acquired by Alexander Boswell junior, were described as “All and Haill that house presently possessed by the said Andrew Blane, consisting of the ground and street storeys of the tenement lately erected by the said deceased John Sutter on the piece of ground after-mentioned, with the area at the back

of the said tenement, and pump-well therein, together with the sunk area, and three cellars under the pavement opposite to the front of the said tenement, to the south of the division wall in said area, communication with the common sewers, free access to the roof by the common stair and common service window, and whole pertinents, the said Andrew Blane and his foresaids being always bound to maintain and uphold upon their own expenses the arches of the cellarage and communication with the common sewers, and also the pavement covering the same and railing thereon; but they are to have no concern with upholding the roof, common stair, or service window above-mentioned, which buildings hereby disposed and others were lately erected and formed by the said deceased John Sutter on that piece of ground," &c.

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The second storey was described as "All and Whole that lodging or dwelling-house, consisting of four fire-rooms, kitchen, lobby, pantry, closets, and other conveniences, being the third storey or second storey above the ground flat of that tenement of land on the west side of South Hanover Street, lately built by the said John Sutter upon that piece of ground," &c., "together with the northmost cellar of the three cellars in the north division below the pavement in the front area of the said tenement, with an equal share and privilege of the office-house to be built in the said front area below the fore stair leading to the common stair of the said tenement, along with the two upper flats thereof, to which the possessor of each flat shall have a key, and which is to be built and upheld at their joint expense, and with the benefit of the common water-pipe in the said front area, and communication with the common sewers, and also the pavement covering the same, with free ish and entry to the said lodging, and access by the common passage or stair to the roof and chimney-tops for the purpose of sweeping the vents or other necessary occasions; and also with free ish and entry to the said cellar, water-pipe, and office-house by the common stair of said tenement, and by the stair leading to the sunk area in the front thereof: The said Robert Pitcairn and his foresaids to be at the whole expense of upholding the arch of the said cellar, and at the joint and proportional expense effeiring to his feu-duty with the other proprietors of the said tenement in upholding the water-pipe and the communication with the common sewers, the pavement, common stair, and iron railing on the front of said tenement, but to be at no part of the expense of upholding the roof of the said tenement, which is to be upheld and supported by the proprietor of the garret storey of said tenement."

The third and attic storeys were conveyed in similar terms *mutatis mutandis*. And all the common stair portion of the buildings was subsequently acquired by the Magistrates as above-mentioned.

Boswell, who had converted the main-door part of the tenement into a shop, proposed, in 1879, to extend his premises by building out a saloon to the back the full height of his street floor, and terminating in a building of considerable height fronting the meuse lane, which was the boundary of the back ground to the west.

The proposed erections were objected to by the Magistrates as proprietors of the flats, and the Dean of Guild refused his warrant. The case was taken by appeal to the Second Division, who sustained the Dean of Guild's judgment. The nature of the buildings then proposed will be best seen from a report made by the Dean of Guild on 6th July 1880 under a remit by the Second Division,—

"The building in question is proposed to be erected only about 21 feet distant from the windows of the property of the respondents, the Lord Provost, Magistrates, and Council, is to extend along the whole

No. 176. length of the said property, and is to be built to the height (measuring to the eaves) of 18 feet above the level of the sills of the windows of the lowest flat of the said respondents' property, which is occupied as the Lands Valuation Office, and to the height of 6 feet above the level of the sills of the windows of the respondents' flat immediately above the said offices.

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"A back building similar to that proposed to be erected by the appellant has been erected on the back ground immediately to the north of his back ground. This building is of the same height as the appellant's proposed building, and is the same distance from the back windows of the tenement in front of it as the appellant's proposed erection is from the said respondents' property.

"The Court inspected the back rooms in the said front tenement which are on the same level as the Lands Valuation Offices, and found that the said back building materially interferes with the access of light thereto.

"On these grounds the Dean of Guild and his Council have to report that the appellant's proposed erection on his back ground will have the effect of materially interfering with access of light to the said respondents' property, and that the said lowest flat of the respondents' property in particular will be materially affected thereby."

Boswell having modified his plans, again applied in December 1880 to the Dean of Guild for his warrant.

His application was again opposed by the Magistrates, on the ground, as stated in their pleas—1. The petitioner is not entitled to the warrant craved, in respect (1) that his proposed alterations are not sanctioned by the petitioner's titles, and are an infringement of the rights of the respondents as conterminous proprietors; (2) that the height to which the petitioner intends to increase his property exceeds the limits prescribed by the Police Act of 1879. 2. The petitioner is not entitled after the decision in the previous application to have warrant granted to increase the height of the buildings on the back ground to an extent which will interfere materially with the access of light to the respondents' property; and as the plans now proposed would have that effect the present application ought to be refused. 3. *Separatim*, in no view is the petitioner entitled to build on the back area, in which the proprietors of the main or front tenement have an interest, to a greater height than the level of his own property.

The proposed buildings are thus described in the Dean of Guild's interlocutor:—"On the back area there is proposed to be built by the petitioner, immediately behind the petitioner's street storey, a saloon, extending backwards to the meuse lane; at a distance of 21 feet 6 inches from the back wall of the petitioner's street flat, and the flat belonging to the City of Edinburgh, there is to be erected over the said saloon an addition of a first floor and attic floor 19 feet 9 inches higher at the ridge of the roof and 8 feet 9 inches higher at the wall head than the top of the petitioner's street storey; the saloon, in so far as between the main tenement and the said additional floors, is to be lighted by a cupola, rising about 3 feet above the petitioner's street flat; the sill of the back windows of the respondent's said flat is about 3 feet above the petitioner's flat, and the windows are 7 feet in height."

The Dean of Guild, on 17th February 1881, pronounced this interlocutor:—"Finds . . . that, in the opinion of the Court, the proposed new buildings would not materially interfere with the light or air of the respondents' said flat; that the proposed buildings being of a greater height than the street storey belonging to the petitioner, the said respondents would be thereby prevented from extending their flat to the back above the saloon proposed to be erected by the petitioner; that these build-

ings would thus encroach on the rights of the respondents as proprietors of said flat; that the petitioner is not entitled to build on the back area to a height which would infringe on the rights of the proprietors of the upper flats: Therefore, to this effect, sustains the defences for the city of Edinburgh: Refuses the application," &c.

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Boswell again appealed to the Court of Session.

After hearing counsel¹ the Second Division, before further answer, "remitted to Mr John Burnet, architect in Glasgow, to examine the premises in question; and, with reference to the points in controversy in this process, to report his opinion whether the operations proposed will injure the light and air of the building of the respondents above that of the appellant, or affect the value of the same, and to accompany his report with any remarks he may consider likely to be of assistance to the Court."

Mr Burnet reported that he was of opinion that "the building operations proposed would injure the light and air of the buildings of the respondents above that of the appellant, but to so inappreciable an extent as not to affect the value of the same."*

¹ *Authorities referred to.*—Stewart v. Blackwood, Feb. 3, 1829, 7 S. 362; Scott v. Commissioners of Police of Dundee, Dec. 18, 1841, 4 D. 292, 14 Scot. Jur. 121; Urquhart v. Melville, Dec. 22, 1853, 16 D. 307, 26 Scot. Jur. 137; Cochrane v. Ewart, Jan. 13, 1860, 22 D. 358, 32 Scot. Jur. 160, March 25, 1861, 23 D. (H. L.) 3, 4 Macq. 117, 33 Scot. Jur. 435; Gow's Trustees v. Mealls, May 28, 1875, *ante*, vol. ii., 729; Johnston v. White, May 18, 1877, *ante*, vol. iv., p. 721; Barclay v. McEwen, May 21, 1880, *ante*, vol. vii., 792; Heron v. Gray, Nov. 27, 1880, *supra*, p. 155.

* Mr Burnet accompanied his report with this note:—"1. The proposed back buildings would undoubtedly diminish the light and air of the respondents' property; but the degree of interference would be so slight, that, in my opinion, the market value of the property would not be lowered. That value depends in a great measure upon the situation being in the centre of the business portion of the city of Edinburgh. In the event of a sale after the erection of the back buildings, should these be authorised, intending purchasers would not, I think, look upon the property as depreciated by diminution of light and air, as I consider the property would be possessed of both these essentials in sufficient quantity for all practical purposes.

"2. Such a building stance in Glasgow—that is, a steading stretching from a street to a back lane—is usually held under a single not a several ownership. In practice the whole plot from back to front is built over to a uniform height, but for the preservation of light and air a well or court is usually formed about the middle of the property, and the walls around this well or court are mainly of glass. The open space proposed to be allowed in the present case is larger relatively than is left open in Glasgow, while the space for light and air usually allowed in Glasgow is, as a rule, found to be quite ample.

"3. While the above is my opinion, I venture to make the following suggestions, as invited by the Court, with the view to minimising interference with the amenity of the respondents' property, and lessening the chance of injury to it from fire or housebreaking, through the erection of the back buildings, viz.—(1) There should be no windows in the wall of the proposed back buildings, facing the back windows of the respondents' property. (2) That wall should be entirely faced with white enamelled bricks. (3) The roof of the saloon, with its skylights or cupolas, should be placed no higher than the level of the lowest floor of the respondents' property. (4) No skylight or cupola should be placed in the roof of the saloon nearer the back wall of the respondents' property than 6 feet. (5) The roof of the saloon should be constructed of concrete, for prevention of fire contagion, and laid with white coloured tiles for light and general amenity. (6) The ceiling of the ground-floor of the appellant's back building—that is, the portion facing the lane—might be made lower, say 4

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THE COURT having considered Mr Burnet's report, and being of opinion that there was no limitation to the appellant's right in the area of back ground in question, and being satisfied that there would be no substantial interference with the light and air of the flats above by the operations proposed, pronounced this interlocutor:—"Recall the interlocutor of the Dean of Guild of 17th February 1881 appealed against: Grant warrant to the appellant (petitioner) to erect saloons and workshops as craved, subject to the alterations on the plans suggested by the reporter, and remit to the reporter to see the alterations carried into effect, and to report: Find no expenses due to either party, and decern."

T. J. GORDON, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—PATERSON, CAMERON, & Co., S.S.C.—Agents.

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Davidson v.
Dalziel, &c.

JOHN DAVIDSON, Complainer.—*Trayner—R. V. Campbell.*
GEORGE DALZIEL AND ANOTHER (Hewetson's Trustees).—*D.-F. Kinnear—Gloag.*

Sale of Heritage—Objections to Title—Right in Security—Personal or Real—Real Burden.—By his settlement T M disposed to his wife in liferent his heritable property, and gave her "the disposal, as she may direct, of the sum of £125 sterling, to be paid twelve months after her death, out of or from the house now occupied by K," being a part of his heritage. He then disposed this house and another adjoining it, after his own and his wife's death, to his brother G M, or to his heirs after him, and added, "but this allotment is subject to the payment by the said G M or his heirs, in twelve months after the death of my wife, of the sum of £300 sterling, to be disposed of as follows, viz.—£125 sterling as aforesaid to be willed or disposed of by my wife," and the rest in small legacies.

G M having died, another brother, A M, served heir to him, and made up a title proceeding on his service and T M's settlement. The widow was also in-
left for her liferent.

During the widow's life A M borrowed money on the fee of the property, and, becoming insolvent, the subjects were sold by the creditors under the powers in their bond. The articles of roup obliged the exposers to deliver a formal and valid disposition of the subjects under the burden of the widow's liferent, and under the burdens, conditions, provisions, &c., specified, contained, or referred to therein, or in the title-deeds thereof, and stipulated that "in respect the exposers are not aware of any incumbrances affecting the said subjects," except their own bond, which they were bound to clear off, "they, the exposers, shall not be bound to furnish any certificate of searches of incumbrances."

A list of titles was appended to the articles of roup, and included the settlement of T M.

The purchaser refused to pay the price until the subjects were cleared of the burden of £300 payable out of them in terms of T M's settlement.

Held (dub. Lord Justice-Clerk) that the purchaser, having bargained to take the subjects with any burdens which the title-deeds laid upon them, and having had the opportunity of examining the title-deeds, including the settlement of T M, was bound to accept the title tendered.

Opinion (per Lord Justice-Clerk and Lord Craighill) that the burden of £300 imposed by the settlement of T M was not a real burden, but a personal obligation merely on G M and his heirs.

or 5 feet, as this height can readily be spared from the very high ceiling proposed. The height of the building itself would thus be reduced to a considerable extent, without detriment to the appellant, and to the advantage of the respondents' property in substantially lessening the height of the building opposite their back windows."

THE late Thomas M'Math was proprietor of certain subjects in the No. 177. village of Penpont, Dumfriesshire.

In 1844 Thomas M'Math, and his wife Mrs Helen Crawford or M'Math, executed a mutual disposition and settlement, whereby Thomas M'Math conveyed his whole estate to his wife in the event of her survivance. After the death of Thomas M'Math, his widow, in 1869, expedited a notarial instrument on the mutual disposition, and was infeft in the heritable subjects in Penpont, but this infeftment was reduced in 1873, so far as necessary to give effect to the provisions in right of which Alexander M'Math then was under another deed executed by Thomas M'Math in 1865, to be immediately mentioned, on the ground that the mutual disposition had been thereby revoked.

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2d DIVISION.
Ld. Curriehill
I.

In 1865 Thomas M'Math executed a *mortis causa* disposition and settlement, whereby, in the first place, he gave, granted, assigned, and disposed to his wife in the event of her survivance—" (3) A liferent of all the property possessed by me in the village of Penpont, Dumfriesshire; and (4) the disposal, as she may direct, of the sum of £125 sterling, to be paid twelve months after her death, out of or from the house now occupied by James Hunter Kellock, merchant, Penpont, Dumfriesshire." And, in the second place, he bequeathed or gave, granted, assigned, and disposed, after the death of his wife as aforesaid, " to George M'Math, my brother, or to his heirs after him, the house and shop now occupied by the said James Hunter Kellock in Penpont, Dumfriesshire, together with the house next to it, now occupied by John Lorimer, . . . but this allotment is subject to the payment by the said George M'Math or his heirs, in twelve months after the death of my wife, of the sum of £300 sterling, to be disposed of as follows, viz., £125 sterling as aforesaid, to be willed or disposed of by my wife; £60 sterling to my brother Alexander M'Math, or to his heirs after him" (and other small legacies, making up in all £300).

George M'Math, mentioned in this settlement, died shortly after his brother Thomas, and Alexander M'Math, another brother, the pursuer of the above-mentioned reduction, thereupon served himself heir to George M'Math, and made up a title to the subjects in Penpont by notarial instrument proceeding on the service and Thomas M'Math's settlement. Alexander M'Math afterwards granted bonds and dispositions in security over the subjects in favour of Thomas Hewetson.

In 1879, Alexander M'Math having become insolvent, the trustees of Thomas Hewetson brought the subjects in Penpont to sale under the powers contained in their bonds, and they were purchased by John Davidson.

The articles of roup contained the following clauses :—" *Sexto*. Upon payment of the price, the exposers oblige themselves to grant and deliver a formal and valid disposition of the said subjects and others to the purchaser and his heirs or assignees, under the burden of the liferent of the said Mrs Helen Crawford or M'Math, and under the burdens, conditions, provisions, restrictions, reservations, and declarations specified and contained or referred to herein, or in the title-deeds thereof, but excepting from such warrandice, tacks, and rights of possession of the tenants of said subjects and others, and said liferent, and containing a clause of entry as on the death of the said Mrs Helen Crawford or M'Math, and shall contain a clause binding the granter of the said bonds and dispositions in security, and his heirs in absolute warrandice of such disposition, and . . . shall also contain a clause of warrandice on the part of the exposers from fact and deed only, and likewise all other necessary clauses. . . . And in respect the exposers are not aware of any incumbrances affecting the said subjects and others, except the foresaid bonds and dispositions in security,

No. 177. and which incumbrances the exposers bind and oblige themselves to purge, they, the exposers, shall not be bound to furnish any certificate of searches of incumbrances. . . . *Undecimo*.—Questions between the exposers and any purchasers or offerer concerning the import of these articles, or the implement thereof, are hereby submitted to the amicable decision of Thomas Brisbane Anderson, Esquire, solicitor, Dumfries; whom failing, of an arbiter to be named by the Sheriff of the county of Dumfries, on an application to him for that purpose by any party interested, and that as sole arbiter. . . .”

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A list of title-deeds, including the settlement of Thomas M'Math, was appended to the articles of roup, and the titles themselves were borrowed by Davidson's agent prior to the sale.

Davidson refused to implement the purchase until the record was purged of Mrs M'Math's infetment so far as not reduced, and of the burden of £300 imposed on the subjects by the settlement of Thomas M'Math.

The exposers, Hewetson's trustees, had recourse to the arbiter, but the purchaser objected to his assuming the reference, on the ground that the point in dispute was not within the reference. The arbiter, in absence of the purchaser, decided the question in favour of the exposers, who thereupon expedite a charge against the purchaser under the extract registered articles of roup and relative decret-arbitral.

Davidson suspended.

He pleaded;—1. The complainer being entitled to a conveyance of the subjects sold, and the title thereto being *ex facie* of the record in Mrs M'Math, the arbiter had no power to order the complainer to take a title *a non domino*, and his decree is invalid. 2. The respondents being bound to clear the subjects and purge the record before insisting on payment of the price, and the record shewing incumbrances which the chargers refuse to have removed or discharged, the prayer of this note should be granted.

The respondents, Hewetson's trustees, pleaded;—1. The action is excluded by the clause of reference in the articles of roup, and by the decret-arbitral following thereon. 3. In any view the question whether the complainer is bound to implement his purchase falls to be determined by the arbiter under the said clause of reference. 4. In respect the purchaser bound himself by the foresaid articles of roup to be satisfied with the titles of the exposers, and not to object thereto, he is not entitled now to refuse to implement the purchase. 5. In respect the title of the sellers is not subject to any valid objection, the suspension falls to be dismissed.

The Lord Ordinary, on 2d June 1881, pronounced this interlocutor:—“ Finds (1) that by the 11th head of the articles of roup there are referred to the decision of the arbiter therein named all questions between the respondents and complainer as to the import of the articles of roup and the implement thereof, and that the present question relates to the import and implement of said articles, and that this suspension is barred by said arbitration clause: Finds (2), and separately, that by the 6th head of said articles of roup the subjects were exposed by the respondents and purchased by the complainer under the burden of the liferent of Mrs M'Math, and under the 'burdens, conditions, provisions, restrictions, reservations, and declarations specified and contained or referred to herein, or in the title-deeds thereof'; that, on the assumption that the burden referred to in the note of suspension is a real burden on the subjects exposed, the said burden appears in the title-deeds exhibited with the articles of roup; that the complainer must be held to have purchased the subjects subject to said burden; and that on this ground also the present

suspension is barred: Therefore repels the reasons of suspension: Finds the charge orderly proceeded, and decerns: Finds the complainer liable in expenses," &c.

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The defender reclaimed.¹

It was intimated at the bar that the respondents would not press their pleas founded on the clause of arbitration.

LORD JUSTICE-CLERK.—This is a suspension of a charge under extract registered articles of roup of a small property in the village of Penpont, Dumfriesshire, and relative decreet-arbitral. Several pleas have been stated, and some of them not without importance. The suspension is opposed, on the ground that the articles of roup contained an arbitration clause, and that the question raised by the complainer, namely, whether the will of Thomas M'Math laid the subject of sale under a real burden, fell within the reference. The respondents have gone before the arbiter and obtained a decision, *ex parte* it is true, in their favour, to the effect that there was no real burden created by Thomas M'Math's will, and on that decision they took their stand. The Lord Ordinary sustained that defence as the first ground of his judgment. But, in the course of the argument, the contention was abandoned, and the parties have desired our judgment on the merits of the question between them, just as if there had been no reference.

The second and alternative ground on which the Lord Ordinary proceeds is that by the 6th head of the articles of roup the subjects were purchased under the "burdens, conditions, provisions, restrictions, reservations, and declarations specified and contained or referred to herein, or in the title-deeds thereof," and that, therefore, Thomas M'Math's will being among the title-deeds exhibited, the complainer must be held to have purchased under the burden created by Thomas M'Math's will, provided it be a real burden, and was not entitled to withhold the price till the title was cleared.

As the question on the submission is withdrawn, the only matter which remains is whether there was a real burden created by Thomas M'Math's will of which the seller was bound to clear the title. The state of circumstances in which the question arises is complicated. By his settlement Thomas M'Math gave his widow a liferent of his heritable property in Penpont, and the disposal of £125 to be paid out of the house at Penpont occupied by James Hunter Kellock, and then, secondly, he gave the fee of his property at Penpont to his brother George M'Math, subject to the payment, within twelve months from the death of his wife, of the sum of £300, consisting of the £125 which was to be at the disposal of his wife, and of a number of small legacies.

That burden of £300 was made real, so far as it could be, by the notarial instrument of 1877 following upon Thomas M'Math's settlement, and in favour of Alexander M'Math, the heir of George M'Math.

The sellers, who are creditors of this Alexander M'Math, under bonds and

¹ Allan v. Cameron's Creditors, 1780, M. 10,265; Martin v. Paterson, 1808, M. App. Personal and Real, No. 5; Macdonald, &c. v. Place, Feb. 24, 1821, Hume, 544; M'Intyre v. Masterton, Feb. 3, 1824, F. C.; Ralston v. Farquharson, June 17, 1830, 8 S. 927; Tailors of Aberdeen v. Coutts, Aug. 3, 1840, 1 Rob. App. 296; Magistrates of Arbroath v. Dickson, March 19, 1872, 10 Macph. 630, 44 Scot. Jur., 347; Stewart's Trustees v. Hart, Dec. 2, 1875, *ante*, vol. iii. p. 192; Morton v. Smith, Nov. 8, 1877, *ante*, vol. v. p. 83; Ball's Prin., sec. 919; Manzie's Lectures, 3d ed., pp. 843 and 883.

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dispositions in security, exposed the property, subject to Mrs M'Math's liferent, under articles of roup, in which they state that as they are "not aware of any incumbrances affecting the said subjects and others, except the foresaid bonds and dispositions in security, and which incumbrances the exposers bind and oblige themselves to purge, they, the exposers, shall not be bound to furnish any certificate of searches of incumbrances." And they now say that the clause just read, coupled with the express stipulation that the subjects were exposed under all the burdens, conditions, &c., specified and contained or referred to in the title-deeds, put the purchaser on his inquiry, and bound him to ascertain for himself what burdens affected the subjects, and relieves them of any obligation to purge the record of any such burden which may exist.

Now, there is no doubt that a man may expose his property for sale under any condition he pleases, provided that condition is legal and clearly expressed, and if a purchaser purchases on the footing on which the exposure is made, he is bound, and cannot complain. If a property was exposed on the express condition that the purchaser shall take his chance of the title, I am not prepared to say that that would not be a legal stipulation. But then it must be clearly expressed. Here there is great obscurity. No doubt the bonds and dispositions in security under which the property was exposed were the only burdens of that class which affected the property. But it is clear, first, that the exposers were aware of the settlement of Thomas M'Math, and of the construction which had been or might be put on it; and, second, that the purchaser was also aware of the existence and terms of that will, though his attention was not expressly called to the argument which might be founded on it.

I might have had great difficulty on the point whether the exposers, being thus aware of the supposed burden, were entitled to state that they were not aware of any encumbrances affecting the subjects other than their own bonds, and were not bound to call the purchaser's attention to this supposed burden. I should have preferred to have found that they did call the attention of the purchaser to it. But I feel myself relieved from the necessity of determining that point, because I am clear that there was no real burden created by Thomas M'Math's settlement. That settlement was a bequest of the fee of this heritable subject to a certain person, with an obligation on him, which never was more than personal, to pay certain legacies, including this sum of £125, of which the testator's widow had the power of appointment. It is impossible to maintain that all these legacies are constituted real burdens, and though the power of appointment is given in somewhat different terms, I am not able to distinguish between it and the legacies in this matter. I am entirely of the opinion expressed by the Lord President in the case of the *Magistrates of Arbroath* (10 Macph. 635). It may be that the precise words "real burden" need not be used if equivalent words are used, but that there must be equivalent words appears to me to be indispensable if the burden is to be one to which singular successors are to be liable. Apart from the point that this is a contingent burden only, conditional upon the exercise of a power by the testator's widow, which she may never exercise, which in itself creates some difficulty, I am of opinion that there is no constitution of a real burden by the settlement of Thomas M'Math. The words used are wholly insufficient for that purpose. The case of the *Tailors of Aberdeen v. Coutts* (1 Rob. App. 296) does not in the least conflict with this view. It related to a perfectly different matter, to conditions or restrictions affecting the land itself, and not to payments out of

the land. But, notwithstanding that important decision, the law remains that to constitute a money payment a real burden on land words must be used to express that it is real, and as there are none such here I am of opinion that there is no ground for this suspension.

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LORD YOUNG.—The case has been presented to the Court rather clumsily. The charge was one on articles of roup and a relative decreet-arbitral, and it was sought to be suspended on the ground that the arbiter had no jurisdiction, because the point in dispute was not the subject-matter of the reference. The Lord Ordinary thought that the arbiter had jurisdiction, but he also thought the arbiter's decision was right. We have had both points argued to us, but after the argument had gone a certain way the respondents said they would abandon the arbiter's decision, and both parties agreed to take our judgment on the merits, as if there had been no reference, and the argument was concluded accordingly. As I understand the present position of matters, if we are satisfied that on the merits the arbiter's decision was right, then we must find the charge orderly proceeded.

Now, I am of opinion that the arbiter did decide rightly—not that there was no real burden here, because neither he nor I can determine that in the absence of Mrs M'Math and others interested—but that the suspender took the risk of such burdens as there might be as a condition of his bargain. In this process, to which Mrs M'Math is not a party, we cannot decide what are Mrs M'Math's rights under her husband's will. We must take the case on the same footing as the arbiter did, that there may be a real burden, and I am of opinion that the suspender bought with express notice of Thomas M'Math's will and its whole contents, and that with whatever burdens it saddled the property he deliberately took it. With notice of this will he bargained to take the subjects with any burdens which the title-deeds laid upon them. He now says he had no notice of the notarial instrument whereby this burden, if it be a burden, is put on record. But he had the deed itself as well as the notarial instrument sent to his agents, and he had the same means of ascertaining as the exposers what burdens affected the subjects and entered the record. Nothing was concealed from him,—for it is not suggested that the exposers knew that this burden was a real burden and did not draw his attention to it,—and he in express terms took his chance of what burdens there might be.

Without attempting to decide whether and to what extent, if any, this deed burdens the property, it is sufficient for our decision that the suspender bought with notice, and that it was an express condition of the bargain that there should be no relief.

LORD CRAIGHILL.—I concur in the reasoning of Lord Young. I cannot say that, knowing what we now know, the articles of roup were framed in the most judicious way. But I can understand the difficulty under which the exposers laboured. There are two ways in which this particular burden of £125 might be dealt with. It might be treated as a burden on the owner, or on the property, and it was not very clear which was its true nature. But it was plain that it was a prospective and contingent burden only. It was certainly at the date of the sale not an actual present incumbrance on the property. Mrs M'Math might exercise the power conferred on her, or she might not. But in the meantime she had not exercised it, and, therefore, there was no sum with

No. 177. which the property was burdened, and no creditor. I think, therefore, it was the dubiety arising from these circumstances which led the exposers to frame the obligation to purge incumbrances at the end of the 6th clause of the articles of roup in the terms in which it is expressed. And having so expressed it, they are not, in my opinion, bound to relieve the purchaser of all dubiety as to this £125, which might or might not come to be an incumbrance.

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But supposing they knew, as I think they did, that there had been a notarial instrument recorded, whereby this power of appointment, to the extent of £125, had entered the record, I am of opinion that, on the true interpretation of the 6th clause of the articles of roup, the risk was taken by the purchaser. So far as a burden at all, it was clearly one "contained or referred to" "in the title-deeds thereof,"—that is, of the property—and such burdens the purchaser undertook. A list of title-deeds was appended to the articles of roup, and the first on the list was the settlement of Thomas M'Math. It is hardly contended that the means of knowledge were not as much in the hands of the purchaser as of the exposers. In point of fact, the titles were examined by his agent previous to the sale. The time for raising this question was before he went forward to bid, and not after he had made the purchase. And if, on examination, he was not satisfied, he should have held back.

I therefore agree in the opinion of Lord Young, and in the second ground of the Lord Ordinary's judgment.

I may add, that if the issue had been properly presented to us for decision, whether or not this £125 had been made a real burden on the property, I should have adopted the view which has been expressed by the Lord Justice-Clerk.

LORD JUSTICE-CLERK.—I think it right to say, after hearing the expression of your Lordships' views, that I certainly did not intend to decide what the right of Mrs M'Math or her appointees might be. It is too clear to require to be pointed out that in a question between a seller and a purchaser nothing that is done or decided can affect the rights of an incumbrancer.

But where a purchaser undertakes to shew that there is an incumbrance which affects the subjects, not only are we put to decide that question, but it is, in my opinion, the only one which we can decide.

And, lastly, I had fully in view the rule that if the question is a doubtful one the seller is bound to give notice of it. But I was of opinion that the question was not doubtful. The mere fact, however, that the purchaser had access to the titles would probably be sufficient to prevent challenge on the ground that there was a burden undisclosed.

THE COURT adhered.

JOHN LATTI, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 178.

WILLIAM GRAHAM and SPOUSE, Petitioners.—*Keir.*

July 19, 1881.
Graham.

2D DIVISION.
M.

Judicial factor—Tutor-dative, appointment of, while ward's father still alive.—Colonel William Graham, proprietor of the entailed estate of Mossknow, in the county of Dumfries, and Mrs Ann Mair or Graham, his wife, presented a petition to the Second Division of the Court of Session for appointment of a tutor-dative to their eldest son, William Mair Graham. The petition set forth "that, on April 25th 1855, the said William Mair

Graham, then twenty-three years of age, was found and cognosced under a brief issued from her Majesty's Chancery *incompos mentis et fatuus*, and that he had been in that state from the tenth year of his age. The said William Mair Graham has, since the said date, continued to be in the same state of mental incapacity. The petitioner, William Graham, has acted as tutor to his said son, who has resided in family with him at Mossknow since that date. The said petitioner, however, is now eighty-four years of age, is nearly blind, and very infirm, and is thus no longer able to act as tutor to his son. He is accordingly desirous to be relieved of his duties as tutor, and to have some one who is able and fitted to take charge of his son and his estate appointed tutor-dative to him. The said William Mair Graham is next heir of entail to the petitioner in the said estate of Mossknow, and has also an interest in part of his mother's adjoining property."

No. 178.
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Graham.

No answers having been lodged to the petition, the Court granted the petition, and appointed James A. Crawford, Esq., late of the Bengal Civil Service, to be tutor-dative.

FRASER, STODART, & BALLINGALL, W.S.—Agents.

JAMES HENDERSON FERGUSON (Trustee on John Clark Yuill's Sequestrated Estate), Appellant.—*Sol.-Gen. Balfour—Jameson.* No. 179.

CENTRAL HALLS COMPANY (LIMITED), Respondents.—*Pearson—W. C. Smith.*

July 20, 1881.
Ferguson v.
Central Halls
Co. (Limited).

Public Company—Liability for calls where shares forfeited for non-payment—Want of Notice.—The articles of association of a limited company provided that "twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call," and "a call shall be deemed to have been made at the time when the resolution of the directors authorising such a call shall have been passed." It also provided (rule 29) that "any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing on such shares at the time of the forfeiture" A call was made upon the 14th June, payable in equal instalments upon the 21st July and 23d August following. On the 28th June, before the date when notice of the call required to be given to the shareholders, the shares of a member of the company were forfeited in respect of non-payment of former calls. He received no notice of the call of 14th June until 13th August, when a circular intimating it was sent to him. *Held* that he was liable for this call notwithstanding the want of the statutory notice, the Lord President, Lord Deas, and Lord Mure holding that having ceased to be a shareholder before the time for giving notice had expired he was not entitled to that notice, but that his liability to pay the call arose under rule 29 without notice,—Lord Shand holding that the forfeiture of the shares did not affect the owner's right to notice, but that the liability for the call attached to all the shareholders from the date of the resolution to make it.

Mr J. C. YUILL held shares in the Central Halls Company (Limited). Upon his estates being sequestrated two claims were lodged by the company with his trustee for £169, 7s. 9d. and £723, 6s. 6d., being the amount of unpaid calls upon holdings of 10 and 200 shares respectively, and penal interest for non-payment. The trustee rejected the claims.

1st DIVISION.
Sheriff of
Lanarkshire.
M.

The call in respect of which these claims were lodged had been one of £2, 10s. per share, made upon 14th June 1880. It was "payable at the registered office, in two equal instalments of 25s. each, the first instalment on Wednesday, 21st July, and the second on Monday, 23d August following." On 28th June the bankrupt's shares were declared to be forfeited, in respect of the non-payment of previous calls, and his name was removed

No. 179. from the register. No notice was sent to him of the call, and he received no intimation until a demand was made for payment, on the 13th August. July 20, 1881. The articles of association of the Central Halls Company, so far as in Ferguson v. point, are quoted below.*
Central Halls Co. (Limited).

The company appealed to the Sheriff of Lanarkshire against the trustee's deliverance.

The trustee stated;—"6. With reference to the call of £2, 10s. per share, alleged to have been made on 14th June 1880, it is specially averred that said call was not duly made, and the amount thereof does not fall to be ranked on the bankrupt's estate, in respect, *inter alia*, by the articles of association of the appellants' company it is provided that calls can only be made subject to the directions contained in said articles; and it is further provided, that twenty-one days' notice of the time of each call shall be made, whereas, in breach of said articles, no notice of the call was given to the bankrupt until after his shares had been forfeited, and after the time for payment of said call had come, or at least within twenty-one days of the said time. The call therefore fell."

He pleaded;—"2. The appellants not being creditors of the bankrupt for the sums claimed, in respect the calls alleged to have been made were not duly made, and the amounts thereof are not due, the trustee's deliverance should be sustained.

The Sheriff-substitute (Erskine Murray), upon 25th May 1881, pronounced this interlocutor:—"Finds (1) that the main question at issue is,

* "VI.—CALLS.

"12. The directors may, from time to time, but subject to the directions hereinafter mentioned, make such calls on the shareholders, in respect of all moneys unpaid on their shares, as the directors think fit; and every shareholder shall be bound to pay the amount of every call to the persons, and at the time and place appointed by the directors. 13. Twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call. . . . 15. A call shall be deemed to have been made at the time when the resolution of the directors authorising such a call shall have been passed. 16. If any call, payable in respect of any share, is not paid on or before the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of ten per cent per annum from the day appointed for the payment thereof to the time of the actual payment. . . .

"VII.—FORFEITURE OF SHARES.

"25. If any shareholder fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him requiring him to pay such call, together with interest and any expenses which may have accrued by reason of such non-payment. . . . 27. If the requisitions of any such notice, as aforesaid, are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof, be forfeited by a resolution of the directors to that effect. . . . 29. Any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing on such shares at the time of the forfeiture, and the interest, if any, thereon. . . .

"XX.—EVIDENCE.

"104. On the trial or hearing of any action or suit to be brought by the company against any shareholder to recover any debt due for any call, it shall be sufficient to prove that the name of the defender is on the register of the shareholders of the company as the holder of the number of shares in respect of which such debt accrued and that notice of such debt was duly given to the defender in pursuance of these presents. . . ."

whether the appellants, the Central Halls Company, are entitled to be ranked on their claim for a call of £2, 10s. per share on shares in their company held by the bankrupt, but forfeited as per resolution of 28th June 1880: Finds (2) that it appears that this call was made by resolution on 14th June 1880, and that by article 15 a call shall be deemed to have been made at the time when the resolution of the directors authorising such a call shall have been passed: Finds (3) that while under the resolution in question the call was to be paid in certain instalments, and article 13 provides that 'twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call,' the bankrupt's shares were, on 28th June, a date previous to that on which, by article 13, the twenty-one days' notice required to be sent, declared to be forfeited under article 27, in respect of the non-payment of previous calls, &c., and the bankrupt's name being struck off the register of shareholders, no notice was sent to him of the £2, 10s. call: Finds (4) that article 104 declares that, in suing 'any shareholder to recover any debt for any call, it shall be sufficient to prove that his name is on the register as the holder of the shares, and that notice of the debt was duly given to him:' Finds (5) that in these circumstances it is contended by the respondent, the trustee, that the appellants have lost any right to insist on the call, in respect of their failure to send notice: Finds in law that this contention is ill-founded as regards the £2, 10s. call itself, and that the appellants are entitled to be ranked on the estate for the £2, 10s. call on the bankrupt's shares, but not for the penal interest thereon. Reserving to pronounce further."*

The trustee appealed to the Court of Session, and argued;—The call was not well made, because, by the articles of association, the power to make it was "subject to the directions hereinafter mentioned." One of those was the giving of notice, and none had been given in this case. Forfeiture of shares was a matter *strictissimi juris*; though the debt might be due when the call was made, it was not enforceable, if there was a failure to give notice.

Argued for the Central Halls Company;—The call was due from the day on which it was made.¹ The company were relieved from the duty of giving notice by the fact of the forfeiture of the shares.² The claim was based upon the 29th article of the articles of association. Notice under the 13th article was not essential to make the call effectual. It

* "NOTE.—On consideration of the various clauses in the articles, and the authorities that have been referred to, the Sheriff-substitute has come to be of opinion that the giving of the notice mentioned in the 13th article is not an absolute condition of liability on a call in the case of already forfeited shares. The clause is directory rather than imperative; and even if imperative as regards existing shareholders, the case of one who has ceased to be a shareholder is very different. For the object of the notice in question is manifestly to prevent a shareholder falling into a position as regards arrears that might entail forfeiture. But when he has already forfeited his shares, the only possible good of the notice to the former shareholder is to prevent his incurring the penal interest stipulated for non-payment. To that extent, therefore, and to that extent only, the Sheriff-substitute considers the effect of the want of notice to apply. The call itself became an existing debt on the 14th June, though it was not payable till the dates of payment. As long as Yuill remained a shareholder, he was entitled to the privilege of one; but not after, through his own default, he had ceased to be one."

¹ *In re the China Steamship and Labuan Coal Co. (Limited)*, Dawes' case, 1869, 38 L. J. Chanc., 512.

² *In re Blakeley Ordnance Co.*, Stocken's case, Jan. 16, 1868, 3 L. R. Chanc. App. 412; the Companies Act, 1862, first schedule, table A, 20.

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No. 179. was directory, not imperative.¹ Want of notice did not even relieve the shareholders, and the bankrupt had ceased to be a shareholder.
 July 20, 1881. It was not contended that penal interest was due.
 Ferguson v. Central Halls Co. (Limited).

LORD PRESIDENT.—It appears that the bankrupt in this case was a shareholder in a company called the Central Halls Company (Limited) to the extent of ten shares as regards one affidavit made in his sequestration, and to the extent of 200 shares as regards the other affidavit. He allowed the calls on each set of shares to fall greatly in arrear, so that at his sequestration he was owing, in respect of the ten shares, an aggregate sum of £169, 7s. 9d., and, in respect of the 200 shares, an aggregate sum of £723, 6s. 6d. The company claim to rank in his sequestration for these sums, and it appears to me that the controversy is now limited to one call only on the shares in question, namely a call made on the 14th June 1880. The Sheriff-substitute has given effect to the claim of the company, and has found them entitled to rank for that call along with the other sums which they claim, and I think that the Sheriff-substitute has done rightly. But as the point is one both of novelty and importance it is necessary to see exactly how the facts stand.

In consequence of the calls having fallen so deeply into arrear, the shares of the bankrupt were forfeited on the 28th June 1880, *i.e.*, the date of the resolution of the company declaring the shares to be forfeited. It is not contended that any informality or invalidity attaches to this forfeiture. It was carried out exactly in terms of the articles of association. The call was made on the 14th June, just a fortnight before the forfeiture of the shares; and the 29th article of association provides that “any shareholder whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing on such shares at the time of the forfeiture, and the interest, if any, thereon.” In virtue of this clause of the articles of association it is not doubtful that the company have a good action against shareholders whose shares have been forfeited, for any calls made and owing at the date of the forfeiture. It seems to me that where a resolution making a call has been passed, the call becomes a debt of the shareholder. But it is contended that to make the call effectual it is necessary that there should be intimation in terms of the 13th head of the articles of association. The 12th head provides—“The directors may from time to time, but subject to the directions hereinafter mentioned, make such calls on the shareholders in respect of all moneys unpaid on their shares as the directors think fit; and every shareholder shall be bound to pay the amount of every call to the persons and at the time and place appointed by the directors.” And the 13th head provides—“Twenty-one days’ notice at least shall be given of the time and place appointed by the directors for payment of every call.” Now, the resolution of the directors not only imposed a call but appointed a time and place when and where the call was to be paid, and at the date of the forfeiture there had been no failure to give notice, because there was plenty of time after the 28th June, the date of the forfeiture, to give notice of the time and place of payment, the first instalment of the call being payable on the 21st July and the second on the 23d August. Consequently on the 28th June there had been no failure of duty on the part of the company or its directors to intimate the time and place of payment of the call. But on the 28th June the bankrupt ceased to

¹ Newry and Enniskillen Railway Co. v. Edmunds, Feb. 5, 1848, 2 Welsby, Hurlstone, and Gordon, 118.

be a shareholder through the forfeiture of his shares, and the question therefore is, whether the company were under an obligation to give him twenty-one days' notice in terms of the articles of association.

It appears to me that the twenty-one days' notice is a privilege of the shareholders, and a very important privilege. For if they had not twenty-one days' notice of the time and place of the call they might incur the risk of forfeiture by failure to make payment at the time and place appointed, and they might also be found liable in payment of penal interest. It is therefore clearly a privilege to which they are entitled. What the precise effect of failure to give notice would be in the case of a shareholder whose name is still on the register I do not think it necessary here to determine. It is a point of some difficulty.

But the question here is, whether one who has ceased to be a shareholder is entitled to that privilege which belongs to existing shareholders? and I think, with the Sheriff-substitute, that at the date of the forfeiture there was a debt due, not only for calls then payable, but also for calls of which the terms of payment had not arrived. They were debts due by the bankrupt, but due by him not as a shareholder, but as having been a shareholder. At the same time, whether or not one who has been a shareholder is entitled after the forfeiture of his shares to notice in terms of the articles of association, he is certainly entitled to some notice. Every man is entitled to some notice as to when and where he is to pay his debts. And notice of this kind the bankrupt has had. On 13th August a circular was sent to him intimating that a call had been made, payable in equal instalments on the 21st July and the 23d August, and requiring payment. That is not notice in terms of the articles of association, but it is a perfectly sufficient intimation to any ordinary debtor, and having ceased to be a shareholder the bankrupt is just in the position of an ordinary debtor. Therefore I am of opinion that this is a debt due by the bankrupt, or, rather, a debt in his sequestration, which may be enforced in the ordinary way.

LORD MURE.—I think this is a delicate question; but, on the whole, I agree with your Lordship. It is not disputed that the call was here duly made, or that a time and place of payment were fixed in the resolution by which it was made. But it is maintained that, as no special notice of this had been given to the bankrupt, in terms of the 13th section of the articles of association, which provides "that twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call," the company, in respect of this failure, have now no right to recover payment of the calls. The argument of the respondents, on the other hand, is that, after the forfeiture of the bankrupt's shares, which was duly made on 28th June, for failure to pay calls previously due, the provision as to giving notices to shareholders under section 13 of the articles of association no longer applied to the appellant. The Sheriff-substitute has, I think, rightly given effect to that view. What might have been the effect of want of notice, if the bankrupt had remained a shareholder, I do not think it necessary to inquire. He was not in the position of a shareholder entitled to notice, and the 29th section of the articles lays upon him the obligation to pay calls, notwithstanding forfeiture of his shares.

LORD SHAND.—I have come to the same result as your Lordships in holding

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No. 179. July 20, 1881. *Ferguson v. Central Halls Co. (Limited).* that the Sheriff-substitute is right in saying that as regards the £2, 10s. call itself "the appellants are entitled to be ranked on the estate for the £2, 10s. call on the bankrupt's shares, but not for the penal interest thereon." But while I agree with this result I do not put that result on the same grounds as your Lordships have done.

On the 14th of June the directors resolved that there should be a call of £2, 10s. per share, "payable at the registered office in two equal instalments of 25s. each, the first instalment on Wednesday 21st July, and the second on Monday 23d August 1880." On 28th June the shares of the bankrupt were forfeited in respect, not of this call, but of former calls. At the date of the forfeiture two days only had to elapse before the twenty-one days required for the notice of the payment of the first instalment would begin to run. But no notice was given to the bankrupt, and no intimation of the call was made to him until after the first instalment had become payable, and ten days before the second fell due. Now, as I understand the view of your Lordships, this gentleman, being no longer a shareholder, was no longer entitled to notice in terms of the articles of association. I cannot assent to that view. I do not think that the circumstance that his shares had been forfeited puts Mr Yuill, as regards notice, in any different position from those who remained shareholders. I think that he was entitled to the same notice. The articles of association provide—"Twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call." Now, if the liability of the shareholders for payment of the calls is conditional upon their getting notice, it appears to me to follow that the liability of Mr Yuill must be the same. For I cannot see that the forfeiture can take away the right to notice of calls which is the condition of the shareholder's liability. The case, therefore, seems to me to raise this question, with which I think the Court ought to deal, viz., whether the call creates a merely contingent liability dependent on due notice being given, or whether the liability is absolute although the time of payment is conditional on the shareholder having twenty-one days' notice?

Now, it is not disputed that the resolution making the call was quite in terms of the articles of association. A clear interval of twenty-one days intervened between the date of the resolution and the time fixed for the payment of the first call, and there was a month between the two successive terms of payment. Now, the effect of making a call seems to me to be to create an instant debt, and I think that this view is very much supported by the 15th article of association, which provides "that a call shall be deemed to have been made at the time when the resolution of the directors authorising such a call shall have been passed." In short, I do not think that anything of the nature of a merely conditional or contingent liability is created by the call. Take the case of a call in which notice had been given to some of the shareholders but not to others. The result of making the liability conditional on notice being given is that there would be a debt created as against the one body of shareholders who receive notice, but not as against the other who do not. This seems to me to be a very disastrous result in carrying on such a company. It is said that the directors might make a new call. But that, it appears to me, would be very anomalous. I never heard of such a thing. I think, therefore, that the call creates an instant liability, and that the only effect of not giving due notice is, that a notice must subsequently be given to pay the call twenty-one days afterwards. The only difference between such a case, and one in which notice has been duly given

is, that penal interest does not run for twenty-one days after the date of the notice actually given. No. 179.

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LORD DEAS.—For the reasons stated by your Lordship in the chair and Lord Mure, I concur; but supposing I were to hold these reasons not to be well-founded, I should then be prepared to concur in the separate ground stated by Lord Shand, in the concluding portion of his opinion, as of itself sufficient to lead to the same result.

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THE COURT refused the appeal.

J. & J. Ross, W.S.—DOVE & LOCKHART, S.S.C.—Agents.

JAMES HALDANE, Judicial Factor on the Girvan and Portpatrick Railway Company, Petitioner.—*D.-F. Kinnear—Graham Murray.* No. 180.

GIRVAN AND PORTPATRICK RAILWAY COMPANY, Respondents.—

Mackintosh—J. P. B. Robertson.

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Portpatrick
Railway Co.

Railway—Judicial Factor—Special Powers—Railway Companies (Scotland) Act, 1867, 30 and 31 Vict. c. 126, sec. 4.—A judicial factor appointed on the undertaking of a railway company under sec. 4 of the Railway Companies (Scotland) Act, 1867, presented a note to the Court for authority to enter into negotiations for the sale of the line, and upon consideration of the result of the negotiations, for authority to apply to Parliament for an Act authorising either the sale of the line or the raising of capital by the issue of debentures. *Held* that the judicial factor did not require special powers to enter upon the negotiations.

(*Supra*, p. 669.)

1ST DIVISION.
B.

Mr Haldane who had been appointed judicial factor on the undertaking of the Girvan and Portpatrick Railway Company under section 4 of the Railway Companies (Scotland) Act, 1867, presented this note, praying the Court “to authorise the judicial factor to enter into negotiations for the sale of the line, and to receive offers for the purchase thereof; and thereafter, upon consideration of the result of the said negotiations and the offers received by the judicial factor, as reported by him to your Lordships, to authorise him to apply to Parliament for an Act or Acts authorising the sale of the line, or otherwise for an Act or Acts authorising him to raise capital to an extent not exceeding £20,000 by the issue of debentures, which shall rank preferably, both as regards principal and interest, to the debentures already issued or authorised under the Girvan Company’s existing Acts of Parliament.” In the note the various negotiations of the factor for the working of the line were narrated, and it was stated that the only proposal of the Glasgow and South-Western Railway Company for working the line was for a six years’ arrangement.

The directors of the Girvan and Portpatrick Railway lodged answers to the note, in which they stated that it was desirable, both for the company and the public, that the Glasgow and South-Western Company should continue to work the line. They subsequently stated at the bar that the Glasgow and South-Western Railway Company were willing to enter into an interim arrangement to work the line for six months.

The judicial factor asked the Court to grant the first part of the prayer of the note authorising him to enter into negotiations for the sale of the line.

LORD PRESIDENT.—The note for the judicial factor in this case prays the Court “to authorise the judicial factor to enter into negotiations for the sale of the line, and to receive offers for the purchase thereof; and thereafter, upon consideration of the result of the said negotiations and the offers received by the judicial factor, as reported by him to your Lordships, to authorise him to

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apply to Parliament for an Act or Acts authorising the sale of the line, or otherwise for an Act or Acts authorising him to raise capital to an extent not exceeding £20,000" for the purpose of working the line. Now, all that is proposed at present is that the first part of that prayer should be granted, viz., that the factor should have authority to enter into negotiations for the sale of the line, and to receive offers for its purchase. I confess I do not think it at all necessary that the factor should have any special authority to enter into such negotiations. I think they fall very naturally and properly within the scope of his powers as judicial factor. Of course, before any concluded arrangement can be made, he must report to the Court and obtain their sanction to apply for an Act, which would certainly be necessary in order to enable him ultimately to sell the line. And therefore, in so far as what is at present asked for by the factor is concerned, I am disposed not to grant it, as being unnecessary. But it is suggested, on the other side, by the directors of the line, who are superseded in the management, but still represent the corporation, that the proposal or suggestion of Mr Haldane that the line should not be any longer worked by the Glasgow and South-Western Railway after the 31st of this month, is a very inexpedient thing for the sake of the company and the public; and they say that the Glasgow and South-Western Company are willing to continue to work the line for another temporary period of six months or so while these negotiations are going on. I think it is much to be regretted that that proposal was not made to the factor, the only person who had any power to entertain or listen to it. But now that it is made, I have no doubt that the factor will give due consideration to it. The only communication that the Glasgow and South-Western Company have made to him as yet seems to me to be a proposal to renew for a period of six years the previously existing working agreement, or something very like it; and that proposal, I think, the factor was very well advised in declining. But that it may be expedient to enter into a reasonable arrangement for working this line for six months more, while these negotiation are going on is, I think, a very proper subject for the consideration of the judicial factor, and in his hands I think your Lordships should leave it.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

THE COURT did not pronounce any order.

TODD, MURRAY, & JAMIESON, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

No. 181.

July 20, 1881.
Clapperton,
Paton, & Co.
v. Anderson.

CLAPPERTON, PATON, & COMPANY, Pursuers.—*Ure*.
ADAM ANDERSON, Respondent.—*Campbell Smith—Rhind*.

Caution—Stat. 1696, cap. 25—Stat. 19 and 20 Vict. cap. 60 (Mercantile Law Amendment Act, 1856), sec. 6—Name of creditor in obligation omitted.—A and B signed an obligation to become sureties for an instalment of a composition on C D's bankrupt estate. *Held* that the obligation was not void by reason of the creditors in the obligation not being named.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

ON 18th December 1876 Adam Anderson granted, along with two others, a cautionary obligation in the following terms:—'We, hereby agree to become, jointly and severally, sureties for payment of the last of four instalments of a composition of fifteen shillings per pound, offered by James S. M'Laren on the debts due by his firm of Todd & M'Laren, drapers, Lanark, said instalments being payable at three, six, nine and twelve months from 15th December 1876; moneys to be lodged

by him fortnightly for behoof of the creditors to meet the several instalments as they fall due; Mr John S. Todd, his partner, to retire from the firm without consideration, he receiving his discharge under the composition settlement; but the subscriber, Adam Anderson, hereby restricts his liability under this obligation to the sum of £135, and no more." The instalment was not paid, and on 8th September 1880 Clapperton, Paton, & Company, creditors of James S. M'Laren, raised an action against Anderson in the Sheriff Court of Lanarkshire for £49, 11s. 8d., being the proportion of the sum of £135, guaranteed by Anderson, to which they were entitled in respect of their claim against M'Laren's estate.

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Anderson defended the action.

Pleaded for Clapperton, Paton, & Company;—(1) The defender having become cautioner, as aforesaid, for a debt due to the pursuers, which is still unpaid, decree as craved ought to be pronounced. (2) The defender being justly indebted and resting owing to the pursuers under said cautionary obligation the sum sued for, decree as craved ought to be pronounced.

Pleaded for Anderson;—(1) The creditors of the bankrupt M'Laren, including the pursuers, having, without the knowledge or consent of the defender, allowed the bankrupt to depart from the arrangement betwixt him and them under which the alleged cautionary obligation was created, the defender is freed from the said obligation. (2) The creditors of the said bankrupt, and particularly the pursuers, having failed to see that the condition in the alleged cautionary obligation in reference to the fortnightly lodgment of moneys by the bankrupt was fulfilled, and the same not having been fulfilled, the defender is freed from all liability under the said cautionary obligation. (5) The document founded on being defective and insufficient, the defender falls to be assoilzied.

The Sheriff-substitute (Guthrie), on 9th March 1881, repelled the defenses, and decerned in terms of the petition.*

Anderson appealed to the Sheriff (Clark) who, on 13th May 1881, adhered.

Anderson then appealed to the Court of Session, and argued;—(1)

* "NOTE.—The defender has not instructed any laches on the part of the pursuers or those acting for them, such as to liberate him from his guarantee. Every effort seems to have been used by Mr Tolmie to get the principal obligant to make the stipulated fortnightly deposits of money to meet the instalments of composition, and there is nothing to infer a discharge of the cautioner under the rules summarised in Bell's Princ. 263. The English cases of *Watts v. Shuttleworth*, 29 L. J., Ex. 229, 7 H. and N. 353, and *Black v. Ottoman Bank*, 8 Jur. N. S. 801, lay down rules which appear to be consistent with our own authorities,—viz., that the discharge of a cautioner does not take place by mere inactivity of the creditors unless there be such a degree of negligence as to imply connivance or fraud; but that there must be some positive act done by him to the prejudice of the surety, or an omission of an act which his duty enjoins him to do, and which omission proves injurious to the surety. There is nothing in evidence in this case of such a character, and indeed it may be reasonably held, as the pursuers argued, that the stipulation was one the fulfilment of which the cautioner himself was bound to see to. The defender's real reason for objecting to pay was, in truth, not the non-fulfilment of this alleged duty of the pursuers, but rather the non-fulfilment by the bankrupt of the other private arrangement, which has been held to be irrelevant as a defence. He was also quite aware, as the evidence shews, that M'Laren was not making the fortnightly payments.

"The guarantee is in favour of 'the creditors' of a party named, and I think it does not fall within the terms or the intention of the statute anent blank writs. There is a description of the grantees in which *constat de personis*, and that is all the law requires—Ersk. iii., 2-6."

No. 181. The obligation was void, because the creditor was not named. Except in the case of a testamentary settlement, the creditor must be named and not merely described.¹ Such a document must be addressed to some one in order to be binding. The 6th section of the Mercantile Law Amendment Act 1856 provided that all such obligations as this were to be in writing.² That surely contemplated that they should be addressed to some one. In that case the decisions in England under the corresponding section in the Statute of Frauds applied.³ (2) The creditors, by the way in which they had neglected to look after the debtor, and omitted to see that the fortnightly instalments were paid, had liberated his cautioner.

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LORD JUSTICE-CLERK.—I am unable to see any ground for recalling the Sheriff's judgment. As to the constitution of the obligation, the appellant's counsel did not maintain that the English Statute of Frauds applied to Scotland, but he said that by the Mercantile Law Amendment Act such obligations must be in writing. This one is in writing. But then he says it is blank in name of the creditors under it. That is a mistake. It is not so. It is quite clear who is creditor under it. The case cited from English law is a totally different case. I think that under the Mercantile Law Amendment Act this is a good cautionary obligation, and that there can be no doubt as to who the persons are in whose favour it constitutes a right. On this matter I may refer parties to the note of the editor in M'Laren's edition of Bell's Commentaries, vol. i. 402, *et seq.*

As to the appellant's second point, I am unable to read the obligation as imposing on the creditors the duty which it is said was laid upon them. I am for adhering to the judgment of the Sheriff.

LORD YOUNG and LORD CRAIGHILL concurred.

THE COURT dismissed the appeal.

W. OFFICER, S.S.C.—CAIRNS, M'INTOSH, & MORTON, W.S.—Agents.

No. 182. RIGHT HONOURABLE JOHN INGLIS, Pursuer.—*D.-F. Kinnear—Sol.-Gen. Balfour—Trayner—Graham Murray.*

July 20, 1881.*
Inglis v.
Shotts Iron
Co.

SHOTT'S IRON COMPANY, Defenders.—*Asher—Mackintosh—
J. P. B. Robertson.*

Nuisance—Property—Calcining Ironstone.—A mining company leased the coal and ironstone on an estate, subject to the condition that they should not conduct any operations within a certain area (which extended about two miles from the mansion-house). They thereafter commenced calcining ironstone in bings at places beyond this area, near their march. The proprietor of the adjoining estate raised an action concluding for interdict against the company calcining within two miles of his lands, on the ground that the smoke from their bings was destroying the trees in his plantations. *Held*, after a proof, (1) that the pursuer had proved that his plantations had been injured by the defenders' operations; and (2) that he was entitled to interdict to prevent the defenders calcining within one mile of his march.

¹ Stat. 1696, cap. 25; Ersk. 3, 2, 6; Duncan's Trustees v. Shand, July 19, 1872, 10 Macph. 984, 44 Scot. Jur. 566.

² 19 and 20 Vict. cap. 60, sec. 6.

³ Williams v. Lake, Nov. 18, 1859, 2 Ellis and Ellis, 349; 29 Car. ii. cap. 3.

* Decided July 5, 1881.

Diss. Lord Young, who was of opinion that further evidence should have been taken as to whether the places for the calcining bings had not been conveniently and reasonably chosen, having regard to the interests of the company as well as of the neighbouring proprietor.

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2D DIVISION.

Lord Ruther-

furd Clark.

M.

THE SHOTTS IRON COMPANY became, by a series of leases between 1865 and 1873, lessees of the coal and ironstone and other minerals on the estates of Penicuik, Dryden, and Loganbank in the county of Midlothian. The minerals on these estates were of great value and large extent, and the leases were all of long duration. After the company had expended upwards of £50,000 in workmen's houses, water-works, railways, and other preparations, they, in March 1877, commenced calcining the ironstone raised from the estate of Penicuik at a point on that estate situated near to where it marched with the estates of Glencorse and Belwood, the properties immediately to the north-east of Penicuik estate. The bing erected at this spot continued to burn until the end of April, emitting during that period considerable quantities of smoke. The Right Honourable John Inglis, the proprietor of Glencorse and Belwood, through his agents, complained to the company that the result of the smoke from their calcining bing was to injure his plantations on these estates, and called upon them to desist. The company having, however, during the summer of 1877, constructed another bing on the same site, and also prepared other bings at no great distance, he, in October 1877, presented a note of suspension and interdict in the Court of Session against these bings being ignited. On 8th October interim interdict was granted. The Shotts Company lodged answers to the note, and on 27th November the note was passed and the interim interdict continued, and a record made up between the parties. A proof was in due course taken by the Lord Ordinary (Young), after which the Shotts Company, in March 1878, lodged a minute, in which they stated that "it was, and had always been, their intention to confine their calcining operations, in conformity with the usual custom, to the winter months, and that they hereby undertake to confine their calcining operations at the place mentioned in the prayer of the note of suspension and interdict to the months of November, December, and January in each year."

The proprietor of Glencorse thereafter lodged a minute, in which, in respect of the above minute of the company, he stated that he no longer pressed for interdict, but reserving all claims for damages, past and future, from calcining, and also reserving his right to apply for interdict against the company calcining during the months to which they now restricted themselves should the calcining become injurious to his property or a nuisance to himself.

On 12th March 1878 the Lord Ordinary (Young), "having considered the case, with the proof, and the minutes Nos. 44 and 51 of process, in respect of the undertaking of the respondents by their minute No. 44 of process, and that in consideration thereof the complainer does not now ask for interdict," recalled the interim interdict, found it unnecessary to pronounce any decree on the merits, and found the company liable in expenses.*

* "NOTE.—At the close of the proof I thought it proper, because it might be useful, to express the impression which I had, *first*, that the calcining which had taken place in March and April was contrary to custom and injurious to the complainer's property; and *second*, that the calcining in what were called the dead months of the year (November, December, and January) being the customary season for that operation, might be practised without injury (of the nature of a nuisance) to the complainer's property. Acting on the suggestion

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The Shotts Company thereafter proceeded to calcine ironstone in November and December 1878, and January 1879, at the original place called Incline No. 1, at another place at some distance therefrom called Incline No. 2, and at a third place at a still greater distance called the New Hearths at Mauricewood. In November and December 1879, and January 1880, they calcined at Incline No. 1 and at the New Hearths, and from 3d January till 11th March 1880 they calcined at Incline No. 2.

The proprietor of Glencorse, finding, as he averred, that his plantations were being greatly injured by the continuation of the calcining, raised, on 30th October 1880, an action of declarator that the Shotts Company had illegally calcined ironstone to his nuisance, and for interdict against their calcining on any part of the Penicuik estate within two miles of the pursuer's lands.

In his condescendence he set forth the procedure in the note of suspension and interdict, and averred that the injury to the plantations had greatly increased, and that unless calcining was stopped the whole of his trees would be destroyed, and the amenity of his estate as a residential property be entirely sacrificed.

The Shotts Company lodged defences, in which they denied that the injury to the plantations complained of was caused by calcining. They also averred there were many mills and other factories in the neighbourhood of the pursuer's property. They also stated that their calcining operations were conducted in the ordinary manner, and if such operations were put a stop to the iron industry of the country would suffer serious injury, and its development would be practically arrested. They also offered to pay any damage which the pursuer could establish that he had suffered through them.

The pursuer pleaded;—The pursuer is entitled to decree of declarator

implied in the expression of my impression, the parties have lodged the minutes Nos. 44 and 51 of process, which supersede the necessity of further controversy except on the question of expenses. On this question (having heard counsel) I am of opinion that the respondents must pay expenses. It was explained during the proof, and then for the first time, that the respondents recognised a custom against calcining in spring and summer, or except during the three dead months of the year (no doubt because of the probably injurious effects on vegetation in the vicinity), and that their calcining in March and April was exceptional and accidental. The present record gives no such explanation, and suggests no limitation of season for calcining. On the question of actual damage or not from the calcining in March and April the evidence is conflicting, but of the tendency of calcining at that season to damage vegetation, and especially trees, there is, on the evidence, no doubt, and to calcine then is admittedly contrary to custom. I must, therefore, hold that the complainer had reasonable cause of complaint, and his resort to the Court has been successful to the extent of putting a restraint upon the respondents, by their own voluntary undertaking given after the proof, and with which he is, I think, properly content, not to calcine except during the months of November, December, and January.

“I introduce no reservations into the judgment, because I think it unnecessary. The case before me involves no claim of damages, and no otherwise as regards the future, than that the respondents undertake to confine their calcining operations to the months of November, December, and January. The parties by their minutes have only enabled me, without further argument, to give effect to the opinion which I had formed (*prima facie*) on hearing the evidence, that the respondents ought to be restrained from calcining in the other months. The complainer is content with their undertaking. What may be the result of the respondents' use of the liberty which they retain, or what rights or remedies may thereupon arise to the complainer, cannot be now considered or be affected by what is now done.”

and interdict as craved, in respect that the operations complained of are No. 182.
wrongful, illegal, and are to the nuisance of the pursuer.

The defenders pleaded ;—(2) The operations complained of being law-
ful, the defenders should be assoilzied. (4) The operations complained of July 20, 1881.
not being to the nuisance of the pursuer, the defenders should be assoilzied. Inglis v. Shotts Iron Co.
(5) The pursuer does not suffer, and has not sustained, damage entitling him to any of the decrees concluded for. (6) *Separatim*, no ground is alleged or exists for the delineation of two miles libelled, and the prohibition thus concluded for is uncalled for and unnecessary.

A proof was allowed, and evidence led at great length. The result of the evidence, which was in many instances very conflicting, may be shortly summed up as follows :—

Under the leases of minerals on the Penicuik estate the Shotts Company were taken bound not to carry on any of their operations within 150 yards of any feus granted on that estate or of any dwelling-house or farmstead, or on any land tinted brown on a plan signed as relative to the lease. The effect of these restrictions was that operations could not be carried on except at a very considerable distance—about two miles—from Penicuik House and the policies and plantations round it. Under the lease of Loganbank minerals the tenants were bound not to sink pits, or carry on any surface operations on that estate at all.

The part of the estate of Penicuik where the ironstone was brought to the surface, and on which, in immediate proximity to the pit-heads, the calcining bings were placed, was a narrow strip, about 300 yards wide, running between Glencorse, Belwood, and Mr Cowan's estate of Beeslack, and the bing at Incline No. 1 was only a few yards from the march of Glencorse. The other bings—Incline No. 2 and the New Hearths—were situated at a greater distance from the march, but neither further than 1000 yards therefrom.

The pursuer examined a number of witnesses, foresters and others, who all spoke to the good and satisfactory state of the plantations on Glencorse and Belwood prior to 1876, when the calcining commenced, and to the great falling off in the strength and appearance of the trees and plantations since that date. The symptoms of the diseased trees were stated by these witnesses to be clearly traceable to the effect of the sulphurous fumes from the bings. Other witnesses were adduced by the pursuer, who spoke from experience of the effect of similar fumes in other parts of the country, and stated that what was complained of here was, according to their experience, the result of calcining.

The defenders, on the other hand, although unable to bring forward any contradictory evidence as to the state of the plantations before 1876, adduced a number of witnesses, who stated that the condition of the trees was exactly what was to be expected from the want of draining, overcrowding, and injudicious treatment of the plantations. It was also proved that the seasons after 1876 had been exceptionally wet and cold. These witnesses also denied that the symptoms were such as resulted from smoke from calcining bings. One fact greatly relied on by the witnesses for the defenders in support of their view was, that not only were trees at a greater distance suffering while those nearer the bings remained comparatively uninjured, but that in some instances the injury was on the side of a tree farthest from the bing.

The pursuer had caused "smoke plans" to be made shewing the course which the fumes from the bings had taken during the periods of calcining. From these it appeared that the prevailing wind was south-westerly, and that the fumes were carried from that direction into the plantations.

The ore calcined was proved to contain only 1 per cent of sulphur, and

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of that it was estimated only 25 per cent was given off during calcination. The proportion of sulphur was thus no greater than in ordinary coal.

The scientific witnesses for the pursuer—Professor Dewar and Dr Dittmar—made various experiments, with a view to supporting their contention, that the injury to the trees was the result of sulphurous fumes. One of these was by what was called the “rain test.” Glass bottles, carefully protected, were placed at various spots on Glencorse and Belwood, and the rain water collected in them was subjected to analysis. A sulphate was discovered in this water—not free sulphuric acid. Professor Dewar and Dr Dittmar, however, accounted for the sulphate, by saying that it was composed by the free sulphurous or sulphuric acid combining with the soda in the bottles, which were new. They had not, however, ascertained, whether what they discovered was sulphate of soda.

The scientific witnesses for the defenders maintained that the sulphate found was sulphate of ammonia, which was formed by the sulphuric acid as it was set free at the bing, combining with the ammonia also set free during calcination. Sulphate of ammonia, it was stated, would not be injurious to vegetation.

Dr Dittmar deposed to another experiment made by him, namely, subjecting a number of trees, similar to those in the Glencorse plantations, in a small greenhouse, to fumes containing sulphuric acid in the proportion of five volumes to a million volumes of air. These plants were so exposed for about a month, at the end of which time it was found that about one-fifth of them were damaged by the fumes, and, to all appearance, in the same way as the trees in the plantations.

The pursuer's scientific witnesses made a further attempt to ascertain the presence of sulphurous or sulphuric acid in the smoke and air, by means of what was called the “iodine test,” the result of which was to shew that sulphurous or sulphuric acid was present in considerable quantity.

The defenders' scientific witnesses endeavoured, by analysing the leaves of trees in the plantations, to ascertain whether sulphur was present in them, but failed to find any unusual quantity.

A considerable part of the defenders' proof was directed to the point that in no case could the fumes be dangerous beyond 400 yards, whereas the places where great mischief was said to have been done here were as far as 1000 or 1100 yards from the bings. It was proved that there was a large number of paper mills, coal mines, and other manufactories in constant operation, in the valley of the Esk, and in the immediate neighbourhood of Glencorse, and that these had been in existence for many years.

On 18th March 1881 the Lord Ordinary pronounced this interlocutor: —“Finds, declares, and decerns in terms of the declaratory conclusions of the libel: Further, interdicts and prohibits the defenders, in all time coming, from calcining ironstone, or iron ore, or burning blaes, on any part of the said lands of Penicuik, within one mile of the pursuer's said lands, and decerns: Finds the pursuer entitled to expenses.”*

* “NOTE.—This case has been conducted on both sides with great anxiety and ability.

“When the Lord Ordinary came to hear the parties on the evidence it was admitted that there was no question of law between them. The Lord Ordinary has only to decide a question of fact. It is this—viz., whether the pursuer's estate has been injured by the calcining operations carried on by the defenders. The pursuer conceded that he must establish a substantial injury. The defenders admitted that if he did so he was in law entitled to the remedy which he sought.

“The evidence which has been led is very voluminous and very conflicting.

The Shotts Company reclaimed, and argued ;—The pursuer had failed in the proof. It was clearly proved by the evidence for the defenders

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The Lord Ordinary does not propose to examine it in detail. He will only refer to the more salient points, and state the considerations on which his decision is based. *Ingilis v. Shotts Iron Co.*

"The defenders began to calcine in March 1877, and they have since continued to do so. They have three places—viz., No. 1 Incline, No. 2 Incline, and the New Heartha. At the first and third of these places the burning has been limited to the winter months, with the exception of the year 1877, when it began at No. 1 Incline on 13th March, and finished on 28th April. At the second it continued into spring, during the years 1877, 1878, and 1880.

"Incline No. 1 is situated very near the march of the lands of Glencorse, being not so much as 200 yards to the south of them. Incline No. 2 is close to Belwood. The New Hearths are about 1000 yards to the south of Glencorse, though considerably nearer Belwood. They are to the south-east of that estate. The pursuer complains chiefly of injury to the lands of Glencorse, though he also alleges that Belwood has suffered.

"The case of the pursuer is, that prior to 1877 the trees on his estates were remarkably thriving ; that the first appearance of injury to the plantations was in the summer of 1877, immediately after the calcining in the spring of that year ; that the injury has increased, and is increasing very rapidly ; and that it is wholly due to the calcining. A large number of witnesses of skill support this view, and say that the injury from calcining is of the most marked and obvious kind.

"As the Lord Ordinary understood them, the defenders did not dispute that the plantations went back in 1877, but attributed that fact to the cold and wet seasons of 1876 and 1877. With respect to the coniferæ, which were the most injured, they say that their condition was due to over-crowding, want of draining, bad soil, and climate, and planting under deciduous trees, especially beeches. But they allege that, while such decay as exists is due to these causes, the plantations have within the last two years improved on the whole. They bring a great body of witnesses in support of their averments. These witnesses depone that there is not the slightest trace of injury from calcining.

"In this state of the evidence it is necessary to examine the reasons why the calcination of ironstone may be injurious to vegetation.

"The raw ore which is calcined by the defenders contains about one per cent of combustible sulphur. This substance, when burnt in the open air, gives off sulphurous acid, which gradually becomes sulphuric acid by the absorption of another atom of oxygen. It is not disputed that sulphurous acid and sulphuric acid, if present in sufficient quantity, are injurious to vegetable life. The question is, whether these acids, or either of them, reach the pursuer's land in such quantities as to injure vegetation.

"That the smoke from the bings comes upon the pursuer's lands is not capable of dispute. This has been matter of careful observation. Plans based on these observations have been made by Mr Blyth, shewing the number of times the smoke has come from the bings, and the distance it has reached. A reference to them will shew that the pursuer's plantations have been very frequently subjected to the influence of the smoke, and particularly at those places where injury has been observed—viz., Sergeant's Croft Plantation, Pheasant Corner, and Temple Walk. It is proved, too, that the smoke, if the weather is calm, hangs about the places which it has reached, and takes a considerable time to dissipate.

"But does the smoke contain or carry with it the acids in destructive or injurious quantity? Experiments have been made to test this point ; but a very important one has been so conducted as not to give, by itself at least, perfectly reliable results. The Lord Ordinary refers to what has been called the rain test. The rain-water was collected in monthly quantities at six different stations in order to determine whether there was an increase of sulphuric acid in the air when the bings were burning. It is obvious that this experiment could never

No. 182. that what these trees were dying of was not poisoning by sulphurous fumes, but of overcrowding, want of draining, exposure to wind, bad seasons, and such natural causes.

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shew the maximum increase, but it gave some very remarkable results, which are tabulated at p. 109 of the evidence. What may be called the normal amount never exceeded five parts of sulphuric acid in one million parts of water. But at all the stations there was at times a notable increase; and at some an increase by more than five times—as, for example, at Sergeant's Croft and Pheasant Corner.

"The observers, Professors Dewar and Dittmar, draw the inference that the increase was due to an increase of free sulphuric acid in the air. But the soundness of the inference is not free from doubt, and it appears to the Lord Ordinary that the doubt could have been obviated had the experiment been conducted with more exactitude. If the acid was free in the air, in which state it is alone injurious, it would enter the collecting vessels as a free acid, and the Lord Ordinary does not see why an acid reaction could not have been obtained, which would of course have been conclusive. But, unfortunately, the vessels which were used were new glass bottles, of an ordinary or inferior kind of glass, and the glass contained soda, which would be taken up by any free sulphuric acid which entered the bottle. The liquid was therefore a solution of a sulphate. But of what sulphate? Professor Dewar assumes rather than proves it to be a sulphate of soda 128 F. If it were, the soda could only come from the bottle, and the acid must have been free in the air; for the air would not furnish any material addition of soda. But whether it was sulphate of soda has not been conclusively determined.

"It is said that the increase of sulphate might be and was probably due to an addition of sulphate of ammonia. Professors Dittmar and Dewar did not think that this was possible, and hence they did not determine the base of the sulphate. But the scientific witnesses for the defenders say that it is likely that a large portion of the sulphurous or sulphuric acid would combine with ammonia during the process of calcining, and hence that the air would contain an addition of sulphate of ammonia which would not do any harm. They do not, however, pretend that no sulphurous acid is given off in a free condition. Dr Voelcker computes it to amount to a quarter per cent of the entire sulphur.

"Another experiment was, however, made to determine whether there was free acid, and no objection seems to be stated against it, either as regards its theory or the manner in which it was carried out. It is detailed in the evidence of Professor Dittmar at pp. 111 and 112, and it shews a marked increase of acid at various places, and, as the Lord Ordinary understands, of free acid; for the theory of the experiment was to introduce a re-agent, in order to combine with such sulphurous acid as might exist in the air, and thence to determine the amount of the acid. It may be observed, with respect to the experiment made on 17th December 1880, that the amount of free acid found at Sergeant's Croft was 2.8 volumes per million volumes of air; and the note of the 'smoke observer' for that day is 'smoke at No. 1 Incline, Sergeant's Croft Plantation, Pheasant Corner, and Loganbank Grounds.' The evidence leads the Lord Ordinary to believe that the acid was present in such quantity as to injure; indeed it is not said by any one that such a proportion of acid to air as is indicated in these experiments would not be injurious. The Lord Ordinary may further notice the collection of water from the forester's house, and from a birch tree in Sergeant's Croft, which go a long way to shew the dissemination of sulphuric acid in injurious quantity.

"One other test may be referred to of a practical kind. Mr Dupré, a witness for the defenders, says, that if 'discomfort was at once felt by an ordinary observer the fumes that caused that discomfort would be injurious to vegetation.'—See Proof, p. 280. The case has occurred, and has been spoken to by several witnesses. The Lord Ordinary may refer, in particular, to the evidence of J. H. Dickson, p. 96.

"These later experiments and observations seem to the Lord Ordinary to

The onus was on the pursuer to shew that there was sulphur poisoning present, and he had failed. The evils he complained of were to be found in great force at distances at which the fumes must be held to have been quite innocuous. But even had some damage been proved the pursuer was not on that account entitled to the interdict craved. This was not a case of a manufactory being suddenly commenced in a rural district. The whole district was, and had been for many years, a manufacturing and mining one. Nor was it a case of selecting a spot where least damage would be done to their landlord and most to their neighbours. Nor were they carrying on any works which were not indigenous to the district. What they were doing was merely using the mineral products of the estate in the only way in which they could be used. Proprietors were not to be allowed to stand upon their extreme rights when what they were finding fault with was an industry not uselessly thrust upon them, but necessary to develope the resources of an adjoining property.¹ It was not sufficient that the pursuer should establish that some injury had been done to him; he had to make out that suffi-

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prove that sulphurous fumes reached the pursuer's lands in a quantity sufficient to injure. But they do more. They seem to remove any doubt which attaches to the rain test, and to shew that the notable increase of sulphates was due to the increase of free acid, and not to sulphate of ammonia. Hence, in the opinion of the Lord Ordinary, it is proved that the calcining operations of the defenders were capable of injuring the pursuer's lands, and he is therefore disposed to accept the evidence of those who say that they did injure them, rather than the evidence of those who say that they did not. The Lord Ordinary may say that he places much reliance on the evidence of Dr Angus Smith, whose experience and position shew him to be a very competent observer, and whose testimony is very decided in favour of the pursuer.

"The defenders have, no doubt, some strong points in their favour. They have given evidence to shew (1) that the calcination of ironstone, containing no more combustible sulphur than that which is calcined by the defenders, is not injurious to vegetation (see the evidence of Dr Sloan and Dr Lawrence); and (2) that when an ore containing much more sulphur is calcined, the injury does not extend beyond 300 or 400 yards at the most—(See the evidence of Professor Stöckhardt). But these are isolated instances, which have not been examined on their own merits, and though very important, cannot, it is thought, outweigh the evidence which the pursuer has brought in this case.

"But they further found on the fact that the trees and hedges nearest to the bings have not suffered. It is certainly natural to suppose that the nearest trees and hedges would suffer first, and it is singular that this is not so in the present case. But this may be explained on the ground that the fumes have been carried past them or over them. It is impossible to speculate with any certainty on the height to which the fumes would rise, or the places to which they would be carried with destructive effect, or on the causes which may explain why some trees may resist while others fail. The circumstance founded on by the defenders is no doubt much in their favour, but it cannot overcome what the Lord Ordinary holds to be the positive evidence of the presence of injurious fumes in the pursuer's estates, and the injury resulting therefrom.

"It remains to consider how far the prohibition by the Court against calcining is to extend. This must necessarily be fixed in a somewhat arbitrary manner. But if the view which the Lord Ordinary has taken of the evidence be correct he thinks that it would not be safe to put the limit at less than a mile."

¹ St Helen's Smelting Co. v. Tipping, July 5, 1865, 11 Clark's, H. L. Cases, 642, and cases there cited; Salvin v. North Brancepeth Coal Co., July 14, 1874, L. R., 9 Chanc. App. 705; Dewar v. Fraser, Jan. 20, 1767, M. 12,803; Ralston v. Pettigrew, July 29, 1768, M. 12,808; Bell's Prin. (Guthrie), sec. 9, and cases there cited.

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cient had been done to constitute a nuisance. This he had failed in. There had been no attempt even to distinguish between injury resulting from natural causes and injury resulting from smoke damage. Interdict should not be granted in this case, as the operation was a natural and reasonable one for the purpose of making use of the property, and of turning it to the best account.¹ Any injury suffered was merely trifling compared to the beneficial results enjoyed. The degree of purity of atmosphere to which any person was entitled was a question of place and circumstances, and in this case the neighbourhood was already a manufacturing one, and the air was already greatly polluted. The smoke from the bings was ordinary coal smoke, and the same results would have followed from the erection of dwelling-houses. At all events, if it was held that substantial injury was done by these operations the true and just solution of the question was to take the case as one of damages, and not as a case for interdict. The defenders were willing to pay any damage which could be ascertained to have been caused by them.

Argued for the pursuer;—An actionable nuisance had been clearly established on the evidence. The plantations had been perfectly healthy up to the date of the commencement of the calcining, and after that date they had become unhealthy and diseased in a manner which it was utterly impossible to attribute to natural causes. The smoke was proved to enter the woods and to lie there in huge heavy masses, and the trees became unhealthy and shewed all the well-known symptoms of poisoning by sulphur. The nuisance being thus established, it was no answer to say that the calcining was carried on in a proper and convenient spot, and was a reasonable use of the land.² Interdict was the proper legal remedy. The ordinary rule of law was *sic utere tuo ut alienum non lædas*, and that applied here. If the Shotts Company could not carry on their works without injuring their neighbours' trees then they must desist.³

At advising,—

LORD JUSTICE-CLERK.—The Lord Ordinary has decided this case on the footing that it only raised an issue of fact. The proof was led before himself, and he has returned his verdict on it in favour of the pursuer. We have never held ourselves precluded from reviewing the conclusion arrived at by a Lord Ordinary in such circumstances, even although we were not prepared to hold it contrary to the evidence; but in considering such a verdict on an issue of fact we must, of course, attribute the greatest weight to the opinion of the Judge who took the evidence, and saw and heard the witnesses, and I should be slow to alter the result expressed in his verdict, unless I thought the overbalancing elements material.

In the present case we have a voluminous proof, and have listened to an oral argument of great ability, extending over several days. After studying the

¹ D'Eresby's Trs. v. Strathearn Hydropathic Co., Oct. 21, 1873, *ante*, vol. i. p. 35; Comyn's Digest, vol. i. p. 420.

² Hole v. Barlow, May 5, 1858, 27 L. J., C. P. 207; Bamford v. Turnley, July 12, 1862, 31 L. J., Q. B. 286; Walter v. Selfe, April 16, 1851, 20 L. J. Chanc. 433.

³ Kerr v. Earl of Orkney, Dec. 17, 1857, 20 D. 298, 30 Scot. Jur. 158; Duke of Buccleuch v. Cowan, &c., Dec. 21, 1866, 5 Macph. 214, 39 Scot. Jur. 591; Robertson v. Stewart, Dec. 11, 1872, 11 Macph. 189, 45 Scot. Jur. 115; Caledonian Railway Co. v. Baird & Co., June 14, 1876, *ante*, vol. iii. p. 839; Fraser's Trs. v. Cran, June 1, 1877, *ante*, vol. iv. p. 794; Fletcher v. Rylands, May 14, 1866, L. R., 1 Exch. 208, and July 17, 1868, L. R., 3 E. and I. App. 330; Rankine on Landownership, p. 313, cases there.

printed papers with care, and giving my best attention to the pleadings from the bar, I have formed the opinion, not, I own, without difficulty, but ultimately without hesitation, not only that the view of the Lord Ordinary is not opposed to the weight of the evidence, but that the result which he has reached expresses the verdict which on these materials I should have pronounced.

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In explaining the general impressions on which I found this conclusion or verdict in point of fact it is neither to be expected nor desired that I should analyse the evidence in detail, and this is the less necessary that, while most of the evidence is weighty, and much of it is apparently conflicting, the material points of concurrence and divergence are marked by broad features, which admit of being easily arranged and illustrated.

The foundation of the pursuer's demand is very simple. He is the proprietor of the estate of Glencorse, in the county of Midlothian, a property which is said to be nearly 1000 acres in extent, and to have a rental of over £1200 a year. He says that for a great many years he has paid great attention to the ornamental plantations on his property, which cover a considerable area, and contain many good specimens of the rarer pines. Until 1877, he represents these woods to have been uniformly healthy and flourishing; but in that year the defenders, the Shotts Iron Company, who hold mineral leases of the ironstone in adjacent lands, commenced the process of calcining the minerals in open bings and heaps, at three points in an outlying corner of the estate of Penicuik, and bounded mainly by the lands of the pursuer, and those of Mr Cowan of Beeslack. The result is said to have been that, in the summer and autumn of 1877, a marked change occurred in the state of the woods. While they had been previously healthy, and in good order, the trees, especially the conifers, began to go back, and to exhibit all the symptoms, which he alleges to be well marked and notorious, of poisoning from the fumes of sulphur disengaged in the process of calcining. The pursuer accordingly raised an action of interdict against the Shotts Company, to have the process prohibited at the places where it had been carried on. This action was terminated in March 1878 by a compromise, by the terms of which, while both parties reserved their respective rights, the Shotts Company undertook to carry on calcination only in the months of November, December, and January.

It is not said that the defenders have violated this agreement; but the damage, so far from having been abated, is said to have increased as calcination proceeded; and on these general allegations the present action for declarator and interdict has been presented.

In defence, the defenders deny entirely that any damage or injury whatever has been done to the pursuer's property by the calcination. They say that the amount of sulphur disengaged in the process is so slight as to be absolutely innocuous, and what there is, is in the form of a sulphate, for the most part, which is not injurious to vegetation. They allege, further, that the parts of the pursuer's plantations said to be most injured are so far from the calcining bings as to be beyond the influence of the fumes; and that trees said to have been injured in some, if not in many cases, are near to, or in the neighbourhood of trees upon which the smoke has had no effect; and they specially plead that the decaying state of the pursuer's woods is owing to a combination of natural causes, under which they were certain to be unhealthy, and to decay.

I do not of course mean to go in detail through the testimony by which these

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conflicting views are maintained; but I shall shortly indicate the impression which the evidence on each side has made on me.

First, as to the pursuer's evidence. He has proved, as I think, conclusively, that, up to the period when this process of calcining commenced, these woods were healthy and flourishing. This seems to be clearly proved by four witnesses—the pursuer; Milroy, his forester; a man of the name of Robertson, who took a superintendence of the woods; and by the person in charge of the woods on the adjoining property of Beeslack. Their evidence is quite distinct—quite consistent—and altogether uncontradicted by any one who knew the woods prior to 1877, when calcining was commenced. In truth, no witnesses who knew the woods before 1877 have been called on the part of the defenders. The same witnesses for the pursuer also testify to the immediate and marked change for the worse which took place a few months after the calcining commenced in 1877, and this has continued and increased ever since.

The pursuer has also established, by a large and consistent body of testimony, that the appearances which thus suddenly were presented by his plantations were the distinctive results of sulphur fumes. These indications are now familiar to all acquainted with the ironstone districts, either in Scotland or in England; they are fully described by the witnesses, and were at once recognised by them as being the characteristic signs of injury by the fumes of sulphur. The substance of the evidence of these witnesses is to the effect that, as matter of fact and experience, trees will not grow within the reach of the fumes which are the product of the open calcination of ironstone, or, at least, that these fumes are fatal to healthy arboreal life. The experience of the “black country” in England, of the effect of the process in the neighbourhood of Durham, and especially of similar bings or burning heaps in the vicinity of Dalry, in Ayrshire, is said to demonstrate that, within the range of their operation, hardly a healthy tree is to be found.

It is farther sufficiently established by the pursuer's evidence, that, in point of fact, sulphur is evolved in this process of calcination in a quantity sufficient to affect, and in many instances to destroy, vegetable life, if subjected closely and persistently to their effects. On the general aspect of this evidence, I am of opinion that, if taken by itself, it is conclusive of the main allegations on which the pursuer's action is based.

One element in this proof weighs very much with me. I mean the fact, which I must hold as proved, because there is no evidence to the contrary, that these woods presented a healthy and vigorous appearance before the calcination began, and commenced to shew symptoms of decay immediately thereafter. That fact, to my mind, disposes of a large amount of criticism, for, if the distinctive appearances of sulphur were absent until the calcination began, and developed themselves for the first time a few months afterwards, no amount of theoretical opinion will avail to avoid the conclusion, which common sense must suggest, that the sequence of events in this instance indicates cause and effect. The evidence led by the defenders must, therefore, be considered and estimated in the light of this significant and suggestive fact.

I shall proceed to consider the defenders' evidence in two or three of the more important details to which it relates. I commence with one view which has been very anxiously elaborated, and which occupies a large space in this volume of evidence,—I mean the allegation that the injury to the pursuer's woods is the result of the operation of natural causes. It is alleged by many witnesses of

character and skill that these causes are numerous and varied. Bad soil to begin with—inclement exposure, imperfect drainage, want of sufficient thinning in some places, injudicious thinning in others, are said to have tended to the general decay throughout all the plantations. Some of the pines have been planted under deciduous trees, where it is known they cannot thrive. Others on the site of former woods, where the roots of the former occupants of the soil hinder the young growth. Hence a fungus has attacked the roots, and a fly has devastated the leaves. In short, no physical calamity to which growing timber, especially pine, is subject, is, according to these representations, absent in the plantations of the pursuer.

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The picture thus drawn by the defenders' witnesses, which I have not over-coloured, removes from the points of controversy one of the most important. It proves conclusively the injury which the trees have sustained, whatever the cause of it. If the condition of these plantations be as the defenders represent, they must have been the subject of some injurious influence, from whatever quarter it came. So far the evidence tends to corroborate the case of the pursuer as regards the condition of his woods in and subsequent to 1877. But when we come to consider this catalogue of causes, as accounting for the physical appearance of the woods, I must own that the evidence has not impressed me favourably, and is far from carrying conviction. It proves too much, and, so far from solving the required problem, is inconsistent with its conditions.

I do not doubt that, in a greater or less degree, all these injurious influences are to be discovered within the Glencorse plantations; and, I suppose, the same thing might be said of any wood of young pines in any district of the uplands of Scotland. Overcrowding and exposure to wind, planting under deciduous trees, or on the site of former plantations, are familiar elements in such parts of the country. Probably there is not a stretch of planting on the sides of the Pentlands in which they are not to be found, in some degree, even under the best management. It might also be assumed, but that is by no means so certain, that the appearances they are capable of causing in individual specimens have some particulars in common with those created by sulphur fumes. But although these things were granted, the causes in question are totally incapable of producing the result of the origin of which we are in search. All these tendencies are of gradual operation, as indeed the witnesses say; and although I am myself well satisfied that the conclusion to which they advance is only reached by the device of substituting the general for the partial (and the large amount of skilled and independent testimony adduced by the pursuer leads to that conviction), it is clear, on their own shewing, that these causes could not have produced the phenomena in question. Supposing that any one of them, or that all combined, might, in process of time, have converted the flourishing woods described by the pursuer into decaying and backgoing timber, they never could have combined to produce this result within the same three months. That all these different and unconnected causes of decay, which had never exhibited their presence before, were simultaneously stimulated into activity in the summer of 1877, it is impossible to believe, if we believe the uncontradicted testimony of those who were familiar with these plantations up to the beginning of that year. For that sudden change, and those unwonted indications of decay, we have one cause, and one cause only, established in the proof. It is an agent of the existence of which there is no doubt, and it is one which only came into operation for the first time shortly before these appearances began to shew themselves. I remain,

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therefore, entirely unconvinced by this long and elaborate mass of evidence, and what I think its untrustworthy features throw an unfavourable light on the rest of the speculative testimony adduced for the defenders.

If, as has been maintained, the effect of the hard winter of 1876-77 was the source of this damage, it is but reasonable to think its operation should have extended all over Scotland; but we have no evidence to that effect. The illustration drawn from one of the woods of Penicuik is to my mind too vaguely proved, and altogether insufficient to neutralise the views that I have now expressed. I do not give much weight to, and place but little confidence in, that testimony.

Secondly, It is maintained by the defenders, and much insisted on, that these woods do not exhibit the general aspect known to be caused by the operation of sulphur fumes on vegetable life; and, in particular, that they do not exhibit one peculiarity which is found in these cases, namely, that the injury does not diminish in proportion to the distance from the bing; that trees which are near escape, while those at a greater distance are said to be injured.

Now, while it is clearly proved by the witnesses for the pursuer that, in general, the amount of injury does diminish in proportion as the distance from the bing increases, it is also true that there are many individual positions in which the vegetation has escaped, which are nearer to the bings than some of the trees which have suffered. But this arises from the operation of well-established laws. These fumes do not travel along or over the earth in a broad horizontal line, but generally in a close and often a narrow column, of varying altitude, according to the density of the atmosphere. They follow the direction of the prevalent wind, but the places which they assail are determined by many causes which it is difficult to trace. One of the pursuer's witnesses, Anderson, says—"All persons who know about these fumes know that they swim along the atmosphere in a body, as a rule, and they carry death and destruction along with them. The trees on the outside suffer worst. But if that is persevered with, it eventually kills the whole breadth of the plantation on which it strikes; and that is what I call a vista." (54, 55). In the same way Slater says—" (Q.) Do you find, in your experience, that the fumes will pass through a plantation in a certain direction, and leave a distinct mark of the progress of the fumes? (A.) Yes. (Q.) Passing through it like an avenue? (A.) Yes." And one of the defenders' witnesses, Mr Stead, says, in relation to the timber near the bings in the county of Durham,—“Of course the surface of the ground in the district has something to do with the effect. If the bings are in a valley the trees on the hills round about are more affected than if they were on flat ground, and I should say at a greater distance.” In this way it is certain that proximity is not and cannot be an invariable rule, but it is modified by the breadth and altitude of the column, the configuration of the ground, and the nature, condition, and health of the plant affected. Allowing for these modifications, I think the evidence does establish that at Glencorse, as elsewhere, the injury from the fumes is greater the nearer the plant affected is to their source.

The only question on the evidence which I have found attended with difficulty relates to the distance at which these fumes are injurious. The defenders have collected a considerable body of evidence in order to establish that the sulphur fumes evolved from these calcining bings cannot travel to the distance relied on by the pursuer, at least with the noxious effect ascribed to them. I have considered this question with considerable anxiety and care, because the evidence

led for the pursuer on this point is defective in precision, and that on the part of the defenders has at least apparently the merit of being pointed and specific. No. 182.

It is said by the defenders that the proper range of sulphur fumes emitted by calcination from open heaps does not extend beyond from 200 to 300 yards, at least as far as relates to their injurious effects. Now, the point at which the greatest amount of damage is said to have been done in the Glencorse woods by these fumes, namely, the point named in the proof Pheasant Corner, is at least 500 yards from bing No. 1, and over 1200 yards from bing No. 2; while the plantation at Flotterstone is considerably more distant. From this the defenders conclude that the trees cannot have been injured at these points from the sulphur fumes. July 20, 1881. Inglis v. Shotts Iron Co.

I observe, however, in the first place, that the defenders' evidence on this head is not quite so conclusive as at first sight appears. It is true that Dr Völcker asserts that none of the Glencorse trees were injured by the fumes. Dr Aitken says that the effects of the fumes seem to disappear at 200 yards, and several others of the defenders' witnesses concur with him. Dr Odling found no trace of them at 400 yards. But, on the other hand, Mr Vicars Thomson says the maximum distance at which the effects are even visible is from 400 to 500 yards; and Mr Ford says that "the fumes may have a slight effect probably to the distance of half a mile, or about that; but it is so slight that it is scarcely distinguishable."

Thus, as it stands, this testimony falls far short of demonstrating even the improbability of these fumes operating injuriously at 1000 or 1200 yards; and in regard to the analogies drawn from specific localities, such as Durham or Dalry, something may depend on the difference between level ground and the breezy uplands at the foot of the Pentlands. But the opposing evidence seems to me sufficient to displace any such conclusion. In the first place, such reasoning must yield to the fact, if it be a fact, that the trees at the distance in question shewed what I must hold to be clear signs of the effect of the fumes, for these were observed at Flotterstone, which is considerably beyond the range in question. In the second place, the description given by the pursuer's witnesses of the results observed by them in calcining districts seems to exclude the opinion that the effects of the fumes are limited to such distances. Further, it seems well established that the columns of smoke were seen all over the estate of Glencorse, and that the odour of sulphur which they bore along with them was sensible to quite as great a distance as the pursuer has alleged; and Dr Odling and Mr Dupré tell us that where the odour is perceived the presence of sulphur to an injurious extent may be inferred. And lastly, we have the results of the chemical experiments, with which the Lord Ordinary in his note has dealt in a manner quite satisfactory to me. With these I do not propose to deal in detail, but content myself with making one or two remarks on Dr Dittmar's and Dr Dewar's experiments with rain-water, which, although one flaw in the process prevents them from amounting to demonstration, are yet important contributions to the solution of this question.

These experiments were conducted at all the principal points at which injury from the fumes was alleged, and they certainly prove the presence of sulphur at all of them in an appreciable quantity. It is no doubt true that the sulphuric acid in the bottles was not free, but in the form of a sulphate; and it is said that this might have been sulphate of ammonia formed in the atmosphere by sulphurous acid in combination with the ammonia disengaged in the process of calcining, and that, if such were the case, the sulphur reached the stations in a state innocuous to

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But it does not follow that the experiment is to be thrown aside, for it proves that, combined or uncombined, the sulphuric fumes reached the different stations at which these experiments were made; and failing direct evidence as to whether they reached them in a deleterious or an innocuous state, correct reasoning would suggest that we should ascertain the results coincident with their presence.

To take only one illustration. It appears quite clear, from the evidence of Lamont and others, and is not disputed, that the greatest damage done to the trees was about the point named Pheasant Corner, which is said to be 500 yards from Incline No. 1, and 1200 yards from Incline No. 2, as to which it lies in the direct line of the prevailing wind. If, therefore, Dr Dittmar's experiment shews the presence of the greatest amount of sulphur at the point of the greatest amount of damage, it is reasonable to conclude that there is a connection between these facts. Now, Dr Dittmar's tables shew two results,—first, that the amount of sulphur ascertained in the month of February of each year, from October 1878 to February 1881, was largely greater than in any other month, following as it did on the three winter months of calcining; and, secondly, that in the month of February 1880—three years after the calcining commenced—the amount of sulphur disclosed at Pheasant Corner was the largest ascertained at any point at any time. It is not unreasonable to draw the inference that the sulphur, when it reached this point, was not innocuous.

The only other remark I shall make on the evidence relates to a view pressed on us by the defenders, founded on the fact that healthy trees were found side by side with trees which were injured. But I see no reason to suppose that such influences do not operate on vegetable life as analogous influences operate on animal life. The weaker and predisposed succumb, the stronger and less susceptible for a time resist. So Dr Dittmar found in his greenhouse experiment. Only a percentage of the plants was destroyed, although doubtless, had his experiment continued, all must in the end have perished.

On the evidence, therefore, I come to the conclusion that the injury which the pursuer says he has suffered, and that which he says he has reason to anticipate, have been sufficiently established by the evidence. Of course, there are many points to which I have not alluded, and necessarily could not allude, in this mere summary of the main results. I am also of opinion that these are directly the result of the defenders' operations in the calcination of ironstone close to his boundary. If this be so, I do not doubt that he is entitled to the remedy of interdict. His interest is not to be measured even by his present loss. If the view I have taken of the facts be correct, he has to contemplate

the total destruction of his plantations as ornamental timber. There is no reason to suppose that what has taken place everywhere else will not occur here. The conifers, no doubt, being the most susceptible, will give way the soonest ; but experience seems to shew that the hardwood trees will follow, and that their destruction also is only a question of time. Against this result I think he has a reasonable claim to be protected.

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No question of law was raised before the Lord Ordinary ; but we have had from the bar, on the reclaiming note, a long and able argument to shew that, assuming the facts to be as the Lord Ordinary has found them, the defenders have only done with their own property what they were entitled to do, whatever injury they may have caused to the pursuer ; and that these operations, undertaken entirely for their own profit and for that of the proprietor, possess a *quasi* exceptional character, which ought to protect them from being stopped, whatever obligation of damage their results might infer.

This is, of course, a well-worn theme ; but the law on the subject is not doubtful, nor do I think the present by any means a difficult example.

The general rule is, that every one is bound so to use his property as not to injure his neighbour. It is equally certain that this rule may suffer modifications according to the varied considerations of social life. Things which are forbidden in a crowded urban community may be permitted in the country. What is prohibited in enclosed land may be tolerated in the open. Vicinity—close proximity—may make that a nuisance which may cease to be so at a distance ; and the habit and practice of the neighbourhood has also some weight in cases of this kind. Nor, in extreme cases, do I doubt that the comparative interests at stake may be taken into view.

But I do not think the facts of the present case make it necessary to apply any of these modifying rules. The simple ground of complaint in this case relates, not to any use which the defenders make of their own property, but to the use which they make of the atmosphere as it passes over them, by injecting into it noxious vapours, which prevent it reaching the pursuer in purity, and cause damage to his property. The law on this subject was fully discussed and settled in the case of a running stream, in the action against the papermakers on the Eak. The analogy of the atmosphere may not be in all respects complete, inasmuch as the rights of riparian proprietors in water-runs are more capable of definition and appropriation than those in the purity of the atmosphere. But in the case of injury to health by polluting the air the regulating principles are precisely the same, and we so applied them in the recent case of *Fraser v. Cran*, 4 R. 794 ; and injury to property, although admitting, as I have said, of some qualifications, substantially follows the same rule. The cases relating to brick-burning in urban or suburban districts, several of which have been decided by the Courts in England, were instances mainly of annoyance and discomfort ; but the judgment in the case of *Bamford v. Turnley*, 31 L. J., Q. B. 286, has substantially set the law on that subject on an explicit footing, and the opinion of Baron Bramwell in that case proceeds on principles which are conclusive of the present.

It is true that if we continue the interdict which the Lord Ordinary has granted these mineral lessees may be exposed to inconvenience, and even to loss. But I cannot hold in the present case that this consideration can justify the continuance of the wrong. It was very truly said by Lord Justice James in a recent case, that when large interests are at stake persons should not stand on their extreme rights. I am quite of that opinion, but the sentiment seems

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to tell against the defenders. There is no attempt to shew, on the proof, that the operations of the defenders might not be carried on at other points of the estate of Penicuik, without doing any injury to the pursuer's property, or other conterminous proprietors. The evidence is left a blank upon that subject, and there are no facts upon which we can come to a conclusion on it. But it is manifest that any difficulty on this head is entirely the voluntary act of the proprietor of the minerals, and the defenders, his lessees. Their lease covers an area upwards of three miles in extent, measuring from the pursuer's boundary, besides the minerals in the adjoining property of Logan Bank. I have looked into these leases, and their provisions afford a very instructive commentary on what the parties to them believed to be the character and effect of calcining. As regards Logan Bank, the defenders are prohibited by their lease to calcine on any part of the lands. By their lease from the proprietor of Penicuik they are prohibited from calcining on more than one-half of the area I have mentioned,—that is to say, on an area of nearly two miles in length; and although the portion on which they are not debarred from calcining extends to more than a mile from the pursuer's boundary, they have chosen to set down these calcining heaps within a couple of hundred yards of the pursuer's property, at points at which the width of the grounds narrows to about 300 yards. But these are voluntary acts. It is certain, at least for anything that appears, that the proprietor of Penicuik could not justify the works complained of on the pretext that he could not carry on the operations elsewhere. Nor do I think he could, by interposing a tenant, and introducing these restrictions into his lease, obtain the full value of his minerals, and save his own woods at the expense of his neighbour. It is not, in my opinion, a reasonable arrangement between landlord and tenant in a mineral lease to exempt practically nine-tenths of the surface of the mineral field, and all positions where such operations might injure the landlord, and to select for these deleterious operations a mere corner close to their neighbour's land, to the prejudice of one to whom they can yield no profit.

LORD YOUNG.—The defenders are tenants of the minerals in the lands of Penicuik, belonging to Sir George Clerk, and of Logan Bank, belonging to Mr Maxwell Inglis. The pursuer is proprietor of Glencorse, which marches with both, and of Belwood, which adjoins Glencorse on the west. The defenders have for some time been calcining, at a place called Incline No. 1, ironstone won from both Penicuik and Logan Bank, and at places called Incline No. 2, and New Hearths, ironstone won, as I understand, from Penicuik only. The pursuer complains of the calcining at all these places as a nuisance to his properties of Glencorse and Belwood, and seeks to restrain it by interdict accordingly. The nuisance alleged is injury to trees and hedges from the smoke. By an arrangement, referred to on record, the calcining has since 1878 been limited to the months of November, December, and January. The question regards calcining in these months only—whether it occasions a nuisance to the pursuer.

There is a residence on Glencorse, and also on Belwood, both let, and I think it must be assumed that with respect to these there is no nuisance, for there was no attempt to prove any, and it appears that the residence on Glencorse has recently been let for an increased rent to a tenant who makes no complaint. Neither has any attempt been made to prove injury to herbage or crops. In-

deed, no inmate of either residence, and no agricultural tenant or cultivator No. 182.
 were called. Further, there is no evidence of injury to deciduous trees, which, July 20, 1881.
 I understood it to be admitted, were not liable to injury from smoke (in the *Ingles v. Shotts Iron*
 quantity found), between November and January. The controversy in fact Co.
 regards only the conifers—were they injured by smoke or not? On this question
 the evidence is voluminous, and so contradictory that one could not, I think,
 greatly hesitate to answer the question differently according as the witnesses
 on the one side or the other were relied on. I should myself have thought,
 although I desire to speak diffidently, being aware that your Lordships think
 otherwise, that the question was a fitting one to be tried by a jury.

Of the three properties owned by the pursuer, two, I think, may be laid out
 of view as of no account in the case,—House of Muir, inasmuch as it is
 admitted that no damage has been done to it; and Belwood, inasmuch as it is
 not proved, at least in my opinion, that any damage has been done to it. The
 firs planted by the pursuer himself, and to the condition of which the evidence
 is almost exclusively confined, are on Glencorse, and the substantial question of
 fact in the case regards them only. It is, I think, proved that, since 1877—
i.e., since the commencement of the calcining complained of—a considerable
 number of these firs have manifested symptoms of bad health such as may be
 caused by any of several causes, and that many of them have died. With
 respect to some—I think not a few—of these unhealthy and dead firs, it is
 proved that their condition is not attributable to smoke from the defenders'
 calcining bings, but to natural causes. With respect to others again, and these
 in considerable number (though the evidence does not enable me to judge of
 the number even approximately), it is, I think, proved that smoke from the
 bing at Incline No. 1, which is in their immediate neighbourhood, is, if not the
 only cause, a material contributory cause of their condition.

Our only knowledge of the extent of the woodland on the property of Glen-
 corse is such as we can collect from an inspection of the map, and the fact that
 it is worth £25 a-year for grazing, if cleared of trees. Throughout this wood-
 land the firs in question were planted within the last twenty-five years. The
 unhealthiness and death undoubtedly proved extends throughout; and the pur-
 suer has adduced evidence to shew that the pernicious effects of the smoke
 from the defenders' bings extends throughout, and is the true cause of the bad
 condition of the trees, at least generally and for the most part. I cannot say
 that this has been proved to my satisfaction. I think, on the contrary, that it
 is proved that other causes operated extensively; and that with respect to the
 parts of the property at a distance from the calcining bings these other causes
 were not materially aided by the smoke. The smoke is from coal fires, and no
 otherwise noxious than smoke from any fires in which coal is burnt. It is in
 greater volumes than smoke from house chimneys, and given off at a lower
 level, but it is the same smoke. The noxious ingredient is sulphur—the
 percentage of which, in this particular coal, is exceptionally low. Now, the
 generation of such smoke at calcining bings is, and has long been, of common
 occurrence, and it is reasonable to expect that the effect of it, and the distance
 to which it operates on vegetation in the neighbourhood, and particularly on
 conifer trees, should be known and capable of being shewn by the evidence of
 actual experience. There is, accordingly, such evidence in this case, and it is
 generally to the effect that, while a calcining bing is injurious to vegetation in
 the immediate vicinity, it has little effect beyond 200 yards, and none at all

No. 182. beyond 400 yards. This testimony of experience is, I think, confirmed by the scientific evidence—or perhaps I should rather say confirms it. There is, as I have said, evidence of the existence and operation (to a considerable extent admitted by the pursuer's witnesses) of other causes sufficient and likely to injure and kill young fir trees at the various places where they in fact suffered; and having regard to that evidence on the one hand, and on the other to the experimental and scientific evidence to which I have just referred as to the distance at which calcining bings are injurious to trees, I am unable to say that it is proved to my satisfaction that the unhealthiness and death of trees beyond 400 yards from the bings is attributable to them. I think it not immaterial to notice that Mr Barron, one of the pursuer's witnesses, who has experience of the effects of smoke from calcining and cokeing bings, although some of his language is rather vague and indefinite with respect to distances, practically confined his evidence to the immediate neighbourhood of Incline No. 1, and took all his specimens, whether for exhibition or his own examination and consideration, within a distance of 200 yards of it.

But if 400 yards, or even twice that distance, be taken as reasonably safe, there is an end of the case with respect to Incline No. 2 and New Hearths, for I have already observed that there is, in my opinion, no proof of injury to Belwood, and the notion of prohibiting calcining within two miles or one mile cannot be sustained.

With respect to Incline No. 1, I am of opinion, as I have said, that the calcining operations there have, in fact, been prejudicial to a number of conifers (Norway firs and spruces) on the pursuer's property of Glencorse. In the state of the evidence this cannot be affirmed with absolute certainty, for it is possible that the proved condition of the trees may be the effect of other causes which are shewn, as I think, to have produced similar effects where the smoke from the bing did not operate. But that smoke being itself a sufficient cause of the proved effect, and likely to produce it within a distance of from 200 to 400 yards, I think it reasonable within that distance to attribute the effect to it, and to take the case on that footing accordingly.

So taking it, the question of law is, whether there is here such nuisance and injury to the pursuer's property as to entitle him to the remedy he asks? I do not regard this as a simple question in the sense of being easily answered. The defenders are certainly not at liberty to cause avoidable damage to the pursuer or any other adjoining proprietor,—that is to say, avoidable consistently with the reasonable exercise of their own legal rights at suitable or convenient places within their own bounds. It follows from what I have already said that with respect to Incline No. 2 and New Hearths the action fails on the facts—no damage being done by them to the pursuer's property. With respect to Incline No. 1, by which I think damage is done, my doubt is about the reasonableness of calcining at that place, even in the winter months—for to the extent of confining the operations to that season the defenders have yielded to the injunction *sic utere tuo ut alienum non lēdas*. It was explained at the bar that the minerals of Logan Bank and Penicuik crop out there, and that the consequence of interdicting the working and calcining them would be to sacrifice a considerable part of the mineral field. But although there is some evidence on this subject it is slight, and I cannot say satisfactory. On the other hand, the pursuer does not, as I understand, suggest that No. 1, as a place of working and calcining, was not properly selected with reference to the legitimate interests of

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the mineral field, and could be abandoned without a great sacrifice to the defenders and their landlords, or that it is an inconvenient place otherwise than with reference to the wellbeing of the fir trees in the neighbourhood. In the circumstances, and considering the decision that is about to be pronounced, it is probably an idle thing for me to pursue this topic. I should, however, wish to say for myself that I think the legality of an act, and the reasonableness of doing it at the particular place, is to be taken account of, and may be sufficient to defend it, notwithstanding that it causes damage to a neighbouring property. The nature and extent of the damage are, of course, to be considered, on the one hand, as well as the nature and extent of the proprietary interests sought to be sacrificed in order to avoid it, on the other. It is according to the evidence that iron ore, such as that here in question, must be calcined at the pit-head where it is brought to the surface, and that a field of such ore cannot in fact be worked on other terms. I cannot assent to the contention that it is necessarily sufficient for the pursuer's case that he has proved damage to his fir trees such as would entitle him to protection and remedy against a wrongdoer. I think magnitudes and proportions are to be considered, and also whether or not the defenders have acted with a reasonable regard to their neighbours' interests in selecting the places for operations which are in themselves quite legitimate. I am not prepared to hold that the case is made out with respect to Incline No. 1, although, had my views on the case generally prevailed, I should have been prepared to allow further evidence regarding it—not as causing damage or not, but as being or not being a convenient and reasonably chosen place for working and calcining, having regard to the defenders' legitimate interests as well as those of the pursuer.

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LORD CRAIGHILL.—I differ from the opinion which has just been delivered by my brother Lord Young, and concur with that which has been given by your Lordship in the chair. This case has received from me very anxious consideration since the argument was taken on the reclaiming note. I have not prepared a written opinion setting forth the result at which I have arrived, or the reasons which have led me to that result; but your Lordship was good enough to allow me an opportunity of reading the opinion which had been previously prepared by your Lordship, and I became so satisfied with the views of the case you presented that it appeared to me to be necessary only to adopt your Lordship's reasons and conclusions. Therefore, my Lord, for the conclusions at which I have arrived, I refer to the opinion you have delivered.

THE COURT adhered.

INGLIS & ALLAN, W.S.—HOPE, MANN, & KIRK, W.S.—Agents.

DUNCAN WRIGHT AND OTHERS, Suspenders.—*Taylor Innes.*
HON. G. A. H. G. O. ELPHINSTONE AND HUSBAND, Respondents.—*Pearson.*
Parish—Churchyard.—Held by Lord Adam, Ordinary, that certain persons, being heritors and parishioners, were entitled to interdict to prevent another heritor from converting the family mausoleum in an old parish churchyard into an Episcopal chapel.

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ston.
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IN August 1880 Duncan Wright and others, heritors and parishioners in the parish of Tulliallan, presented a note of suspension and interdict against the Honourable Georgina Augusta Henrietta Godolphin Osborne

* Decided March 16, 1881.

No. 183. Elphinstone, commonly called Lady William Godolphin Osborne
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 Wright, &c. v. Elphinstone, residing at Tulliallan Castle, Kincardine-on-Forth, and the
 Lady Elphinstone. said Lord William Godolphin Osborne Elphinstone, as administrator-in-law for his said wife, and as an individual, praying the Court to interdict, prohibit, and discharge the said respondents, or either of them, from interfering with, or proceeding to occupy and use, for the purpose of building a church or chapel for Episcopal services, the burying-ground in the churchyard of Overtown, in the parish of Tulliallan and county of Perth, or any part thereof.

The suspenders averred;—(Stat. 2) “The parish church of Tulliallan originally stood on the edge of the old road leading from Kincardine ferry to Perth, and about one and a half miles north from the town of Kincardine. It was surrounded in the usual way by the parish churchyard. The church was afterwards removed about a mile nearer to the river Forth, and a new churchyard formed, but the old churchyard, known by the name of Overtown, continued to be, and to be used as, the parish churchyard, and it has been for centuries a burying-place for the parish of Tulliallan. It is still used for the purpose of interments by the parishioners, and these take place from time to time.” (Stat. 4) “Early in the present year the complainers ascertained that the respondents, or one or other of them, proposed to erect a church or chapel in the said churchyard, and to use the same for the purpose of ordinary public worship, in accordance with the forms in use among the body of Dissenters known as Scotch Episcopalians. In carrying out this design it is believed and averred that the respondents intend wrongously to interfere with the solum of the churchyard and the graves of different parties, and to remove tombstones and other monuments, to make room for the intended church or chapel.”

The suspenders pleaded;—1. The respondents having no right or title to use the churchyard for the erection of a chapel, the prayer of the complainers ought to be granted. 2. The erection of an Episcopalian chapel not being a proper or legal use of a parish churchyard, the prayer of the complainers ought to be granted. 3. The proposed erection being an invasion of the rights of the complainers as heritors and parishioners their prayer ought to be granted, with expenses.

The respondents made the following answer to Stat. 4 above quoted:—(Ans 4.) “Denied, subject to the following explanations. The respondents, who are members of the Episcopal Church, propose to make an addition of 18 feet in length to the existing mausoleum, in which the late Lord Keith, father of the respondent, Lady William Godolphin Osborne Elphinstone, and certain other of her Ladyship’s relatives, have been interred, in order to adapt the same for use as a place for worship for themselves and the members of their household according to the forms of the Episcopal Church in Scotland, there being no Episcopal chapel nearer than three and a half miles from Tulliallan Castle. No graves or tombstones in which the complainers or any of them are interested will be in any way interfered with by the said operations, which necessitate the removal of only one tombstone, and that of great age, and illegible through decay.”

They also averred;—(Stat. 1.) “In and prior to 1673 a small church stood in Overtown churchyard, and was used for Episcopal service according to the form then recognised by the State. To this church there was attached a small burial-place, which is believed to have been then used for the interment of residents in the barony of Tulliallan, now the property of the respondents.” (Stat. 2.) “In or shortly after 1673, the barony

of Kincardine, and certain other lands now in great part the property of the respondents, were disjoined from the parish of Culross and annexed to the parish of Tulliallan, which parish, prior to 1673, only included the barony of Tulliallan. In consequence of the increased extent of the parish a new church was built in 1675 in the village of Tulliallan (about a mile and quarter distant from the said old church), and a churchyard of considerable extent, given off from the Tulliallan estate, was attached thereto, in which burials have regularly taken place down to the present time, and which has ever since been the churchyard of the parish." (Stat. 4.) "The new churchyard opened in 1675 was intended to supersede, and did in fact supersede, the Overtown burial-place, as the churchyard of the parish; and the latter, which is wholly surrounded by the respondents' lands, thereupon ceased to be regularly used, and the church fell into ruin."

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The respondents pleaded;—1. The complainers have no title to insist in the present application. 2. The ground in question being the property of the respondents, and, *separatim*, no right of the complainers being interfered with or injuriously affected by the proposed operations, the note should be refused, with expenses. 3. The said ground not being now the parish churchyard, and not having been so for more than two centuries, the note should be refused.

After a proof the Lord Ordinary pronounced the following interlocutor* :—"Having heard counsel for the parties on the proof adduced, and

* "OPINION.—. . . I propose to limit my judgment to the real question at issue, viz., that involved in the first branch of the case as to the right of Lady Elphinstone to erect a chapel in what is called the churchyard of Overtown, and to use it for the purpose of public worship according to the Episcopalian form.

"Now, in regard to the evidence in this case, I do not think there is any reasonable doubt, or that it is matter of dispute, that this churchyard was, prior to 1672 or 1673, the burial-ground for the parish of Tulliallan. That being so, I am further of opinion, upon the evidence, that that ground has never been abandoned or given up, but has continued to be a parish churchyard. There is evidence before me that burials have been going on there ever since. In 1672 or 1673 a new churchyard was formed, and it necessarily followed that interments in the old original kirkyard would cease to be so numerous, and those that were made would relate to parties whose predecessors had been buried there, and that they alone would probably be the parties buried in the old churchyard. The younger parishioners would, I think, be buried in the newer churchyard, but which is now an old burying-place. I find from the plan of the old churchyard that there exist tombstones of all dates, and at various intervals, the last of them being so late as 1875. It was proved that in recent years three or four burials had taken place. That shews to me pretty conclusively that this old churchyard has never ceased to be anything but a churchyard. It was suggested by Mr Pearson that the Welches were buried there by some private right or title of their own. It may be held, in connection with the old excambion, which is said to have taken place 200 years ago, that all the numerous people who appear to have been buried there since were buried in respect of some private right or title. I have no doubt that those existing tombstones represent only a tithe of the people buried there in that time. I am therefore of opinion, upon the evidence, that the old churchyard of Overtown was at one time the parish kirkyard of Tulliallan, and has continued to be so down to the present time. If it is assumed that this was once a parish churchyard,—and looking to the fact of all those people having been buried there I cannot take the suggestion that possibly there may have been some other right or title held by those persons,—I say that there is no evidence before me that this piece of ground has ever been abandoned or disused as one of the churchyards of the parish.

"Now, if that is so, I have no doubt, upon the law, as to the rights of

No. 183. considered the same, with the productions and whole process, Suspends the proceedings complained of, and interdicts, prohibits, and discharges

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heritors, and the character in which they hold their title to the churchyard. It is not material in this question to inquire who are the heritors. Whoever they are, I think they hold the churchyards in trust for the parishioners, and are bound to see that they are administered for the purposes for which churchyards were instituted by the law of Scotland. I think the heritors have the fullest right of administration in connection with the churchyards and the tombstones which may be erected in them. They can prevent even the erection of a mausoleum, if they think fit, or anything that interferes with the free use of the churchyard. But it is quite a different matter to say that the whole of the heritors can combine together—or that one can do it with the approval of the others—to use the churchyard for purposes foreign to it. No consent of the whole heritors can authorise such a step, because that would be a breach of trust, and that is really what this case comes to. If it is a breach of trust, then I hold that the parishioners, and I should think also those parties having land in the parish, although they may not at the moment reside in the parish, would be entitled to interfere; they are entitled to do so, if there is a misuse by the heritors as trustees, of the property under their charge. Therefore, if this be a parish churchyard,—as I think it is,—it humbly appears to me that the suspenders here have a title to come forward and say,—You shall not apply the churchyard, which you hold for us and our successors, to purposes inconsistent with churchyard uses. Mr Pearson suggested that they had no right to interfere by way of interdict,—that they were bound to bring a declarator. Now, that would have been a very appropriate mode of determining the rights of parties; but if the fact be as stated, it humbly appears to me that it lay on Mr Pearson's clients to bring such a declarator. It is contended that,—presumably by excambion,—Lady Elphinstone or her predecessors had originally right to this ground, and now have right to it. It may be so; all I say is that it lies on them to prove their right. I am of opinion that the parishioners, seeing Lady Elphinstone disturbing the existing state of the churchyard, were quite entitled to interfere. I therefore think that there is nothing in the objection that the proceedings here on the part of the suspenders should have been by way of declarator. Now, in regard to another point, there is no doubt at all as to what the object of the proceeding is, because the respondents set out, in their 4th answer, that 'the respondents, who are members of the Episcopal Church,' &c. (reads). One can understand why this particular site should be selected by the respondents for the erection of an Episcopal chapel. I do not think it matters a straw whether the building to which an addition is proposed to be made is called a mausoleum; I do not think that makes the least difference. It would have been the same though there had been no mausoleum there at all, and the respondents were simply proposing to erect for the first time an Episcopal chapel in what I think is the parish churchyard. Mr Pearson suggested that the purpose only is objected to. In one sense that is quite true; but there is also the question whether the erection of the building is legal. If Lady Elphinstone proceeds to use the existing building, it may be for an illegal purpose. The building, as I think, is not to be used in connection with the purposes of the churchyard, but is to be used for a purpose quite foreign. It appears to me that whether a building interferes with accesses to the graveyard, or with the tombstones in the graveyard, is nothing to the point. I do not see why a heritor, who, in my humble opinion, is in no better position in this case than any other heritor, has any more right to build an Episcopal chapel than Mr Welch, in respect of his lair, had to build a Presbyterian church (if he be of that persuasion) over the remains of his ancestors, or than any other party in similar circumstances. I think the proceeding in question is a diversion, on the part of the trustees of this churchyard, from its proper purpose as a churchyard, and I think it is a breach of trust on the part of Lady Elphinstone. If the remaining heritors of the parish do not choose to come forward and say, You are not to do this, then I think the petitioners here are quite entitled to come

the respondents, or either of them, from interfering with, or proceeding to occupy and use, for the purpose of building a church or chapel for Episcopal services, the burying-ground in the churchyard of Overtown, in the parish of Tulliallan and county of Perth, or any part thereof, and decerns: Finds it unnecessary to dispose further, in the meantime, of the prayer of the note of suspension and interdict: Finds the complainers entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax, and report."

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CARMENT, WEDDERBURN, & WATSON, W.S.—DUNDAS & WILSON, C.S.—Agents.

THE UNITED INCORPORATION OF MASONS AND WRIGHTS OF HADDINGTON, No. 184.
Petitioners.—A. J. Young.

Nobile officium—Stat. 9 and 10 Vict. (*Exclusive Trading in Burghs Act*, 1846), cap. 17, secs. 1, 2, and 3—Application of funds of incorporation nearly extinct—*Procedure*.—An ancient Incorporation of Masons and Wrights in a burgh, which had formerly the privilege of exclusive trading, having become almost extinct, a petition was presented to the Court, under the 3d section of the *Exclusive Trading in Burghs Act*, 1846, to have certain resolutions as to the future application of the funds approved of. The Court remitted the resolutions to the Registrar of Friendly Societies, and upon his report approved of the resolutions as amended by him.

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Resolutions approved of by the Court in the above circumstances.

THE UNITED INCORPORATION OF MASONS AND WRIGHTS OF THE BURGH OF HADDINGTON was a body founded many centuries ago for the purpose of carrying on these trades exclusively in that burgh. The Act of 9 and 10 Vict. cap. 17, for the abolition of the exclusive privilege of trading in burghs in Scotland, having been passed in 1846, the membership of the incorporation fell off greatly, and in January 1881 there was only one

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forward and do it. If Lady Elphinstone has acquired a right of property in this churchyard it will be different; she may then do whatever she likes. It has been suggested that she has acquired such a right of property, but there is no proof of it whatever, so far as I can see. It has been said that in the year 1672 or 1673 a new church was built, and a new churchyard formed round it; that there must have been an excambion or something of that kind, but of which there is no trace,—some excambion whereby Lady Elphinstone acquired a right of property, which, admittedly, she did not possess before in this churchyard. I say there is no evidence of there having been any such excambion. I think the presumption is all the other way, because I think the future history of the churchyard shews that the parishioners just used it, as before, for carrying on their interments. The whole case turns upon the leading question whether this was in the old days, before the Reformation and downwards, a parish churchyard. I think it was a parish churchyard, and has never been anything else than a parish churchyard. It may be a mere sentimental objection that the parishioners in this parish should interfere with the erection of an Episcopal church, and the carrying on of Episcopal services, in the midst of what, I think—and of what they think—is an existing churchyard belonging to the parishioners. I can only say it is a sentiment in which I should be very much inclined to share. Assuming always that this churchyard belongs to the Church of Scotland, I can quite sympathise with the opinions of those parishioners who do not desire that Episcopal services should be carried on in such a place. Therefore, I think that the suspenders are entitled to interdict in terms of the first part of the prayer, and that it is unnecessary to dispose of the remaining points."

* Interlocutor pronounced 7th June 1881.

No. 184. member of the body resident in Scotland, although one or two other members were believed to be alive and resident abroad.
 July 20, 1881. The accumulated funds at that date amounted to about £120, and the
 The United incorporation also owned house property of the value of £400. Under
 Incorporation of Masons and their former practice, and in virtue of a charter granted to them by the
 Wrights of Magistrates and Town-Council of Haddington in 1647, "the incorporation
 Haddington. was empowered to apply its funds for the help of decayed freemen of the
 craft and their wives and children, and any other necessary uses belonging
 to the craft. The relief afforded to such widows of members as were
 in poor circumstances was a payment of about £2 each per annum. For a
 time there were generally four or five widows in receipt of that relief,
 but latterly the number had fallen to two. After these payments, as
 well as taxes, repairs, and other expenses have been met, the funds had
 been regularly accumulated in bank."

Section 3 of the Act above referred to provided that where incorporations fell into such a state as has been above described, it should be lawful for the incorporation to apply to the Court of Session by summary petition to sanction such bye-laws and regulations as might be proposed to meet the circumstances of the case.

Andrew Dickson, the sole surviving resident member of the incorporation, being desirous to obtain the approval and sanction of the Court for an application of the funds beyond that hitherto in use, presented, on 25th January 1881, a summary petition to the Second Division of the Court of Session, in which he set forth the state of the incorporation, and the following resolutions, to which he desired the sanction of the Court:—

"That the funds of the incorporation ought to be applied by the members of the incorporation who are now alive, or who may be assumed or admitted into it, along with David Stevenson, provost; John Hislop, William M'Kay, and Andrew Wood, bailies; Andrew Beatson, Dean of Guild; and Alexander Mouat, treasurer,—all of the royal burgh of Haddington, and their successors in their respective offices above mentioned, for the following purposes:—1. In payment of taxes, repairs, and other necessary burdens and expenses. 2. To meet the charitable purposes authorised by the said gift or charter, with an increase of £2 per annum on the sum now paid annually to each widow, and the claims of any surviving member in destitute circumstances, wherever residing, having a preference. 3. To pay, or assist in paying, the school-fees of such children or grandchildren of parents, or deceased parents, of the incorporation resident in and attending the public schools of the burgh as are deserving of assistance. 4. For the promotion of secondary education in the burgh of Haddington, either by means of a bursary or bursaries, to children attending the public secondary school of the burgh of Haddington, or towards payment of the salaries of the teachers, or towards payment of the expense of appliances in connection with the school, for which assessment cannot be levied on the burgh by Act of Parliament."

The Court, on 16th February 1881, remitted to Mr J. Balfour Paul, advocate, to consider the petition, and report.

On 23d April 1881 Mr Paul lodged his report, approving in the main of the proposed resolutions.¹

¹ Counsel for the petitioners referred to the following similar petitions which had been before the Court:—Guildry Incorporation of Arbroath, July 5, 1856, 18 D. 1207; Incorporation of Wrights of Leith, June 4, 1856, 18 D. 981; Skinners of Glasgow, Dec. 4, 1857, 20 D. 211; also Incorporation of Tailors of Glasgow, before the First Division in July 1880.

On 7th June 1881 the Court pronounced this interlocutor:—"Ap- No. 184.
 prove of said bye-laws, regulations, or resolutions as hereby
 amended, and which bye-laws, regulations, or resolutions as thus July 20, 1881.
 amended are as follows, viz.—'That the income of the incorpora- The United
 tion ought to be applied by the incorporation, or, when the mem- of Masons and
 bers thereof resident within the parliamentary bounds of the Wrights of
 burgh of Haddington shall be under twelve in number, then by Haddington.
 such members, if any, along with the Provost, Bailies, Dean of
 Guild, and Treasurer of the royal burgh of Haddington for the
 time being; and in case it shall happen at any time that there is
 no member of the incorporation resident within the said parlia-
 mentary boundary, then, and so long as this state of things shall
 last, by the said Provost, Bailies, Dean of Guild, and Treasurer, for
 the following purposes, in their order—(1) in payment of taxes,
 repairs, and other necessary burdens and expenses; (2) to meet
 the charitable purposes authorised by the gift or charter granted
 by the Magistrates and Town-Council of the burgh of Haddington
 on 25th September 1647, of new erecting and creating the incor-
 poration,—that is to say, to make allowances to members in
 destitute circumstances, and the widows and children of deceased
 members who have been left or at the time are in destitute cir-
 cumstances, subject, however, to the declaration that the allowance
 to each widow may be increased to the extent of £2 per annum
 beyond what has formerly been allowed, provided this increase
 shall not diminish the fund requisite for the allowance to be paid
 to destitute members; (3) to pay, or assist in paying, the school-
 fees of such children or grandchildren of deceased members of the
 incorporation as may stand in need of such assistance, the ex-
 pediency of such payment in particular cases being left to the
 determination of those at the time in the administration of the
 funds of the incorporation; (4) for the promotion of secondary
 education in the burgh of Haddington by means of a bursary or
 bursaries to children attending the public secondary school of the
 royal burgh of Haddington, or towards payment of the salaries of
 the teachers thereof, or towards payment of the expense of ap-
 pliances in connection with the school or schools, if any, for which
 assessment cannot be levied on the burgh by Act of Parliament,
 and decern."

J. SMITH CLARK, S.S.C.—Agent.

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AGENT AND CLIENT. *Proof*—*Proof pro ut de jure of agreement to qualify contract of employment*—*Agent's right to recover fees*—*Notary-public*.

1. In an action by a notary-public, who paid attorney-tax, but was not otherwise a qualified law-agent, against a firm of money-lenders for payment for professional services in collecting debts, protesting bills, &c., the money-lenders averred that by a verbal agreement entered into before the notary-public was employed it was expressly stipulated that he was to get no remuneration except what he could extract from the debtors. The pursuer pleaded that such an agreement could only be proved by writ or oath. The Sheriff allowed a proof at large, and on considering the evidence held the agreement proved. On appeal the Court adhered to his judgment. *Moscip v. O'Hara, Spence, & Co.*, Oct. 23, 1880, p. 36.

Employment—*Law-Agents Act*, 1873 (*Stat.* 36 and 37 *Vict. cap.* 63), *sec.* 21—*Prescription*—*Reference to Oath*.

2. In an action by Edinburgh law-agents against a person in Glasgow for an account of expenses incurred by them in conducting an action in the Court of Session in his name on the instructions of a Glasgow law-agent, the defender pleaded (1) prescription, and (2) that he had not employed the pursuers. The plea of prescription having been sustained, the pursuers referred the matter to the defender's oath. He deposed that he had not employed the Glasgow agent; that he did not know of the action in the Court of Session until after it had been commenced; that when told of it he informed the Glasgow agent that if he went on with it he must do so on his own responsibility and his own risk, and that he had not employed the pursuers. *Held* that the oath was negative of the reference. *M'Larens v. M'Dougall*, March 16, 1881, p. 626.

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3. Circumstances in which the Court *held* a law-agent bound to repay to a client a sum invested under the agent's advice on a heritable security. *Ronaldson, &c. v. Drummond & Reid*, June 7, 1881, p. 767.

AGENT AND CLIENT—*Continued.**Commission—Expenses—Taxation.*

4. When a law-agent employs an auctioneer or other person to do work on behalf of a client he is bound to credit the client with any discount or donation he may receive from the person so employed. *Ronaldson, &c. v. Drummond & Reid*, July 15, 1881, p. 956.

AGENT AND PRINCIPAL. *Bill of Exchange—Acceptance “per pro.”—Liability of principal.*

1. B., M., & Co., a firm of merchants in Hamburg, in 1869 opened a branch of their business in Dundee under the charge of an agent H, in whose favour they executed a power of attorney authorising him to sign letters, deeds, bills, &c., “per procuration” of the firm. The power of attorney was lodged with the A bank, where the firm kept its account, and where the bills of the firm were domiciled. On 1st September 1879 the firm put an end to the agency, and arranged that thereafter goods purchased by H should be bought on his own account, and sold by him to the firm. Subsequently the B bank, in the knowledge of these facts, discounted bills drawn after 1st September 1879 by a firm of which H was known to be a partner, and bearing H's signature as acceptor *per pro.* of B., M., & Co.

In an action for payment brought by the B bank against B., M., & Co., it was proved that since the termination of the agency the power of attorney had remained in the hands of the A bank, and that H had been allowed to endorse by his own signature, *per pro.* of B., M., & Co., foreign bills payable to B., M., & Co. which they had forwarded unendorsed in payment of his accounts, and that on three occasions he had been allowed to draw cheques *per pro.* of B., M., & Co. upon their account in London. It was also proved that the bills sued on were not granted with B., M., & Co.'s authority or for their behoof.

Held that the B bank having discounted the bills in the knowledge that the agency had ceased, had proceeded at their own risk, and that B., M., & Co. were not liable to pay the amount of the bills.

Opinions as to the duty devolving on a person discounting bills signed *per pro.* to inquire into the extent of the agent's mandate.

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Stockbroker—Sale of stock and closing of customer's account—Misrepresentation by customer as to means and credit.

2. *Held* that where a stockbroker has incurred personal responsibility by purchasing stock for a client on the faith of representations made by him as to his means, which proved not to be correct, and the client has refused to give satisfactory explanations or references, the stockbroker is entitled to realise the stock held for his client, and close the account. *Risk v. Auld & Guild*, May 27, 1881, p. 729.

See *Ship*, 3—*Lease*, 6.

AGREEMENTS AND CONTRACTS. *Liquidate damages—Penalty—Time bargain.*

1. In an action by a contractor for the balance of the contract price, the employer pleaded that he was entitled, in terms of the contract, to a deduction from the contract price of £2 per day for each day the work had remained unfinished after the date stipulated. *Held* that, in the circumstances, the various stipulations as to time being inconsistent with the work being completed on the date fixed, the claim as to liquidate damages could not be enforced.

Observations on penalties and liquidate damages. *Robertson v. Driver's Trustees*, March 2, 1881, p. 555.

Foreign—Locus solutionis.

2. The pursuers and defenders of an action in the Court of Session, who were themselves resident in Scotland, entered into a compromise of it, by which

AGREEMENTS AND CONTRACTS—Continued.

the defenders became bound (1) to grant a power of attorney to the pursuers' firm in Rangoon to sell certain property there, and to the extent of £4250 to retain the proceeds on behalf of the pursuers, and (2) in the event of the properties not realising the said sum then to pay the deficiency. The property was sold, and the price, which did not amount in any view to £4250, was paid in rupees. The value of the rupee in Rangoon was 2s. ; at the current rate of exchange with this country it was only 1s. 8d.

A question having arisen whether the payment in rupees was to be credited as of its value in Rangoon or its value in England, *held (diss. Lord Deas)* that the payment was to be credited at its value in England—The Lord President and Lord Mure holding that Scotland was the *locus solutionis*—Lord Shand holding that although Rangoon was the *locus solutionis* the payment fell to be made in English money in terms of the contract. *Ainslie, &c. v. Murrays*, March 17, 1881, p. 636.

See *Lease*, 1—*Agent and Client*, 1—*Partnership*, 2.

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ALIMENT, RESTRICTION OF. See *Process*, 6.

APPEAL TO HOUSE OF LORDS. *Competency—Cause originating in Sheriff Court—Findings of fact—Judicature Act*, 1825 (6 Geo. IV., c. 120), *sec.* 40.

In appeals falling within the scope of the 40th section of the Judicature Act, 1825, the House of Lords has no concern with the proof led in the Sheriff Court. Where it can be shewn that the Court of Session has not exhausted the issue before it, and that there are material questions of fact left undetermined, a remit will be made to the Court below to pronounce findings upon these questions, but the omission can only be shewn by reference to the judgment and record, and not to the proof. The House of Lords will not remit on matters of fact which are not plainly set forth on record. Mackay v. Dick & Stevenson, March 7, 1881, H. L., p. 37.

APPROBATE AND REPROBATE. See *Succession*, 13.

ARBITRATION. *Objections to decree—Arbiter applying for loan from parties-submitters.*

An arbiter who was the intimate friend of both the parties-submitters having, during the dependence of the submission, become involved in financial difficulties, applied to each of the parties successively for a loan of £1000. The loan was refused by both parties, and the submission was proceeded with until a final award was pronounced. In an action of reduction of the award at the instance of one of the parties on the ground of legal corruption on the part of the arbiter in consequence of his actings in connection with the application for a loan, *held* that his application, although in the abstract liable to misconstruction, was not in itself corrupt, and decree of reduction refused accordingly. *Morisons v. Thomson's Trustees*, Nov. 26, 1880, p. 147.

ARCHITECT'S REMUNERATION. See *Recompense*.

ARRESTMENT. *Furthcoming—Debenture bond in security for advances to be made—Competency—Companies Clauses Act*, 1845 (8 and 9 Vict. c. 17), *secs.* 46, 47, 48, &c.

1. A railway company granted to a bank a debenture bond for £3000 in security for overdrafts which they wished to make. A creditor of the railway company arrested the sum represented by this bond in the hands of the bank. In an action of furthcoming at the instance of the creditor against the bank, *held* that there being no debt due by the bank to the railway company the action fell to be dismissed as incompetent. *Miller v. Girvan and Portpatrick Railway Co. &c.*, Dec. 7, 1880, p. 220.

Bankruptcy—Arrestment on dependence of an action.

2. Arrestments used on the dependence of an action confer a preference although the defender be sequestrated before decree is obtained in the action, provided they be followed up without undue delay. *Mitchell v. Scott (Moir's Trustee)*, June 29, 1881, p. 875.

ARRESTMENT—*Continued.**Arrestment—Judicial Factor—Factor loco absentis.*

3. It is competent to arrest in the hands of a factor *loco absentis* funds belonging to his ward's estate. *Ibid.*

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AUCTIONEER. See *Agent and Client*, 4—*Retention*, 2.

BANK. *Cheque—Refusal to cash cheque on ground of depositor's insolvency.*

A bank which held on account current £413 belonging to an executry estate refused to cash a cheque for £100 drawn on the account, on the ground that the estate was insolvent, and that the bank, which had a claim for £130, intended to apply for sequestration of it. *Held* that the bank was not entitled to withhold payment of the cheque. *Ireland v. North of Scotland Banking Co.*, Dec. 3, 1880, p. 215.

BANK STOCK. See *Trust*, 1.

BANKRUPTCY. *Action of exhibition and transumpt—Trustee's power of recovering documents—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), secs. 90, 91, 92.*

1. The trustee of a bankrupt brought an action against the bankrupt's father as sole trustee under his own antenuptial marriage-contract, under which the pursuer alleged that the bankrupt had a right of fee in certain properties, concluding for exhibition and transumpt of the writs and evidents. *Held* that the proper remedy of the trustee was to call for production of the writs he required under sections 90, 91, and 93 of the Bankruptcy Act of 1856, and action dismissed as unnecessary. *Selkirk v. Service*, Oct. 22, 1880, p. 29.

Sequestration—Mode of voting for winding up by deed of arrangement—Bankruptcy (Scotland) Act, 1856, secs. 35, 38, and 101.

2. In a sequestration the claimants who vote at a meeting under the 35th section of the Bankruptcy Act, 1856, for a winding up by deed of arrangement must support their claims by affidavits and vouchers, as in the election of a trustee, and no one is entitled to have his vote reckoned in number whose claim does not amount to £20. *North of Scotland Banking Co. v. Ireland*, Nov. 20, 1880, p. 117.

Duties of Trustee—Deliverance upon claims where no dividend is declared—Bankruptcy (Scotland) Act, 1856, secs. 126 and 127.

3. *Held*, upon a construction of the 126th and 127th sections of the Bankruptcy (Scotland) Act, 1856, that a trustee in bankruptcy ought not to proceed, under the 126th section, to examine the oaths and grounds of debt, or to issue any deliverance regarding claims, until he is in a position to declare a dividend, and, therefore, that a deliverance admitting a claim where no dividend was declared was no bar to the trustee reconsidering the claim and rejecting it by a subsequent deliverance. *Monkhouse (M'Allum & Co.'s Trustee) v. Mackinnon (Hannay & Sons' Trustee)*, Jan. 28, 1881, p. 454.

Bankrupt's title to challenge rights granted by trustee—Discharged bankrupt's title depends on retrocession or abandonment by creditors.

4. A creditor held a bond over certain heritable subjects, which were not of sufficient value to pay the whole debt. The debtor having been sequestrated, a memorandum of agreement was entered into by the creditor and the trustee in the debtor's sequestration, under which the creditor gave up his right to rank for the unsecured part of his debt, and the trustee agreed to grant an absolute disposition of the subjects contained in the bond. This agreement was approved of by the creditors, and entered in the sederunt-book of the sequestration. The debtor was discharged without payment of a composition. The estate paid a dividend of 1s. 6d. in the £, and the trustee was subsequently discharged. He did not execute a disposition of the subjects in favour of the creditor. The creditor expended a large sum of money in completing the building on the subject which had

BANKRUPTCY—*Continued.*

been in progress at the date of sequestration, and drew the rents of the subject for twenty years. The debtor then raised an action to have it declared that the subjects still belonged to him.

Held that by the sequestration the debtor had been divested of his whole estate, and that by the agreement the trustee had conferred on the bondholder a personal right to the land, which the bankrupt had no title to challenge. *Douglas v. MacLachlan*, Feb. 4, 1881, p. 471.

Appeal against Sheriff's deliverance refusing sequestration—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), secs. 19, 31, 169, 170.

5. An appeal to the Court of Session is competent against a deliverance of a Sheriff refusing a petition for sequestration. *Marr & Sons v. Lindsay*, June 7, 1881, p. 784.

Bills—Lien—Pledge—Bills accepted against goods; bankruptcy of both drawer and acceptor while bills in hands of onerous holder; how goods to be dealt with—English rule of ex parte Waring considered.

6. When A accepts the drafts of B against B's goods in A's hands, if both A and B fail while the goods are still in A's hands, and the bills are in the circle, (1) the billholder is entitled to claim against the estate of each for the amount of the bill, to the effect of recovering on the whole full payment; (2) A's estate has a lien over the goods to the effect of entire relief and indemnification against any payments which A's estate may be required to make in respect of the bills; and (3) B's estate is entitled to demand the goods after such indemnification has been given out of the proceeds, or on full security being given to relieve A and his estate of the bills.

The English rule of *ex parte Waring*, 19 Ves. 345, is inconsistent with the rules and principles of the Scotch bankruptcy system, and has not been adopted in Scotland.

In connection with an agreement, whereby A undertook to employ his works in spinning on hire for B, it was stipulated that A should be bound, if required, to grant his acceptances to B for a sum not exceeding three-fourths of the market value of the raw material and yarns held by him on account of B, and that he should be entitled to a right of lien or retention of goods to a value sufficient to cover such acceptances. It was also specially provided that all materials and yarns sent to A's works should continue to be the sole property of B, subject only to the lien of A for the advances which he might have made to B, or for debts which in any way B might be resting owing to him. Both A and B became bankrupt while bills to a large amount were in the circle in the hands of an onerous holder. At the date of his bankruptcy A held in his hands certain material and yarns belonging to B.

In a competition for the proceeds of these goods between A's trustee, B's trustee, and the billholder, *held* (1) that A's right under the above agreement was strictly that of pledgee, viz., to hold the goods in his hands at the time till relieved of his obligations under the bills, and to indemnify himself out of the proceeds for any payments which he might be required to make in respect of his acceptances, and that A's trustee was entitled to work out this indemnity in exactly the same way as A would himself have done had he remained solvent; (2) that the English rule of *ex parte Waring* whereby in similar circumstances the billholder is entitled to have the security subject applied directly in or towards payment of the bills, and to rank on the estates both of drawer and acceptor for any balance, had not been and could not be adopted in Scotland, as it was inconsistent with the rules and principles of the bankruptcy law of Scotland, and as, while conferring a gratuitous benefit on the billholder to which he had right neither by law nor contract, it would inflict injustice on the creditors of the acceptor by violating, to their prejudice, the agreement under which their debtor held the goods; and (3) that B's trustee was not entitled, in virtue of the title he acquired to B's estate under the Bankruptcy Act, 1856, to have the goods delivered over to him subject to all claims against them to

BANKRUPTCY—*Continued.*

be established in the sequestration, but that the security being a real security by way of pledge A's trustee was entitled to retain them until the object of the pledge was fulfilled. *Royal Bank of Scotland v. Commercial Bank of Scotland, &c.*, June 15, 1881, p. 805.

Insolvent expending funds in improving estate held in trust for children—Resulting trust.

7. In an action by the trustee on A's sequestrated estate against his trustees under an antenuptial marriage-contract the pursuer alleged that A, after he was insolvent, and knew that he was insolvent, expended large sums of money on an estate which he had conveyed to the trustees in security of the annuity provided under the contract for his widow and as a provision to his children, and concluded, *inter alia*, for declarator, that so far as the estate was benefited by A's expenditure, after the date when he was alleged to have become insolvent, the marriage-contract trustees held for behoof of the trustee in bankruptcy. *Held* that the pursuer's averments were relevant. *Main (Fleming's Trustee) v. Fleming's Trustees*, June 30, 1881, p. 880.

"Estate" under section 103 of the Bankruptcy (Scotland) Act, 1856—School-master's salary.

8. The trustee on the sequestrated estate of a teacher in a burgh school presented a petition under the 103d section of the Bankruptcy Act, 1856, praying the Lord Ordinary to declare all right and interest which belonged or might belong to the bankrupt in the salary and emoluments of his office to belong to the trustee, until the bankrupt's debts should be paid, but subject to payment by the trustee to the bankrupt of a reasonable allowance for his maintenance.

Held that as the bankrupt held the office at the date of his sequestration the emoluments subsequently accruing therefrom were not "estate acquired by the bankrupt" after the date of his sequestration in the sense of section 103 of the Act, and petition dismissed.

Opinion (per Lord Fraser) that the section does not apply to fees earned by the personal labour of a bankrupt after the date of his sequestration. *Barron v. Mitchell*, July 6, 1881, p. 933.

Trustee—Report—Right of Trustee to withhold Report—Bankruptcy Act, 1856 (19 and 20 Vict., c. 79), sec. 146.

9. *Held (diss. Lord Deas)* that in a bankrupt's sequestration, when five months have elapsed from the date of the deliverance awarding sequestration, the trustee is not entitled to refuse, when required by the bankrupt, to deliver to him a report under sec. 146 of the above Act "in regard to the conduct of the bankrupt, and as to how far he has complied with the provisions" of the Act. *Mather v. M'Kittrick (Mather's Trustee)*, July 14, 1881, p. 952.

Landlord and Tenant—Claim for rent against sequestrated bankrupt.

10. When the tenant of an urban subject has been sequestrated under the Bankruptcy Act the landlord has a claim in the sequestration for the current year's rent, but no claim against the bankrupt, even although he may have been allowed to remain in possession from the date of sequestration to the end of the year. *Fraser v. Robertson*, Jan. 7, 1881, p. 347.

Trust-deed for creditors—Truster suing trustee to account—Caution for expenses.

11. An insolvent who had granted a trust-deed for behoof of creditors *held* entitled to sue the trustee for an alleged balance without finding caution for expenses. *Ritchie v. M'Intosh (Ritchie's Trustee)*, June 2, 1881, p. 747.
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BILL OF EXCHANGE. *Accommodation Bill—Blank stamp—Bankruptcy.*

1. *Held* that a person who has obtained for his own accommodation a blank acceptance is barred by the acceptor's sequestration from making use of it thereafter. *M'Meehin v. Russell and Tudhope*, March 9, 1881, p. 587.

Blank stamp—Indorsee—Reparation—Damages—Wrongous use of Diligence.

2. In an action brought by the acceptor of a bill against the drawer and an indorsee, concluding for reduction of the bill, and damages, on the allega-

BILL OF EXCHANGE—*Continued.*

tion that the bill had been signed blank by the pursuer, and delivered to the drawer for his accommodation prior to the pursuer's sequestration, and that the drawer had wrongously filled it up and indorsed it after the pursuer's sequestration, and that the indorsee had redelivered the bill to the drawer to enable him to obtain the pursuer's apprehension on a *meditatione fugæ* warrant which had followed, *held* that the pursuer had set forth a relevant case against the drawer of the bill, but not against the indorsee, as it was not averred that he knew that the bill had been delivered blank to the drawer for his accommodation prior to the sequestration of the acceptor. *M'Meekin v. Russell and Tudhope*, March 9, 1881, p. 587.

Issue.

3. Forms of issues to try a question of wrongous filling up of and indorsation of a blank bill, and of wrongous apprehension and imprisonment on a *meditatione fugæ* warrant. *Ibid.*

Forgery—Adoption—Silence as a personal bar to disclaiming liability.

4. When a person comes to know that his signature has been forged to a bill mere delay on his part in giving notice of the forgery to the billholder will not necessarily imply adoption nor bar him from repudiating liability unless the billholder or others have been prejudiced by his silence.

A bill for £76, drawn by A, and bearing to be accepted by B and C, was discounted by the bank. It fell due on 10th April, and on Saturday 12th April the bank gave notice of dishonour to B, who lived at some distance from the office of the bank. On receiving the notice B did not inform the bank that his signature to the bill was a forgery, or communicate with them in any way. On Monday 14th April, without waiting for a reply from B, the bank allowed the bill to be retired by A, who paid £6 in cash and discounted another bill for £70, drawn by him and bearing to be accepted by the same B and C. This second bill fell due on 17th July, and the bank, on 14th, 18th, and 21st July, gave notices that it was coming due, and that it was overdue, to B. B made no reply to these notices until 29th July, when he informed the bank that his signature had been forged. Notwithstanding various suspicious circumstances, tending to shew knowledge and authorisation or adoption on the part of B, *held* (rev. judgment of First Division) (1) that it was not proved that B had authorised his name to be put to the bill, or had subsequently adopted the signature; and (2) that he was not barred by his silence from repudiating liability on 29th July, as the bank had been in no way injured by it. *Mackenzie v. British Linen Co.*, Feb. 11, 1881, H. L., p. 8.

5. Bills accepted against goods—Bankruptcy of both drawer and acceptor while bills in hands of onerous holder; how goods to be dealt with—English rule of *ex parte* Waring considered. See *Bankruptcy*, 6.

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1. *Opinions per* Lord President and Lord Rutherford Clark that the plea of *bona fide* perception and consumption applies only in cases where a person has been in possession of a heritable subject upon an apparently good but invalid title, and has been evicted and is called to account for the rents. *Opinions per* Lord Mure and Lord Shand *contra*. *Huntly's Trustees v. Hallyburton's Trustees*, Nov. 5, 1880, p. 50.
2. B, an heir of entail, raised an action of count and reckoning against the representatives of A, a former heir of entail, for the proceeds of the timber which he was annually allowed to sell, on the ground that by the deed of entail he was bound to apply these in reduction of the capital debts secured on the estate. The defenders, besides maintaining that under his titles A was entitled to appropriate the proceeds of the wood sold, pleaded alternatively *bona fide* perception and consumption. *Opinions per* Lord Mure and Lord Shand that the plea of *bona fide* consumption was well founded. *Opinions per* Lord President and Lord Rutherford Clerk *contra*. *Ibid.*

BUILDING SOCIETY. See *Friendly Society*.

BURGH. *Street*—*Edinburgh Roads and Streets Act, 1862 (25 Vict., cap. liii.), secs. 30 and 33*—*Private Street*—*Notice to owners sought to be made liable for assessment.*

1. Where the Town-Council of Edinburgh, in terms of section 30 of the Edinburgh Roads and Streets Act, 1862, sent a notice to the "owners of lands and heritages" in a thoroughfare which was not a public street, requiring them to repair the carriage-way, and afterwards executed operations amounting to "the making up, constructing, and causewaying" of a street, and assessed the owners, against whom they brought an action for payment, *held* that the proceedings of the Town-Council were invalid, as they ought to have proceeded under section 33 of the statute, and defenders assailed accordingly.

Observations upon the meaning of the term "private street." Magistrates of Edinburgh v. Paterson, Dec. 3, 1880, p. 197.

Jurisdiction of Dean of Guild Court—Competition of heritable rights—Title must be ex facie apparent.

2. A party pleading want of jurisdiction in the Dean of Guild Court, on the ground that the question raised is one of right to heritable property, must set forth upon record an *ex facie* good title to the subjects. Pitman, &c. v. Burnett's Trustees, July 7, 1881, p. 914.

Property—Ground held by magistrates as golf links—Power of magistrates to divert use.

3. A piece of links ground was held by the magistrates and town-council of a burgh as burgh property, subject to the obligation of preserving it for the purposes of the game of golf. In 1820 the magistrates feued off a strip along the southern boundary of this piece of ground where it abutted on the high road. On this strip of ground houses were built facing the high road, and the actings of the magistrates not being timeously objected to, these feus came in course of time to be no longer in point of law part of the Links. Houses were afterwards built at the north end of these feus facing the part of the Links reserved by the magistrates, and access was obtained to them along the margin of the Links. This becoming cut up by traffic, the magistrates resolved to form a regular metalled road twenty-one feet wide on that part of the Links which adjoined these feus, for the general use of the public as well as the feuars. This was objected to as an encroachment on the rights of the inhabitants.

Held (in aff. judgment of Second Division) that on the evidence adduced the formation of the proposed road would not in the meantime interfere with the use of the Links by the inhabitants as heretofore for the game of golf, and that therefore the magistrates were entitled in their administration of the burgh property to make the said road, but that the magistrates were bound to retain the road and the ground on which it was constructed subject to the same uses as any other portion of the Links, and to take such steps as might be necessary to prevent the acquisition by any person or persons of any rights over the same which might conflict with the right of the magistrates to take away or alter said road, or to restrict and regulate the traffic thereon should emerging circumstances render that necessary for the protection of the rights of the inhabitants. Paterson, &c. v. Magistrates of St Andrews, &c., July 27, 1881, H. L., p. 117.

Interdict—Enforcing interdict against buildings erected pendente lite—Equitable compensation for legal rights—Burgh—Administration of burgh property.

4. An inhabitant of a burgh was successful in interdicting the magistrates from erecting municipal stables on a piece of ground held by them for behoof of the inhabitants of the burgh as a bleaching-green and place of recreation. At the date when the process of interdict was commenced the magistrates had already entered into contracts for the buildings, and the works had

BURGH—Continued.

been begun. Interim interdict was refused, and the stables were completed at an expense of £2000 before interdict was granted. In an action at the instance of the interdictor to have the buildings removed and the ground restored to its former state the magistrates offered to make over to the community a piece of ground near the ground in dispute and of double the size. *Held* (rev. judgment of Lord Adam) (1) that the Court had power to allow equitable compensation to be made in lieu of ordaining the removal of the buildings; and (2) that it was for the interest of the community that the offer of the magistrates should be accepted, and that the magistrates should be assolizied on lodging in process a conveyance of the subjects in terms of their offer. *Grahame v. Magistrates of Kirkcaldy*, Jan. 19, 1881, p. 395.

See *Road*, 1—*Prescription*, 2—*Police*, 2.

CALCINING IRON. See *Nuisance*.

CAUTIONER. *Caution—Stat. 1696, cap. 25—Stat. 19 and 20 Vict., cap. 60 (Mercantile Law Amendment Act, 1856), sec. 6—Name of creditor in obligation omitted.*

A and B signed an obligation to become sureties for an instalment of a composition on C D's bankrupt estate. *Held* that the obligation was not void by reason of the creditors in the obligation not being mentioned. *Clapperton, Paton, & Co. v. Anderson*, July 20, 1881, p. 1004.

CAUTION FOR EXPENSES. See *Process*, 10, 12.

CHARITY. See *Police*, 2.

CHARTER-PARTY. See *Ship*, 1, 2.

CHEQUE. See *Bank*.

CHURCH. *Union of Parishes—Effect of Decree of Teind Commissioners in 1670 uniting "Kirks."*

1. In 1455 Chanonry was erected into a burgh and united with the burgh of Rosemarkie, the two being called in combination the burgh of Fortrose. There was a church in each, the cathedral church of the diocese being in Chanonry, and the parish church in Rosemarkie.

In a proceeding by "the Bishop of Ross v. the Parishioners of Rosemarkie," the Commissioners of Teinds, after opposition, pronounced the following decree, dated 2d February 1670:—"The Lords unites the Kirks of Chanonrie and Rosemarkie, and appoints the minister of Rosemarkie and his successors to serve the cure at both kirks Sunday day about. The Lords, of consent of the Bp. of Rosse, declares the parishionairs of Rosemarkie frie of the support of the kirk of Chanonrie *et e contra*."

In an action seeking to enforce liability upon the heritors of Chanonry for repairs of the church, manse, and other ecclesiastical buildings of Rosemarkie, *held* that the meaning of the decree was that, while uniting the two kirks, the heritors of the two districts were to be separately liable each for the support of their own church, viz., the heritors of Chanonry for support of the cathedral church, and the heritors within Rosemarkie district for support of the parish church, and that looking to the decree and what followed upon it the heritors of Chanonry were exempt from assessment for the repairs to the church of Rosemarkie, although liable in so far as regarded the manse and other buildings. *Magistrates of Fortrose, &c. v. MacIennan* (Collector of Rosemarkie), Nov. 26, 1880, p. 124.

Stat. 7 and 8 Vict. cap. 44, sec. 8—Liability of heritors of quoad sacra parish.

2. *Held* by Lord Curriehill (Ordinary) that lands and heritages disjoined from a parish *quoad sacra* are not thereby freed from liability for the parochial burdens to which they were previously liable. *Ibid.*

Parish—Churchyard.

3. *Held* by Lord Adam, Ordinary, that certain heritors and parishioners were

CHURCH—*Continued.*

entitled by interdict to prevent another heritor from converting the family mausoleum in an old parish churchyard into an Episcopal chapel. *Wright, &c. v. Lady Elphinstone*, July 20, 1881, p. 1025.

COLLATION. See *Entail*, 4.

COMMISSION. See *Agent and Client*, 4.

COMPENSATION. See *Railway*, 1.

COMPOSITION. See *Superior and Vassal*, 3, 5, 6.

COMPOSITION CONTRACT. See *Cautioner*.

CONFIDENTIALITY. See *Proof*.

CONTRACT. See *Agreements and Contracts*.

CONTRIBUTORY. See *Public Company*, 1, 2, 3, 5.

CONVERSION. See *Succession*, 8.

CRIME. See *Justiciary Cases*.

CUMULATIVE PROVISIONS. See *Succession*, 3, 4.

DAMAGES, CONSEQUENTIAL. See *Horse*, 1.

DAMAGES, LIQUIDATE. See *Agreements and Contracts*, 1.

DEAN OF GUILD COURT, JURISDICTION OF. See *Burgh*, 2.

DEBITUM FUNDI. See *Superior and Vassal*, 3.

DEPOSIT. *Locatio operarum*—Deposit of goods for hire without stipulation as to duration of contract.

Where goods are warehoused for hire without a stipulation as to the duration of the contract, the depositary is not entitled to insist upon their being removed at his pleasure without shewing reasonable cause therefor.

Circumstances in which it was held that no such reasonable cause had been shewn. *Whyte v. Millar & Young, &c.*, Jan. 22, 1881, p. 432.

DESERTION. See *Husband and Wife*, 11, 12.

DILIGENCE. See *Arrestment*.

DILIGENCE, WRONGOUS USE OF. See *Bill*, 1, 2—*Reparation*, 3.

DOG. See *Reparation*, 6.

DOMICILE. See *Husband and Wife*, 12.

DOMICILE, FORUM OF PERSON WHO HAS NO. See *Jurisdiction*.

DONATION MORTIS CAUSA. See *Succession*, 3.

ELECTION. *Judicial Factor*—*Curator Bonis* to Lunatic—Power of election between legal and testamentary provisions.

Where a person is legally incapacitated from availing himself of a right of election between testamentary and legal provisions he does not lose the right, even though he receive temporary benefit for his maintenance and support out of the estate, and he may exercise it if the incapacity be removed, or, if it be not removed, the right may be exercised by his representatives after his death.

Circumstances which were held insufficient to justify a *curator bonis* for a lunatic in making such an election. *Morison's Curator Bonis v. Morison's Trustees*, Dec. 3, 1880, p. 205.

ELECTION (TO SUE). See *Ship*, 3.

ELECTION LAW. See *separate Index of Registration Appeal Cases*, p. 1092.

ENTAIL. *Right of heir to cut timber*.

1. A trustor directed his estate to be entailed on A, his nephew, and certain other heirs, with this provision,—“And for the preservation of the growing timber and plantations on my said lands, I hereby direct my trustees to reserve the timber and plantations on my said estate when they convey the said lands to A, and the other heirs before mentioned: And it is hereby provided and conditioned that it shall not be lawful to A, or the whole

ENTAIL—Continued.

heirs of entail, to cut down the growing timber or plantations, or any part thereof, without the consent and authority of my said trustees; and that my said trustees shall not be empowered to give such consent unless the growing timber or plantations on my said estate shall require such cutting down or thinning for their better preservation: Declaring also that the produce of all fallen trees, or cut timber, or bark, shall be applied in discharge of the various burdens charged on my said estate." By a deed of alteration and ratification, executed a year later, he made this provision,— "I declare that the principal sums of all debts, legacies, and provisions shall be charged and chargeable upon and affect only the fee of my said lands and estate of . . . and others, and that the rents thereof shall be chargeable with annual payments only; and I further declare that the free revenues of my said estates shall not be accumulated during the subsistence of this trust, nor applied in the payment of capital debts or provisions, but, on the contrary, shall be regularly paid over to my nephew, A, and the heirs of entail substituted to him, as the same shall arise,— that is, the rents and revenues of these estates, after deducting all public burdens, interest of debts, and provisions, jointures, annuities, and other annual charges." *Held* (rev. judgment of Lord Rutherford Clark) upon a construction of the two deeds that the heir in possession was not bound to apply the proceeds of sales of timber to the reduction of the capital debts of the estate.

Opinion (per Lord President) that he would have been so bound had the first deed not been altered by the second. *Opinions* (per Lord Deas and Lord Shand) that neither deed required him to do so. *Huntly's Trustees v. Hallyburton's Trustees*, Nov. 5, 1880, p. 50.

Heir in possession—Provisions to children, authority to charge fee and rents with, by bond and disposition in security—Entail Amendment Act, 1848 (11 and 12 Vict. c. 36), sec. 21.

2. A deed of entail dated in 1799 conferred power upon the heirs of entail in possession to grant provisions to their younger children, not exceeding three years' free rents of the estates, provided that the bonds of provision should "contain this express condition, that the sums contained in the same shall not be exigible at once but shall be payable only by yearly instalments of ten per cent of the capital sum of such provisions, together with the interest due at the time." There was farther a declaration that the heirs in possession should pay regularly the instalments as they fell due, with interest, and should forfeit all right to the estate in the event of their allowing the instalments to fall three years in arrear, but there was no irritancy of the bonds.

In 1819 the heir of entail in possession granted a bond of provision in favour of his younger children for "a sum equal to three years' free rent of the said lands. . . ."

This provision became payable on the granter's death in 1876, and the succeeding heir of entail applied to the Court for power to charge the fee and rents of the estate with the amount by bond and disposition in security under the 21st section of the Rutherford Act.

Held that notwithstanding that the amount of the provisions was payable in ten yearly instalments the 21st section applied, and petition granted.

Case of Campbell, 26th January 1854, 16 D. 396, *distinguished*. *Hope Johnstone v. Hope Johnstone*, Nov. 27, 1880, p. 160.

Agreement between heir in possession and apparent heir—Heir and Executor.

3. An heir of entail in possession expended certain sums in improvements, and entered into an agreement with his son, the apparent heir, whereby the latter bound himself, "his heirs and successors, succeeding to" the estate, to repay the same. The son died without succeeding to the estate, but his eldest son succeeded his grandfather as heir of entail. *Held* that neither the grandson who succeeded to the estate, nor the personal representatives of

ENTAIL—Continued.

the son, were bound by the agreement to repay the sum expended. *Sinclair's Trustees v. Sinclair, &c.*, June 7, 1881, p. 749.

Succession—Collation—Heir aliquin successurus.

4. The heir of entail in possession of an estate by his settlement bequeathed a third of the residue of his free means to his son (who was then heir-apparent to the entailed estate), "partly in consideration of the burdens he will be subjected to on his succeeding me" in the entailed estate, "and to his heirs, executors, and successors." The son predeceased, leaving three children, the eldest of whom succeeded to the entailed estate on the death of his grandfather. In a question between him and the other two children as to whether he could take a share of the grandfather's bequest without collating his life interest in the entailed estate, *held (diss. Lord Young)* that there was here no room for the doctrine of collation, as the heir of entail was entitled to a share of the residue in consequence of the expressed will of the testator.

Observations (per Lord Justice-Clerk and Lord Young) on the case of *Blair v. Blair*, Nov. 16, 1849, 12 D. 97, 21 Scot. Jur. 612. *Ibid.*

Disentail—Provisions to children under Aberdeen Act where subjects disentailed and new entail executed.

5. An heir of entail, who in his marriage-contract had burdened the estate to the extent of three years' free rents as at the date of his death, with provisions to his younger children, obtained from them discharges therefor in their respective marriage-contracts in consideration of provisions therein made, amounting together to £90,000, which he secured on the estate. Subsequently he disentailed his estate, and executed a new entail embracing additional lands, but subject to debts which reduced the free rental below that of the original estate. In the deed he declared that the whole estates should be subject to the real burden of the provisions in his own contract of marriage in favour of his younger children. By his settlement he appointed two of the younger children to the surplus above £90,000.

In a question between the next heir of entail and the younger children, *held (1)* that though the younger children had granted discharges of the provisions in their father's contract of marriage their father had effectually released them therefrom; and *(2)* (in conformity with *Irving v. Irving*, 9 Macph. 539) that the provisions were to be measured by the free rental of the original estate as if it had not been disentailed at the date of their father's death. *Duke of Roxburghe v. Russell*, June 28, 1881, p. 862.

Foreign—Direction to entail jewels as heirlooms in England—Testamentary intention.

6. A trust-settlement in Scotch form, and executed in Scotland by a domiciled Scotch lady, directed that certain jewels, &c. should "be held as heirlooms and settled upon" her son, the Marquis of Bute, "and after him on the heirs entitled to succeed to the Bute estates in the county of Glamorgan;" and in the event of his dying without issue they were to be sold at his death by public auction, and the proceeds applied in the erection of almshouses, &c. The testatrix further directed that certain plate should "be settled and secured upon the same series of heirs as are appointed to succeed to the Marquis of Bute's Glamorganshire estates." The trustees delivered the jewels and plate to the Marquis on obtaining from him a receipt acknowledging that they had been delivered on the conditions set forth in the trust-deed, and binding himself to concur with the trustees in settling them by a formal deed, in such form as might be permitted by the rules of law and equity, in terms of the trust-deed.

In an action brought by the Marquis concluding for declarator that he was entitled to the property of the jewels and plate, it was admitted that by the law of England personal property might be effectually settled as heirlooms. *Held* that as the testator's wish might be effectually carried out by a settlement in English form, the Marquis had acquired no higher

ENTAIL—Continued.

right than a life interest in the jewels and plate, and action *dismissed*.
Marquis of Bute v. Lady Bute's Trustees, &c., Dec. 3, 1880, p. 191.

See *Bankruptcy*, 7—*Judicial Factor*, 2.

ENGLISH ENTAIL OF SCOTCH ESTATE, EFFECT OF. See *Succession*, 10.

EXCISE. See *Revenue*, 7.

EXHIBITION. See *Bankruptcy*, 1—*Process*, 1.

EXPENSES. See *Process*, 10, 11, 12, 13, 14, 15, 16—*Agent and Client*, 4—*Husband and Wife*, 1, 8—*Judicial Factor*, 1.

FACULTY AND POWERS. Exercise of power of appointment.

A testator left the residue of his estate to trustees, with a declaration that upon the death of his son, or on the death of his son's wife if she survived him, the residue of the trust-funds should belong and be paid to the son's children "at such periods, and in such proportions, and under such limitations, conditions, and restrictions," as his son should direct by any deed under his hand.

The son, in a deed of appointment, after making provisions for his sons, directed his trustees to, hold the remainder of the fund "upon trust, to pay the interest thereof" to his two daughters for their own separate use, notwithstanding coverture, and so that the daughters should not have power to dispose thereof by way of anticipation, and upon the death of each daughter to hold her share for her children in such shares as she should have appointed, and, failing children, for such persons as she should have appointed.

In a question, raised during the survivance of the son's widow, between the son's children and the father's trustees, who maintained that the appointments by the son were invalid, on the ground that he had restricted his daughters to mere liferents, and had not validly disposed of the fee of their shares, *held* that the appointment was valid, and had vested in the daughters the capital of their shares, but that these were limited to their separate use for life, independent of any present or future husband, and were to be held by them subject to the power of appointment conferred on them by their father's settlement, but without power to make any other assignment or appointment by way of alienation. *Lennock's Trustees v. Lennock*, &c., Oct. 16, 1880, p. 14.

FEE AND LIFERENT. See *Succession*, 11.

FERRY. See *Property*, 2.

FIXTURES AS BETWEEN LANDLORD AND TENANT. See *Heritable and Moveable*.

FOREIGN. See *Husband and Wife*, 12—*Succession*, 10—*Agreements and Contracts*, 2.

FORESHORE. See *River*, 2.

FORGERY. See *Bill*, 4.

FRIENDLY SOCIETY. Building Society—Effect of winding-up order on position of members—Right of member to pay up loan and withdraw under rules—Stat. 37 and 38 Vict., cap. 42 (Building Societies Act, 1874), sec. 14.

Held that a member of a building society, who under its rules was entitled to withdraw from it on payment of the balance of a loan due by him to the society, was not deprived of this right by the society having gone into voluntary liquidation at a time when it was due no debts except to its own members. Liquidators of the Scottish Savings and Investment Building Society v. Russell, July 7, 1881, p. 917.

GAME. See *Justiciary Cases*, 17, 18.

GAMING TRANSACTION. See *Sponsio Ludicra*.

GOLF. See *Burgh*, 3.

HARBOUR DUES. See *Prescription*, 2.

HEIR AND EXECUTOR. See *Entail*, 3.

HERITABLE AND MOVEABLE. *Lease—Fixtures as between landlord and tenant.*

A person occupied a cottage and piece of garden ground as yearly tenant for a period of ten years. His occupancy had commenced when the cottage was built and while the garden ground was rough and uncultivated. During his tenancy he planted ornamental shrubs, and laid out terraces with turf and gravel walks, access to the different terraces being got by sets of wooden steps. When removing from the subjects the tenant prepared to remove the shrubs, turf, wooden steps, and gravel on the walks. In an action at the instance of the landlord the Sheriff (Maitland Heriot) *held* that the tenant was not entitled to remove shrubs and turf, but allowed him to remove the wooden steps and the gravel from the walks. The landlord acquiesced in the Sheriff's judgment, but the tenant appealed to the Court of Session. The Court dismissed the appeal, Lord Gifford and Lord Young expressing strong opinions that the gravel on the walks was *par soli* and not removeable. *Burns v. Fleming*, Dec. 7, 1880, p. 226.

See *Succession*, 2, 8.

HERITABLE SECURITY. See *Succession*, 2.

HORSE. *Locatio Conductio—Riding horse hired for road galloped in grass field—Consequential damages.*

1. A riding horse hired at the ordinary rate for a day's ride was ridden at a gallop in a grass field. While there it split its pastern bone, and six weeks after, when almost recovered, it died of inflammation caused by a twist in the bowels. In an action at the instance of the owner against the hirer for the value of the horse, *held* (*diss.* Lord Gifford) (1) that the galloping the horse in a grass field was a departure from the implied conditions of the contract, and that the accident must be held to have been caused by the fault of the defender; (2) that the death of the horse being presumably attributable to the want of exercise consequent upon the injury, the rider was liable in the value of the horse. *Seton v. Paterson*, Dec. 9, 1880, p. 236.

Sale—Detention by Seller—Personal bar.

2. A cab-owner purchased a mare from a horse-dealer, which he returned next day to the seller as having failed to answer the warranty alleged to have been granted with her. The seller wrote insisting on the fulfilment of the contract, but meanwhile kept the mare in his own stables, and worked her in his own business. *Held* that, by keeping and working the mare, the seller was barred from insisting in an action for implement of the contract and payment of the price. *Croan v. Vallance*, May 18, 1881, p. 700.

HOTEL. See *Revenue*, 6—*Right in Security*, 1.

HUSBAND AND WIFE. *Divorce—Aliment—Expenses.*

1. A husband having obtained decree of divorce in the Outer-House, the wife presented a reclaiming note. On the wife's motion the Court give her decree for aliment, to continue until final judgment on the reclaiming note, and for a sum to account of her expenses up to the close of the proof in the Outer-House. *Montgomery v. Montgomery*, Oct. 22, 1880, p. 26.

Wife—Affiliation and aliment of illegitimate child—Wife suing without husband's concurrence—Title to sue.

2. A married woman raised an action in the Sheriff Court against a man not her husband, alleging that she had been deserted by her husband, and that three years after her desertion she had given birth to a child of which the defender was the father, and concluding for payment of aliment. The Sheriff assoilzied the defender, on the ground that the pursuer had failed to prove that he was the father of the child. The Court *adhered*.

Opinions (*per* Lord Justice-Clerk and Lord Young), that the pursuer had no title to sue. *Wilkinson v. Bain*, Nov. 9, 1880, p. 72.

Separation and Aliment—Habitual intoxication and reasonable fear of violence.

3. In an action of separation at the instance of a wife against her husband,

HUSBAND AND WIFE—*Continued.*

held that to entitle the pursuer to decree of separation *a mensa et thoro* it was not necessary for her to instruct personal injury to herself, but that proof of the husband's habitual intoxication and violent conduct, inducing a reasonable fear of violence to the pursuer, was enough. *M'Gaan v. M'Gaan*, Dec. 14, 1880, p. 279.

Restriction of Aliment. See *Process*, 6.

Divorce—Condonation.

4. The wife of a sailor confessed to her husband that she had committed an act of adultery. After she made that statement the parties never lived together as man and wife, but the husband soon after went to sea, and during his absence wrote affectionate letters to his wife expressing his forgiveness of what had happened, signing himself "your loving husband." On his return home he discovered that his wife had committed adultery previous to the act which she had confessed. In an action of divorce raised by the husband, *held* that the letters, even if they amounted to condonation of the act of adultery which the wife had confessed, could not be pleaded in condonation of the previous act, of which the husband was ignorant when he wrote them. *Ralston v. Ralston* and Lord Advocate, Jan. 13, 1881, p. 371.

Condonation by letters.

5. *Question*, whether letters of forgiveness from a husband to a wife, without any subsequent cohabitation, will support a plea of condonation. *Ibid.*
Conjugal Rights (Scotland) Amendment Act, 1861 (24 and 25 Vict. cap. 86), sec. 8—Appearance for Lord Advocate—Condonation.
6. *Question*, whether in an action of divorce it was competent for the Lord Advocate to insist in a plea of condonation which had been stated and subsequently withdrawn by the defender. *Ibid.*

Paternity of Child—Presumption pater est quem nuptiæ demonstrant.

7. In the case of a wife separated from her husband the presumption *pater est quem nuptiæ demonstrant* may be overcome by direct or circumstantial evidence. *Montgomery v. Montgomery*, Jan. 21, 1881, p. 403.

Process—Expenses—Wife's expenses of Reclaiming Note refused.

8. Circumstances in which a wife reclaiming against a decree of divorce was refused the expenses of the reclaiming note. *Ibid.*

Divorce—Lenocinium—Bar.

9. Where a man, who had married a prostitute, some years after suggested to her that she should return to her former mode of life, and deserted her, *held* that he was barred by his conduct from insisting in an action of divorce for alleged adultery on her part. *Marshall v. Marshall*, May 20, 1881, p. 702.

Conjugal Rights Act, 1861 (24 and 25 Vict. c. 86), sec. 16—Reasonable provision to wife—Whether husband had obtained complete and lawful possession of the property.

10. A wife having received from her father a sum of money, was allowed by her husband to deposit it in bank in her own name, which she did for two years. She then, with her husband's knowledge and consent, uplifted it and invested £450 in heritable property, taking the title in favour of herself and her heirs and assignees. The rental of the property was about £30 per annum. The husband some years afterwards brought an action to set aside the conveyance in his wife's favour as a donation *stante matrimonio* and revocable. *Held* that the purchase having been made with funds of the wife, of which, though they undoubtedly fell under his *jus mariti*, the husband had never "obtained complete and lawful possession" in the sense of the 16th section of the Conjugal Rights Act, 1861, he was bound in terms of that enactment before claiming the property to make a reasonable provision therefrom for his wife, and that in the circumstances the conveyance in question, which did not exclude his *jus mariti* from the

HUSBAND AND WIFE—*Continued.*

rents during his life, but only secured the property to his wife after the dissolution of the marriage, was no more than a reasonable and moderate provision, and could not be revoked.

Observed (*per* Lord President) that "complete and lawful possession," in the sense of the Conjugal Rights Act, 1861, sec. 16, means something more than a good title to possess, and implies not control merely but actual possession. *Clark v. Clark*, May 25, 1881, p. 723.

Divorce—Desertion—Pursuer unwilling to adhere.

11. In an action by a wife against her husband, concluding for divorce on the ground of desertion, the pursuer deposed that her husband had deserted her in May 1870, and had failed to contribute to her support since that date; that prior to the desertion he had treated her with great cruelty, and that if he had asked her to go back in July 1870 she would have been afraid to go back, and that she was not now willing to adhere. The Lord Ordinary (Adam) found that as the pursuer had, on account of her husband's cruelty, been, during the whole period of desertion, unwilling to resume cohabitation, she was not entitled to the remedy of divorce for desertion.

Held (*rev.* judgment of Lord Adam) that as the defender had deserted the pursuer for upwards of four years, and as there was no proof of his having made such an offer of adherence as she was bound to accept, she was entitled to decree of divorce. *Winchcombe v. Winchcombe*, May 26, 1881, p. 726.

Divorce for desertion—Foreign—Jurisdiction—Domicile.

12. A Canadian married a Canadian wife in Canada. The wife deserted her husband there in 1873, and subsequently refused to adhere. The husband came to Scotland in 1879, and in 1880 raised an action of divorce on the ground of wilful and malicious desertion, averring that he was now domiciled in Scotland. In proof of this averment he deposed that he had abandoned Canada as his home, and had come to reside with his children in Edinburgh; that he had bought a business there, and that his present intention was to remain in Scotland as his home; that one main reason of his leaving Canada was his desire to obtain a divorce, which he could not get by the law of Canada. The action was undefended. *Held* (1) that the pursuer had proved a domicile in Scotland; and therefore (2) that the husband's domicile was that of his wife; and therefore (3) that the Court had jurisdiction to pronounce decree of divorce. *Carswell v. Carswell*, July 6, 1881, p. 901.

HYDROPATHIC ESTABLISHMENT. See *Revenue*, 6.

INCOME-TAX. See *Revenue*, 4, 8.

INHABITED HOUSE-DUTY. See *Revenue*, 1, 6.

INSURANCE, MARINE. *Construction—Total loss—Notice of abandonment—Date of action—From which does liability of underwriters date.*

The "Krishna" was stranded on the west coast of India on 23d May 1879, about a fortnight before the usual commencement of the south-west monsoon. Every possible effort was made by the captain and crew before the breaking of the monsoon to get her off, but without success. The south-west monsoon usually prevails from June till October, and during its continuance any farther effort to relieve the vessel was admittedly impracticable. The owner being advised that the vessel would break up during the monsoon, gave notice, on 7th June 1879, of abandonment, as for a constructive total loss, to the underwriters, with whom she was insured, for full value. This notice they refused to accept. The owner raised an action on the policy on 1st October 1879. The underwriters having subsequently succeeded in salving the vessel, pleaded in defence that there was no constructive total loss either at the date when notice was given, or when the action was raised; and alternatively that in determining the question of constructive total loss the point of time to be looked to was the raising

INSURANCE, MARINE—*Continued.*

of the action, at which date there was no constructive total loss, whatever view might be taken of the state of matters at the date when notice of abandonment was given.

Held (1) that though the total loss of the "Krishna" might, at 7th June 1879, be probable, still, in the circumstances, and looking to the possibilities, a prudent uninsured owner would not at that date have dealt with her as a total loss, but would have waited, and that therefore the notice of abandonment given was premature; (2) that still less was there a constructive total loss at the date of raising the action; and (3) that the underwriters had not, by sending out to save the ship, by implication accepted the notice of abandonment.

Question whether the date of notice of abandonment or of raising action is the point of time at which the question of constructive total loss is to be determined, and the rights and liabilities of parties *hinc inde* fixed. *Shepherd v. Henderson*, Feb. 25, 1881, p. 518.

INTERDICT. *Publication—Private Correspondence.*

It is a question of circumstances whether the Court will grant an interdict against the publication of private letters by the receiver.

A person having informed certain of his wife's relations that he intended to publish for circulation among his friends a private correspondence between himself and his wife and them, they presented a petition for interdict against the publication. The Court, after examining the letters, *refused* to grant interdict.

Observed (*per* Lord Justice-Clerk) that if, by the publication of the correspondence any injury was done, the mere fact that interdict had been refused in the present action would not shield the person publishing it from the consequences of his act. *White, &c. v. Dickson, &c.*, July 5, 1881, p. 896.

See *Burgh*, 4—*Property*, 2.

ISSUES. See *Process*, 2—*Reparation*, 2, 4—*Bill*, 3.

JOINT ADVENTURE. See *Partnership*, 1.

JUDICIAL FACTOR. *Costs of unsuccessful litigation, liability for.*

1. *Held* that the expenses in which a judicial factor was found liable to his opponent in a litigation properly entered upon and conducted by him, though unsuccessful in its result, were proper charges of administration, for which he was entitled to take credit, even though they exhausted the estate, before paying a creditor of the factory estate. *Drummond (Carse's Factor) v. Carse's Executors*, Jan. 27, 1881, p. 449.

Special Powers—Unworkable Trust—Exhumation of dead body.

2. By his trust-disposition and settlement the late William Tennant, of Eatonville, Ayr, directed his trustees to erect upon the place of his interment in the New Cemetery at Ayr a mausoleum, which was to cost £500. After his decease he was interred in the said cemetery in a plot of ground belonging to a deceased relative, whose representatives refused to permit the erection of a mausoleum upon it. On a petition by the judicial factor who had been appointed to execute the trust, authority was granted by Lord Fraser to exhume the body and re-inter it in another part of the said cemetery at the sight of the Sheriff-substitute at Ayr, and to erect a mausoleum upon the place of re-interment. *Kilpatrick (Tennant's Factor)*, March 10, 1881, p. 592.

Tutor-dative, appointment of while ward's father still alive.

3. Petition by a father to have a tutor-dative appointed to his lunatic son, on the ground that the petitioner was incapacitated by age from continuing to act as tutor-at-law, *granted*. *Graham and Spouse (Petitioners)*, July 19, 1881, p. 996.

See *Railway*, 4—*Arrestment*, 3—*Election*.

JURISDICTION. *Forum of person who has no domicile.*

A travelling merchant informed a person in Scarborough, from whom he ordered goods, that he had no fixed residence, but travelled, in pursuance of his

JURISDICTION—*Continued.*

business, all over the United Kingdom. The goods were delivered, some in England, some in Scotland. The purchaser having failed to pay the purchase-money, the seller brought an action against him in Scotland, where he happened to be on business. He had not been forty days in Scotland when the summons was served. *Held* that, in the circumstances, the Scotch Courts had jurisdiction, the defender's forum being wherever he might chance to be for the time. *Linn v. Casadino*, June 24, 1881, p. 849.

See *Husband and Wife*, 12.

JURY TRIAL. See *Process*, 8, 9.

JUS QUESITUM TERTIO. See *Property*, 6.

JUSTICIARY CASES.

Crime.

Indictment, irrelevant—Refusal of leave to desert diet pro loco et tempore—Dismissal of panel from bar—Reindictment for same offence—Competency.

1. Where a libel was found irrelevant, and the Court refused a motion by the advocate-depute to desert the diet *pro loco et tempore*, and dismissed the panel from the bar, *held* that the prosecutor was not barred from raising a new libel for the same offence.

Observed that when the diet is deserted *simpliciter* on the motion of the prosecutor, he is barred from further proceedings for the same offence. *Her Majesty's Advocate v. Hall*, June 17, 1881, *Just. Cases*, p. 52.

Jurisdiction—Falsehood, fraud, and wilful imposition—Locus delicti.

2. *Held* that a domiciled Englishman, resident in England, who had been lawfully apprehended in England and brought to Scotland for trial on a charge of falsehood, fraud, and wilful imposition, by sending letters from England to traders in Scotland, containing false statements and representations, whereby he had fraudulently induced them to forward goods to him in England without payment and without intending to pay for the same, was subject to the jurisdiction of the criminal Courts in Scotland as the *forum delicti*. *Her Majesty's Advocate v. Witherington*, June 17, 1881, *Just. Cases*, p. 41.

Falsehood, fraud, and wilful imposition—Fraudulently ordering and obtaining goods on false pretences.

3. The minor proposition in an indictment under which J W was charged with falsehood, fraud, and wilful imposition, set forth that the panel, in pursuance of a fraudulent scheme of obtaining, on false pretences, the property of other persons, and applying the same to his own uses and purposes without paying or intending to pay therefor, did wickedly and feloniously, and falsely and fraudulently, write a letter with the false and fraudulent printed heading, "J W, commission salesman, Blackburn," and "did enclose therein a bank cheque or order for the sum of £25," bearing to be signed by him, meaning "by the style, terms, and tenor of the said letter, and by the said cheque or order," to represent to A B that he intended to become a *bona fide* purchaser of goods, and that he was "a person of good credit that the said bank cheque or order was equivalent to a ready-money payment, and that the same would be honoured on its being presented for payment at the office in M of the said," and this he did, well knowing that he had "no adequate funds in the said bank to meet the said cheque, and that the same would not be honoured." That the said A B, being deceived by his said false and fraudulent representations, sent certain goods which the panel appropriated, and for which he had not paid, and did not intend to pay. *Held* that the facts set forth in the minor proposition were relevant to support the charge in the major. *Ibid.*

Conviction—Alternative complaint—General conviction.

4. *Held* (following *Boyd v. M'Jannet*, May 21, 1879, *ante*, vol. vi. *Just. Cases*, 43, overruling *Scott v. Morrison*, April 9, 1872, 2 *Coup*. 218), that a general conviction of the offence charged following on an alternative complaint is incompetent. *Charleson v. Duffie*, June 10, 1881, *Just. Cases*, p. 34.

JUSTICIARY CASES—*Continued.*

Falsehood, fraud, and wilful imposition—Relevancy—Ordering goods without intending to pay therefor.

5. The minor proposition of an indictment, under which a panel was charged with falsehood, fraud, and wilful imposition, set forth that the panel "having formed a fraudulent and felonious scheme for the purpose of obtaining the goods of others on false pretences, and applying the same" to his "own uses and purposes, without paying or intending to pay therefor," ordered goods by letters, in which he did "represent and pretend" to the owners of the goods, and induce them "to believe that" he "intended to become a *bona fide* purchaser" of "these goods," and would pay the price thereof weekly . . . or on delivery, or on demand of payment, or shortly thereafter, and the said "goods" were fraudulently received and appropriated by him to his own uses and purposes, and that he had not paid and did not intend to pay therefor. *Held* that the facts set forth in the minor did not relevantly support the charge in the major, that the statement that the accused falsely represented that he intended to become a *bona fide* purchaser, and to pay the price, was not a relevant averment of false pretences, it being necessary to set forth a false statement relating to a past or present fact.

Question, whether a domiciled Englishman, resident in England, who addresses letters to persons in Scotland containing false and fraudulent statements, is subject to the jurisdiction of the criminal Courts in Scotland. *Her Majesty's Advocate v. Hall*, March 25, 1881, *Just. Cases*, p. 28.

Perjury—Competency of trying two or more panels on the same indictment—Relevancy—Separation of trials—Sheriff—Jurisdiction—Administration of justice.

6. In a suspension of a conviction for perjury before a Sheriff and jury, *held* (1) that it was competent to charge two or more panels on the same indictment with perjury, provided the alleged perjury related to the same matter, and was committed to compass the same defeat of justice; (2) that a motion for separation of trials must be supported by special grounds other than that the charge was one of perjury; (3) that where an indictment charged, in the major proposition, conspiracy to defeat the ends of justice by means of perjury, as also perjury, it was not necessary, where the facts inferring perjury were sufficiently set forth in connection with the conspiracy, that the minor should set forth a separate *species facti* applicable to the charge of perjury apart from conspiracy; (4) that the Sheriff had jurisdiction to try a charge of perjury though he could not pronounce the declaration of infamy which was generally in use to be included in the sentence of the High Court by virtue of the Act 1555, c. 47; and (5) that a Sheriff-substitute appointed *ad interim* during the pleasure of the Sheriff was not bound to produce evidence of his authority.

Question, whether the declaration of infamy, generally included in the sentences for perjury, of the High Court, should not now be discontinued in the majority of cases. *Marr, &c. v. Procurator-Fiscal of Midlothian*, Feb. 4, 1881, *Just. Cases*, p. 21.

Indictment—Competency of striking out words from an indictment.

7. *Held* that the Court has power at a pleading diet to allow words to be struck out of an indictment if the alteration does not vary the crime with which the panel is charged. *Her Majesty's Advocate v. M'Intosh*, Feb. 1, 1881, *Just. Cases*, p. 13.

Relevancy—Bad treatment of child—Leaving child in charge of young girl.

8. A panel was charged with "culpable and wilful neglect and bad treatment of a child of tender age, by a person who has the custody and keeping of it, whereby such child is injured in its health." The minor proposition set forth that the panel "did culpably and wilfully neglect to supply the said child with wholesome and sufficient food and clothing, and did feed her with improper and deleterious food." Objection of want of specification, on the ground that administering deleterious substances was charged, and

JUSTICIARY CASES—*Continued.*

that the panel was entitled to be told what those substances were, *repelled*, but the words, "and did feed her with improper and deleterious food," *allowed* to be deleted as superfluous, on the motion of the public prosecutor. *Her Majesty's Advocate v. M'Intosh*, Feb. 1, 1881, Just. Cases, p. 13.

Error in date of minute recording sentence and in warrant of imprisonment.

9. A person was tried before a Sheriff and sentenced to imprisonment on 24th November 1880. The minute of the Court in which the sentence was recorded was by mistake dated 23d November 1880, and the warrant of imprisonment which followed thereon bore the same date. The Court (*diss.* Lord Young) suspended the sentence. *Riddell v. Stevenson, &c.*, Feb. 3, 1881, Just. Cases, p. 17.

Appeal.

Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62), sec. 3, sub-sec. 5—Appeal—Notice—Posting of notice on last day for giving notice.

10. Sub-section 5 of section 3 of the Summary Prosecutions Appeals (Scotland) Act, 1875, provides that an appellant shall, "within three days" of receiving the appeal case from the inferior Judge, "give notice of appeal in writing to the respondent." An appellant posted the statutory notice on the third day, but the respondent did not receive it until the morning of the fourth. *Held* that this was sufficient compliance with the statute. *Charleson v. Duffes*, June 10, 1881, Just. Cases, p. 34.

Prosecution under particular Statutes—Prevention of Cruelty to Animals Act.

Statute 13 and 14 Vict., c. 92, sec. 1, Prevention of Cruelty to Animals (Scotland) Act, 1850—Wanton cruelty—Shooting at a dog trespassing and disturbing game in a field.

11. A dog trespassing in a field chased a rabbit therein. A coachman in the employment of the proprietor of the field followed the dog, and, when within five yards, shot at and hit it, the gun being loaded with No. 4 or 5 shot. The dog ultimately recovered, but suffered much pain for a considerable time. The coachman was convicted on a charge of "wanton cruelty" under the Prevention of Cruelty to Animals (Scotland) Act, 1850.

On appeal, the Court *quashed* the conviction. *Jack v. Campbell*, Oct. 29, 1880, Just. Cases, p. 1.

Food and Drugs Act.

Statute—Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), sec. 6, sub-sec. 4—Buttermilk—Extraneous matter necessary in preparation of article.

12. Sec. 6 of the Sale of Food and Drugs Act, 1875, sets forth that "no person shall sell to the prejudice of the purchaser any article of food . . . which is not of the nature, substance, and quality of the article demanded by such purchaser, provided that an offence shall not be deemed to be committed under this section (4) where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation."

A person was convicted of an offence under the said section for selling buttermilk containing "30 per cent of added water." In a case for the opinion of the High Court of Justiciary the Sheriff stated this question of law:—"Seeing that water is invariably used in churning, and is necessary for the preparation of buttermilk, whether the case does not fall under exception 4 to clause 6 of the said Act." The Court *quashed* the conviction, on the ground that, inasmuch as the libel did not set forth that there was any recognised standard of purity in buttermilk, the case fell under the exception of sub-sec. 4. (Lord Young, while concurring in the above judgment, preferred to rest his judgment on the ground that the facts did not amount to a contravention of the 6th section of the statute, inasmuch as the water was not proved to have been added with the intention of cheating the public, or to the prejudice of the purchaser.)

Question (per Lord Justice-Clerk) whether sub-sec. 4 did not exclude the possibility of a conviction in respect of the sale of any articles in which

JUSTICIARY CASES—*Continued.*

extraneous matter was necessarily mixed in the course of preparation or collection, however great the proportion of that extraneous matter might be. *Warnock v. Johnstone*, July 15, 1881, Just. Cases, p. 55.

Sale of Food and Drugs Act, 1875 (38 and 39 Vict. c. 63), sec. 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 and 43 Vict. cap. 30), sec. 2—*Cream—Inferior quality at inferior price.*

13. A milk dealer, was convicted, under sec. 6 of the *Sale of Food and Drugs Act*, for selling, "to the prejudice of the purchaser, 4d. worth of cream, which was not of the nature, substance, and quality of the article demanded." It was proved that the purchaser had asked for a certain quantity of cream from a servant of the dealer, and was served with cream at 1d. per gill, which, on analysis, was found to be diluted with 34 per cent of skimmed milk. Further, that the dealer had also for sale a superior quality of cream, containing a smaller percentage of skimmed milk, which he sold at a higher price. The magistrate found that the cream at 1d. per gill was not of the quality of cream. On appeal, the Court *held* that the sale of the inferior, though pure, quality of cream at a low price was not an offence within the meaning of the statute. *Morton v. Green*, June 10, 1881, Just. Cases, p. 36.

Police Acts.

Obstruction—Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), sec. 251.

14. The above section enacts—"Every person who in any street or private street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall, on conviction," be liable to certain penalties—"Every person who, by means of any cart, carriage, sledge, truck, or barrow, or any animal or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any public footpath or other public thoroughfare. . . . Every person who shall jostle or annoy any person passing thereon."

A complaint set forth that three men were guilty of a contravention of the *Police and Improvement Act*, 1862, sec. 251, in so far as they did, on the High Street of Kirkcaldy, "to the obstruction or annoyance of the residents or passengers, wilfully cause an obstruction in the public footpath of said street, by means of congregating."

In a suspension of a conviction obtained on this complaint, *held* that the complaint did not set forth any offence under the section libelled, and that the conviction being outwith the statute was not protected by the finality clauses from suspension, and conviction *quashed*.

Opinion, per Lord Justice-Clerk, that the conviction was valid. *Wemyss v. Black*, March 19, 1881, Just. Cases, p. 25.

Suspension—Glasgow Police Act, 1866 (29 and 30 Vict., cap. 273), sections 131, 132—*Relevancy—Prevention of Crimes Act*, 1871 (34 and 35 Vict., cap. 112), sec. 12—*Libel*.

15. The *Prevention of Crimes Act*, 1871, sec. 12, enacts that "where any person is convicted of an assault on any constable when in the execution of his duty such person shall be guilty of an offence under this Act."

In the Police Court of Glasgow the relevancy of a complaint charging an offence under section 12 was objected to, on the ground that it did not set forth knowledge on the part of the accused that the persons assaulted were constables in discharge of their duty. The magistrate repelled the objection, and the accused was convicted and sentenced.

In a suspension brought on the ground that no offence under the statute had been relevantly charged, and that the conviction and sentence being outwith the statute might be set aside by the High Court, *held* (1) that the complaint set forth a good charge in substance, and that the magistrate had jurisdiction to decide on the question of relevancy; and therefore (2) that the jurisdiction of the High Court was excluded by sections 131 and 132 of the statute.

JUSTICIARY CASES—Continued.

Opinions, that the objection to the relevancy of the complaint had been rightly repelled. *O'Brien v. M'Phee*, Oct. 30, 1880, Just. Cases, p. 8.

Public House Act.

Public-house—Public-house Acts Amendment (Scotland) Act, 1862 (25 and 26 Vict. c. 35)—*Breach of certificate*—"Notoriously bad fame"—*Assembling and meeting*.

16. Circumstances which held not sufficient to support a charge against a public-house keeper of "allowing women of notoriously bad fame to assemble or meet together in his house."

Opinion (*per* Lord Young) that to support a charge of allowing men or women of notoriously bad fame to assemble or meet in a public-house it is necessary to prove that the assembling or meeting had reference to the bad character referred to.

Opinions contra (*per* Lord Craighill and Lord Adam). *Kirton v. Cadenhead*, Oct. 30, 1880, Just. Cases, p. 4.

Poaching Acts.

Process—Day Trespass Act, 2 and 3 Will. IV. c. 68—*Summary Procedure Act*, 27 and 28 Vict. c. 53, schedule B—*Complainer appearing by procurator—Complaint signed by procurator*.

17. In an appeal (which was unopposed) against a judgment of the Sheriff-substitute (Cowan) at Greenock, dismissing a complaint under the Day Trespass Act, presented in terms of the Summary Procedure Act, 1864, the Court, after hearing counsel, *held* (1) that the complaint was sufficiently signed by a duly authorised law-agent as procurator for the complainer; and (2) that the complainer might be represented by a law-agent at the trial. *Shaw Stewart v. Wilson*, June 10, 1881, Just. Cases, p. 33.

Trespass—Day Trespass Act, 2 and 3 Will. IV. c. 68, sec. 1—*Farm servant—Killing hare taken from snare—Permission to snare rabbits*.

18. A tenant had power under his lease to snare rabbits, and employed A, one of his farm-servants, to set and attend to his snares. A entered a field on the farm, and took a hare, apparently dead, out of a rabbit-snare. The hare recovered, and ran away. A set his dog after it, and killed it when the dog had retrieved it. A was charged with a contravention of the Day Trespass Act by entering or being in a hay field in search of or in pursuit of game. The Sheriff assoltized the accused. On appeal, the Court (*diss.* Lord Adam) affirmed the Sheriff's judgment. *Lawrie, &c. v. M'Arthur*, Oct. 29, 1880, Just. Cases, p. 2.

LEASE. *Agreements and Contracts—Construction and Effect.*

1. *By agreement, supplementary to their lease, the tenants of certain quarries agreed to construct a tramway from the quarries "by the end of the policy of Thurso Castle to their works at Thurso East," and "to compensate the tenants along the line for any damage done to their farms." The landlord, who was proprietor of Thurso Castle, agreed "to give gratuitously the land required for the tramway."*

From the southmost corner, and along the west wall of the policy, there ran a private occupation road belonging to the landlord, between the policy wall and the foreshore of the estuary of Thurso river, leading from the public road to the tenants' works, and thence to the offices of Thurso Castle. By this road the tenants had been accustomed to cart their material from the quarries to their works, and on it there was room to lay a tramway without interfering with other traffic. It was the only practicable route outside the policy. But before reaching the tenants' works it passed through the works of another quarry company, who, it was alleged by the tenants, would object to the construction of the tramway through their yard.

In a question between the landlord and tenants, the latter claiming right to make their tramway through the policy of the former, held (rev. judgment of First Division) that the meaning of the agreement between the parties was that the tramway should be constructed outside the policy wall, and that the land-

LEASE—Continued.

lord was not bound to give the tenants any right to the ground required, except such rights as belonged to him, but must give them the use of his name in any proceedings necessary to vindicate their rights. Sinclair v. Caithness Flagstone Quarrying Co., April 7, 1881, H. L., p. 78.

Verbal alteration—Proof—Acquiescence—*Rei interventus*.

2. In an action by a landlord for payment of £1500 as the half year's rent of a coalfield, under a written lease, of which upwards of twenty years were still to run (with certain breaks in favour of the tenant), the tenant alleged that with the view of enabling him to resist demands of workmen for an increase of wages, the landlord, who had the option of a royalty or a fixed rent, had verbally agreed to reduce the fixed rent by one-third, and that on the faith of this agreement he (the tenant) had resisted the demands of the workmen and shut up the colliery for two months. *Held (diss. Lord Shand, rev. judgment of Lord Rutherford Clark)* that as the tenant had merely averred a verbal agreement to alter the rent from £3000 to £2000, unsupported by any facts which necessarily implied acquiescence on the part of the landlord in an alteration of the lease, he was not entitled to probation.

Wark v. The Bargaddie Coal Company, H. of L., 3 Macq. 467, and *Sutherland v. Montrose Shipbuilding Company*, Feb. 3, 1860, 22 D. 665, commented upon. *Kirkpatrick v. Allanshaw Coal Co.*, Dec. 17, 1880, p. 327.

House becoming uninhabitable—Right of tenant to leave—Rent where tenant's occupation interrupted for long period.

3. The tenant of a house, the lease of which expired at Whitsunday, removed from the house in the end of February preceding, in consequence of dangerous defects in the drainage. The landlord had the drains put in order, but the operation took two months. In an action by the landlord for the half year's rent, *held* that the failure of the landlord for so considerable a period to supply a habitable house disentitled him to recover any part of the half year's rent. *Scottish Heritable Security Co. (Limited) v. Granger*, Jan. 28, 1881, p. 459.

Circumstances entitling tenant to resile from agreement to prolong lease.

4. On 6th February 1880 the tenant in possession of a dwelling-house agreed, by letter, to take the house for two years from Whitsunday following, when his lease expired. In the end of February he removed his family and furniture from the house, on account of its being uninhabitable by reason of defects in the drains.

Opinion, per cur., that, although the defects in the drains had been remedied by 20th April, the tenant was not bound to resume possession, and was entitled to resile from his agreement to prolong the lease. *Ibid.*

Mineral—Lease to terminate if minerals became "not worth expense of working"—Fall in market price of mineral.

5. In a lease of gas coal for twenty-nine years from Whitsunday 1867 it was provided that if at any time during the subsistence of the lease it should be "judicially found, upon a report by arbiters, that the gas coal, from no fault, neglect, or irregularity on the part of the lessees, has become not worth the expense of working, this lease shall come to an end at the first term of Whitsunday or Martinmas after it shall be so found." In 1880 the lessees obtained a report from the arbiters setting forth that, from no fault on the part of the lessees, the mineral had become not worth the expense of working, the arbiters stating that the grounds on which they had arrived at this conclusion had reference "solely to the state of the market for gas coal at the time." In an action subsequently raised by the lessees, concluding for declarator that the gas coal, from no fault of the pursuers, "has become not worth the expense of working, and that said lease shall come to an end at Martinmas 1880, *held* (1) that the clause in question was to be construed as applicable, *inter alia*, to the case of the mineral becoming not worth the expense of working in consequence of a continued depression of market prices, although the produce of the mines

LEASE—*Continued.*

had not deteriorated in quantity or quality; (2) that the report by the arbiters was to be regarded as proceeding on a due consideration of the existing state and future prospects of the market for gas coal; and therefore (3) that the lessees were entitled to bring the lease to an end. *Shotts Iron Co. v. Deas*, Feb. 25, 1881, p. 530.

Constitution and proof of lease—Implied acceptance of written lease—Rei interventus—Agent and Principal.

6. A subtenant of a farm, prior to the expiry of the principal lease at Martinmas 1876, entered into negotiations with the Edinburgh agent of the landlord (who resided in England) for a nineteen years' lease, at an increased rent. A lease was adjusted, and, after being signed by the tenant, was sent, in August 1877, by the Edinburgh agent to the London agents of the landlord for his signature. The lease was retained by them till August 1878, the tenant, in the meantime, having been in possession of the farm, and having made a payment to account of the increased rent.

In August 1878 the landlord repudiated the lease, and raised an action of removal against the tenant.

Held that, in the circumstances, implied acceptance of the lease on the part of the landlord had been instructed.

Opinions (per the Lord Justice-Clerk and Lord Young) that the landlord's retention of the lease, signed by the tenant, was in itself sufficient to infer acceptance on his part.

Opinion (per Lord Craighill) that *rei interventus* was necessary to bind the landlord. *Ballantine, &c. v. Stevenson*, July 15, 1881, p. 959.

See *Trust*, 2—*Bankruptcy*, 10—*Heritable and Moveable*.

LIEN. See *Retention*, 1, 2—*Bankruptcy*, 6.

LOCATIO CONDUCTIO. See *Horse*, 1.

LUNATIC. See *Poor*, 4—*Election—Judicial Factor*, 3.

MASTER AND SERVANT. *Yearly engagement—Tacit relocation—Special agreement.*

Held that the rule of tacit relocation did not apply to an engagement of a workman for one year. *Lennox v. Allan & Son*, Oct. 26, 1880, p. 38.

MINERALS. See *Lease*, 2, 5—*Nuisance*.

MINOR AND PUPIL. *Tutors and Curators—Authority to accept reconveyance of feu where feuar unable to pay feu-duty.*

In circumstances creating a case of high expediency amounting in law to necessity the Court authorised tutors-nominate to accept a reconveyance of subjects which had been feued out by the father of the ward. *Campbell*, Feb. 26, 1881, p. 543.

MONTHS, CALENDAR OR LUNAR. See *Succession*, 1.

MORA. See *River*, 1—*Personal Bar*.

NOBILE OFFICIUM. See *Burgh*, 4—*Minor and Pupil*.

NOTARY PUBLIC. See *Agent and Client*, 1.

NUISANCE. *Property—Calcining Ironstone.*

A mining company leased the minerals on an estate subject to the condition that they should not conduct any operations within two miles of the mansion-house. They thereafter commenced calcining ironstone raised from this estate in bings at places beyond this radius, and near their march. The proprietor of the adjoining estate raised an action concluding for interdict against the company, on the ground that the smoke from their bings was destroying the trees in his plantations. *Held*, after a proof, (1) that the pursuer had proved that his plantations had been injured by the defenders' operations; and (2) that he was entitled to interdict to prevent the defenders calcining within one mile of his march.

(*Diss.* Lord Young, who was of opinion that further evidence should have been taken as to whether the places for the calcining bings had not been conveniently and reasonably chosen, having regard to the interests of

NUISANCE—*Continued.*

the company as well as of the neighbouring proprietors.) *Inglis v. Shotts Iron Co.*, July 20, 1881, p. 1006.

See *Process*, 2—*Property*, 3.

PARENT AND CHILD. *Filiation—Period of gestation.*

1. Where in an action of filiation intercourse was proved to have taken place at an unascertained date between 287 and 314 days prior to the birth of the pursuer's child, *held* that the fact that the pursuer herself deposed to a date which gave the lengthened period of gestation of 305 days was not enough to overcome her testimony that the child which was born was the fruit of the intercourse which had then taken place. *Cook v. Rattray*, Dec. 4, 1880, p. 217.

Access to child by mother living separate from husband.

2. A lady who had left her husband presented a petition to the Court praying their Lordships to regulate the terms on which she was to have access to her only child, two years of age, who remained with its father. Petition *dismissed*, on the ground that the lady had left her husband without any good or sufficient reason in law. *Mackenzie v. Mackenzie*, March 5, 1881, p. 574.

PARTNERSHIP. *Joint adventure—Rights of co-adventurers where copartnership trade extended on its natural line.*

1. One of three parties to a co-adventure in the purchase and working of a river steamer upon the Clyde purchased three years afterwards, upon the credit of the co-adventure, a second steamer for the same trade. Eleven years later, the position and relations of the co-adventurers having somewhat changed, a third steamer was bought by the same party, the price being paid by aid of a security over the first. In an action of accounting and payment by one of his co-adventurers against the purchaser the Court, in these and the other circumstances of the case, *held* that the presumption that the second steamer was partnership property had not been rebutted, but that as regarded the third there was no sufficient proof of joint ownership or partnership. *Davie v. Buchanan*, Dec. 17, 1880, p. 319.

Obligation on expiry of Partnership to renew, but without a term, whether enforceable—Agreements and Contracts.

2. Three medical practitioners, in 1869, entered into a contract of partnership for a period of ten years, and thereafter so long as they should agree, but subject to any of the partners being entitled to put an end to it at the 30th April 1879, or at the 30th April in any year thereafter, on notice given. The two senior partners bound themselves by a supplementary agreement, also entered into in 1869, "that on the termination of the fixed period of copartnership provided by the said contract . . . neither of them shall enter into any new arrangements connected with the carrying on of their profession and business in A without the concurrence and consent of the other, and unless otherwise agreed, each of the said parties hereto shall then be entitled to retain an equal interest . . . in the present business, subject to deduction," &c.

Held that the supplementary agreement was not binding on the parties to it, for want of a definite and certain term. *Traill v. Dewar*, March 8, 1881, p. 583.

Latent assignation by one partner of his beneficial interest to a copartner.

3. A contract of copartnership provided that it should not be in the power of any of the partners "to assign all or any part of his share or interests in the capital, stock, or profits of the concern, to any person or persons, or to give them a right to inspect the company's books, or to interfere in any way with the business of the company," and that should any such assignation be granted contrary to this stipulation, the same should be null and void "so far as regards the company or other individual partners, who shall not be obliged to pay any attention thereto." It was also provided that on the

PARTNERSHIP—Continued.

death, insolvency, or retirement of any partner, the remaining partners should have the option of buying his interest at the amount standing at his credit at the last balance. The company having come to consist of three partners, R, S, and C, with equal shares, R and S entered into an agreement, which was not disclosed to C, by which R sold to S, his nephew, his whole interest in the concern as it stood at a certain date. R continued ostensibly a partner till his death, which occurred about seven years after the date of this agreement, during which period the business and prosperity of the company greatly increased. On the death of R, when the agreement between him and S came to light, C raised an action against S to compel him to communicate the benefit which he had obtained by his latent arrangement with R.

Held (in aff. judgment of Second Division) (1) that the contract of copartnership did not prohibit a sale of the beneficial interest of one of the partners either to a stranger or a copartner, provided the effect of the sale did not oblige the company or other partners to take cognisance of it; (2) that the rule which requires a partner, dealing with an asset or liability of the company, or transacting in the line of the company's business, to communicate any benefit derived by him to the company, did not apply to a partner purchasing another partner's interest in the company. *Cassels v. Stewart*, Jan. 13, 1881, H. L., p. 1.

PENALTY. See *Agreements and Contracts*, 1.

PERSONAL BAR. *Acceptance of Composition—Mora.*

Held that a creditor who had refused to accept a composition on his debt, but had neglected for ten months to return to his debtor a bill for the amount of the composition which was subsequently sent to him, was not barred thereby from insisting in an action for the payment of the whole amount of his debt. *Thew & Co. v. Sinclair & Co.*, Feb. 1, 1881, p. 467.

See *Bill*, 4—*Husband and Wife*, 9—*Horse*, 2.

PLEDGE. See *Bankruptcy*, 6.

POINDING. *Illegal execution—Appraisement—Liability of creditor.*

A sheriff-officer, in carrying through a poinding under a small-debt decree, poinded almost the whole articles in the debtor's house, and, in the report of the valuation and sale, articles of household furniture, pictures, and portfolios full of engravings were united under one head and valued together. No serious attempt had been made to arrive at the real value, and the whole were valued at the amount of the decree, and expenses. The two appraisers who assisted were not put on oath. No bidders having appeared at the sale, the articles were declared to belong to the poinding creditor at the appraised value, and were removed by him to an auction sale-room for sale. Before they were sold the debtor intimated that the proceedings were illegal, and that he held both the poinding creditor and the sheriff-officer answerable. In an action of reduction and damages, held that the poinding and sale had been illegally carried through, and that the poinding creditor having sold the goods after receiving notice of the illegality, must be held to have adopted the proceedings of the officer, and was liable in damages along with him.

Question, Is the employer of a sheriff-officer liable in damages for his illegal acts?

Opinion (per Lord Craighill) that appraisers in poindings must be put on oath. *Le Conte v. Douglas and Richardson*, Dec. 1, 1880, p. 175.

POINDING OF THE GROUND. *Effect of service of Summons.*

1. The service of a summons of poinding of the ground has the effect of putting a *nexus* on the moveables which are on the subjects at the date of service, and interpellates the heritable proprietor from allowing others to acquire rights over them.

Held that an auctioneer who had, under the instructions of the heritable

POINDING OF THE GROUND—*Continued.*

proprietor of certain subjects, removed moveables which had been on the subjects when a summons of poinding of the ground was served, and who had afterwards sold these moveables by auction, notwithstanding service of a note of suspension and interdict, was not entitled to deduct from the price received therefor either advances made to his employer or his commission. *Lyons v. Anderson, &c.*, Oct. 21, 1880, p. 24.

Security for current interest.

2. Poinding of the ground in security for interest current but not yet due is *competent*, but payment cannot be demanded till the stipulated term arrives.

A petition in a Sheriff Court craved warrant of poinding of the ground for payment of a principal sum of £2000 (which had been constituted a real burden over certain lands bearing interest, but the payment of principal being deferred until the occurrence of an event which had not yet taken place), and of the interest current but not due till the term of Whitsunday next following the date of the petition. The trustee in the debtor's sequestration appeared. Warrant was granted in terms of the prayer, "with this variation, that instead of making payment as craved, the officer who carries out the warrants shall consign the free proceeds with the Clerk of Court to abide the orders of Court." A sale followed, and the proceeds were consigned as ordered. When the first term for payment of interest arrived warrant was granted for payment out of the consigned fund. Like warrants were granted on two subsequent occasions when interest became due. *Held* that the poinding in security for the interest was competent, and that the irregularity in that part of the prayer of the petition which craved warrant of poinding for the principal sum had been cured by the mode of proceeding subsequently adopted by the Sheriff. *Stewart v. Ritchie (Gibson's Trustee)*, Dec. 10, 1880, p. 270.

POLICE. *Assessment—Short tenancy—Stat. 25 and 26 Vict. cap. 101 (General Police and Improvement Act, 1862), secs. 84 and 89—Stat. 17 and 18 Vict. cap. 91 (Valuation Act, 1854), secs. 4, 8, and 11.*

1. Section 84 of the General Police Act enacts,—“Once in each year the commissioners . . . shall assess all occupiers of lands or premises within the burgh according to the valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland . . . in the sums necessary to be levied for the police purposes of this Act, . . . and shall fix a day on which the same shall be payable: . . . Provided always that such assessment shall be imposed as from the 15th day of May in one year to the 15th day of May in the following year, and shall not exceed a rate equal to”

Section 89 enacts,—“The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year, and owners who shall let for rent or hire lands or premises for less than a year shall themselves, as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the commissioners shall judge expedient.”

On 8th September 1879 the commissioners of police in a burgh resolved to assess for the year from 15th May 1879 to 15th May 1880 according to the valuation-roll for that year (which was not then completed, in so far as appeals against it could not be finally disposed of prior to 30th September), at a certain rate per pound, and declared that the owners of premises let for periods less than a year should be responsible for the rates their tenants failed to pay.

The owner of houses let continuously for a year in successive short periods, sometimes to the same tenant, and sometimes to various tenants, objected to an assessment levied upon him as an owner responsible for his

POLICE—*Continued.*

tenants (1) on the ground that the assessment was not valid, having been imposed at a time when the valuation-roll had not been finally completed, and (2) that section 89 only applied in cases where a house let for periods less than a year was vacant for some portion of the year.

Objections repelled. Burgh of Partick v. Marshall, Feb. 16, 1881, p. 480.

Public burden—Burgh assessments—Public charity—Liability of charitable hospital for assessments—Edinburgh Municipal and Police Act, 1879 (Stat. 42 and 43 Vict. cap. 32).

2. The Edinburgh Municipal and Police Act, 1879, sec. 70, exempted from burgh assessment "any house or building which is solely occupied for purposes of public charity, or any premises exempted from taxation by public law." The directors of a charitable hospital in Edinburgh, in order to extend the usefulness of the hospital, opened certain additional wards—which they had otherwise not sufficient funds to support—to patients who should pay 3s. per day for board. *Held* that the fact that certain patients contributed to the cost of their own maintenance did not deprive the hospital of the character of a building "solely occupied for purposes of charity," and that it was entitled to exemption. Chalmers's Hospital v. Magistrates of Edinburgh, March 8, 1881, p. 577.

POOR. *Poor-Law Act, 1845 (8 and 9 Vict. c. 83), secs. 69 and 76—Interruption of acquisition of residential settlement by obtaining medical advice and drugs from the parochial board.*

1. *Held* that the acquisition of a residential settlement was interrupted by the pauper having applied for and obtained medical advice and drugs to the extent of 2s. 2d. from the parochial board. Wallace v. Dempster and Deas, Oct. 22, 1880, p. 27.

Residential Settlement—Sailor—Poor-Law Act, 1845 (8 and 9 Vict. c. 83), sec. 76.

2. A sailor maintained his wife and family for six months in partly furnished lodgings, and thereafter for four and a half years in a house rented by him as tenant in the parish. When at home between voyages he resided with his wife and family. *Held* that he had acquired a settlement by five years' residence. Wallace v. Beattie and Highet, Jan. 6, 1881, p. 345.

Birth Settlement—Settlement of child born in poorhouse of one parish situated in another parish.

3. The parish of A built a poorhouse in the parish of B. A child born of a pauper in that poorhouse afterwards became chargeable on its birth parish. *Held* that the parish of B and not that of A was liable. Russell v. Greig and Craig, Jan. 26, 1881, p. 440.

Pauper Lunatic—Relief—Lunacy Act, 1862 (25 and 26 Vict. cap. 54), secs. 14 and 15.

4. A family consisted of a father and mother and nine children, five being sons and four daughters. One of the sons was an imbecile. The father had an annual income of £120; two of the sons contributed between them £65 per annum to the household expenses; and two of the daughters were in service. *Held* that, in the circumstances, the father had no claim to be relieved by the parochial board of the maintenance of his imbecile son in an asylum. Beattie v. Grozier, June 7, 1881, p. 787.

POOR'S-ROLL. *Poor-roll—Admission where the reporters on the probablis causa litigandi are equally divided in opinion—A.S. 21st November 1842, sec. 1.*

1. Where the reporters on the *probablis causa litigandi* reported to the Court that two of them were of opinion that an applicant had, and two of them were of opinion that she had not a *probablis causa*, the Court (*diss.* Lord Shand) admitted the applicant. Marshall v. North British Railway Co., July 13, 1881, p. 939.

Time of stating objections where admission applied for.

2. *Held*, following Allan v. Allan, Feb. 28, 1872, 10 Macph. 510, that objections to admission to the benefit of the poor's-roll (on grounds other than the want of *probablis causa*) should be stated when the application is moved

POOR'S-ROLL—*Continued.*

in the Single Bills, and before a remit is made to the reporters on *probabilis causa*. Douglas v. M'Veigh, March 18, 1881, p. 667.

See *Process*, 21.

POWER OF APPOINTMENT. See *Faculty and Powers*.

PRESCRIPTION.

Deduction of years of minority—Verus dominus—Road—Right of way.

1. An estate was conveyed to a father in liferent for his liferent use only, and to the heirs of his body in fee. The father died during the minority of his two daughters, who succeeded as heirs-portioners. In an action raised at their instance to have it declared that a certain road which passed through the estate had not been used as a public road during the forty years necessary to found prescriptive use, *held* that in reckoning the years of prescription they were entitled to a deduction of that part of their minority which occurred subsequent to their father's death, and not of that part which preceded it, on the ground that prior to their father's death the pursuers had no vested right. Black v. Mason, Feb. 18, 1881, p. 497.

Royal Burgh—Harbour Dues.

2. *Held* that a charter of royal burgh is a *habile* title on which to prescribe a right to exact harbour and shore dues, and that the usage of exaction for more than the prescriptive period will fix the limits of the right. Macpherson v. Mackenzie, May 21, 1881, p. 706.

See *Agent and Client*, 2.

PRIVATE CORRESPONDENCE. See *Interdict*.

PROCESS.

Procedure generally.

Exhibition of Titles.

1. When in an action of exhibition the Court is satisfied that the titles called for should be produced, the proper course is to ordain them to be exhibited in the hands of the clerk of Court. Clark v. Melville, Nov. 16, 1880, p. 81.

See also *Bankruptcy*, 1.

Issue—River—Nuisance.

2. In an action by riparian proprietors on the banks of a river, to prevent pollution by owners of mills on the river, and others, an issue was adjusted by the Lord Ordinary whether the defenders polluted the river "to the nuisance of the pursuers or their authors, or one or more, and which of them." *Held* that the words "and which" were a departure from the ordinary style of issue, and should be struck out, *diss.* Lord Shand, who held that it was unnecessary to alter the issue adjusted by the Lord Ordinary, as with or without the words "and which" the issue was fitted to try the case. Earl of Southesk v. Inch Bleaching Co. &c., March 5, 1881, p. 573.

Forms of issues for wrongous use of diligence. See *Bill*, 3.

Competency—Value of Cause—Judicature Act, 1825 (50 Geo. III. cap. 112), sec. 28—Conclusion ad factum præstandum.

3. *Held* that an action in the Court of Session for delivery of fifteen I O U's, representing *in toto* the sum of £16, 18s. 6d., was not incompetent. Henry v. Morrison, March 19, 1881, p. 692.

Remit to Lord Ordinary to allow a Proof—Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 62.

4. Section 62 of the Court of Session Act enacts that "when proof shall be ordered by one of the Divisions of the Court it shall no longer be competent to remit to one of the Lords Ordinary to take such proof, but it shall be taken before one of the Judges of the said Division." *Held* (after consultation with the Judges of the Second Division) that this did not apply to a case where the Court recalled an interlocutor of a Lord Ordinary dismissing an action as irrelevant, and remitted to the Lord Ordinary to allow a proof. Main (Fleming's Trustee) v. Fleming's Trustees, June 30, 1881, p. 880.

Entail—Form of interlocutor where reclaimer's counsel were unable to submit argument in support of reclaiming note.

5. In an action for declarator that three deeds of entail were invalid, in re-

PROCESS—*Continued.*

spect that they contained no irritant clauses against altering the order of succession, the Lord Ordinary declared the deeds invalid. The defender reclaimed, but, at the hearing, her counsel stated, that, in consequence of the current of decision, they were unable to submit an argument in support of the reclaiming note. *Held* that the Court should pronounce an interlocutor to the effect that, having heard counsel for the claimer, they refused the reclaiming note and adhered. *Colville v. Marindin*, July 12, 1881, p. 937.

Petition—Restriction of Aliment.

6. It is competent for a person against whom a decree for aliment has been pronounced to present a petition praying the Court to restrict the amount of future aliment. *Macdonald v. Macdonald*, July 19, 1881, p. 985.

Amendment of Record—Court of Session Act, 1868, sec. 29.

7. Observed (per *Lord Watson*) that the provisions of the *Court of Session Act*, 1868, sec. 29, did not warrant the importation of a new party into a suit for the purpose of obviating an objection to the title to sue of the original pursuer. *Hislop v. M'Ritchie, &c.*, June 23, 1881, H. L., p. 95.

Jury Trial—Place and time of trial.

8. Circumstances in which the Court refused a motion to have a case tried in Edinburgh instead of at Glasgow Circuit. *Macpherson v. Caledonian Railway Co.*, July 6, 1881, p. 901.

Jury Trial—Abandonment by not proceeding to trial within twelve months of issues being adjusted—Question, Whether A. S., Feb. 16, 1841, sec. 46, is still applicable—13 and 14 Vict. c. 36 (Court of Session Act, 1850), sec. 40.

9. In this action issues were adjusted on 16th May 1880, and the case was set down for trial on 16th July 1880. On 8th July the order for trial was discharged, by reason of the Lord Ordinary who was to preside at the trial being required to attend the trial of an election petition in the country. No step was taken in the case by either party until 14th July 1881, when the defender gave notice of a motion that in terms of the 46th section of A.S., Feb. 16, 1841, the pursuer should be held as confessed, in respect he had not proceeded to trial within twelve months from the adjustment of issues, and that decree of absolvitor should be pronounced.

The pursuer then, on 15th July 1881, gave notice of trial for the next Christmas sittings.

Held that the Act of Sederunt did not apply, and that under the 40th section of the Court of Session Act he was entitled to have a day fixed for trial. *Baird v. Cornelius*, July 16, 1881, p. 982.

*Questions of Expenses.**Expenses—Bankrupt—Caution for expenses in a reclaiming note where fraud alleged—Reduction.*

10. In an action of reduction on the ground of fraud the Lord Ordinary granted decree against the defender. When a reclaiming note for the defender was called in the Single Bills, counsel for the pursuer moved that the defender should be ordained to find caution for expenses, on the ground that he was bankrupt, and that the trustee in his sequestration had failed to sist himself as a party to the cause.

The Court refused the application, with expenses, on the ground that the general rule in such cases was that a defender was not obliged to find caution for expenses of process (*Taylor v. Fairlie*, March 1, 1833, 6 W. and S. 301), and that here, the bankrupt's character being assailed, the rule should clearly be applied. *Buchanan v. Stevenson, &c.*, Dec. 7, 1880, p. 220.

Expenses—Fees to Counsel where case has extended over more than one day.

11. The fact that the hearing of a case has been continued from one day to another is not in itself a reason why an additional fee should be sent to counsel. *Brady v. Watson*, decided March 15, 1881, reported of date March 19, 1881, p. 694.

PROCESS—Continued.

Caution for expenses—Bankrupt—Trust for creditors—Bankrupt suing trustee to account.

12. A bankrupt who had granted a voluntary trust-deed for behoof of creditors sued his trustee to account for a balance of funds which he alleged was in the trustee's hands. *Held* that he was entitled to sue the action without finding caution for expenses.

Observations (per Lord Young) on the grounds on which the Court will order caution for expenses to be found. *Ritchie v. M'Intosh* (Ritchie's Trustee), June 2, 1881, p. 747.

Expenses—Jury Trial—Fees to Counsel.

13. In a jury trial relating to a right of way, which lasted from 10 a.m. till 6.30 p.m. of each of three days, the Court refused to allow as charges against the losing party more than the usual fees to counsel, viz., twenty, fifteen, and ten guineas to senior counsel, and fifteen, ten, and seven guineas to junior counsel. *Black v. Mason*, March 18, 1881, p. 666.

Expenses—Proof—Copies of evidence for debate before Lord Ordinary.

14. Exceptional circumstances, under which the charge for one copy of the evidence for use of counsel at an adjourned hearing on evidence in the Outer-House was *allowed* against the losing party. *Powrie v. Louis*, June 15, 1881, p. 803.

Expenses—Appeal—Amount of expenses allowed when appeal withdrawn in Single Bills.

15. An appeal against a judgment of the Sheriff of Lanarkshire was lodged in August and appeared in the Single Bills of the first day of the next session. Counsel for the appellant then moved the Court for leave to withdraw the appeal. The Court allowed this to be done on condition of payment of £3, 3s. of expenses to the respondent, and fixed that sum as the amount of expenses to be awarded in similar cases. *Gentles v. Beattie*, Oct. 15, 1880, p. 13.

Expenses—Appeal—Where appeal withdrawn after printing by respondent.

16. An appeal was sent to the Short Roll upon the 15th October. The appellant, on the 2d November following, moved in the Motion Roll that it be dismissed, with modified expenses. The respondent asked to be allowed full expenses, as he had been put to considerable expense in printing documents in preparation for the discussion of the case. Appeal dismissed, the respondent being found entitled to full costs, as taxed. *Smith Sligo v. Knox*, Nov. 2, 1880, p. 41.

See *Agent and Client*, 4—*Husband and Wife*, 1, 8—*Judicial Factor*, 1.

Appeals from Sheriff Courts.

Appeal—A. S., 10th March 1870—Omission to lodge prints in due time.

17. Circumstances in which the Court sent an appeal from the Sheriff Court to the roll although the appellant had failed to lodge prints within fourteen days after the process had been received by the Clerk of Court, as required by sub-sec. 1 of sec. 3 of A. S., March 10, 1870. *Greig v. Sutherland*, Nov. 3, 1880, p. 41.

Appeal—Competency—Judicature Act, 1825, 6 Geo. IV., c. 120, sec. 40—Act of Sederunt 11th July 1828, sec. 5.

18. A Sheriff-substitute allowed a proof on 2d September, and thereafter pronounced three interlocutors discharging the diets for taking the proof and fixing new ones, stating in a note to his last interlocutor that no further indulgence would be allowed to the defender. The defender appealed to the Sheriff-principal, who dismissed the appeal. The Sheriff-substitute, on 15th December, assigned as a new diet of proof the 20th December. The defender appealed to the Court of Session.

Appeal *dismissed* as not timeously presented, the interlocutor of 2d September requiring to be appealed against within fifteen days under the 40th section of the Judicature Act and the 5th section of the A. S. of 1828, and the interlocutor of 15th December not being an allowance of proof or the renewal of an allowance of proof. *Kinnes v. Fleming*, Jan. 15, 1881, p. 386.

PROCESS—Continued.

Appeal—Leave to Appeal—Act 50 Geo. III., c. 112, sec. 36—A. S. 12th Nov. 1825, c. 19, sec. 2.

19. The A. S. 12th Nov. 1825 contains this section,—“The liberty of advocating interlocutory sentences to the Court of Session, in the cases allowed by the Act 50 Geo. III. cap. 112, sec. 36, must be obtained upon an application by petition to the Sheriff. This petition must not contain any argument, but shall merely relate the interlocutors to be advocated.”

Held that the section merely regulates the mode of obtaining leave to appeal in cases where such leave is necessary. *Miller v. Crawford*, Jan. 15, 1881, p. 385.

Appeal—Debts Recovery (Scotland) Act, 1867 (30 and 31 Vict., cap. 96) —Addition of plea after case decided in inferior Court—Pars Judicis.

20. When, in an action under the Debts Recovery Act, 1867, a person having sufficient means to enable him to employ an agent conducts his own cause he will not, in an appeal against the judgment, be entitled to state a new plea. *Simpson v. Selkirk*, Feb. 2, 1881, p. 469.

Appeal—Act of Sederunt 10th March 1870, sec. 3, sub-sec. 1—Time for application to dispense with printing.

21. The process in an appeal from the Sheriff Court was received by the Clerk of Court upon 21st February. Upon the appellant's application to be admitted to the benefit of the poor's-roll, a remit was made on the 25th February to the reporters on *probabilis causa litigandi*. On 4th March the appellant presented a note to the Court praying them “to dispense *hoc statu* with printing, or otherwise, to extend the time for printing until the application for the benefit of the poor's-roll should be disposed of.”

Motion refused, on the ground that it had not been made within eight days after the process had been received by the Clerk of Court, as required by sub-section 1 of section 3 of the Act of Sederunt 10th March 1870, but observed that it would be open to the appellant, within eight days after the appeal should be held to be abandoned under the 1st sub-section, to apply in terms of the 3d sub-section to be reponed upon cause shewn. *Allan v. Sandeman*, March 4, 1881, p. 563.

Appeal—Competency—Sheriff Courts Act, 1876 (39 and 40 Vict. cap. 70), sec. 32.

22. An interlocutor disposing of the whole merits of an action and awarding expenses was pronounced by a Sheriff-substitute on 10th March and adhered to by the Sheriff on the 31st, the unsuccessful party being found liable in the expenses of the appeal, “to be taxed and decerned for along with the other expenses.” The decree was extracted on 21st April. Subsequently, on 2d May, another interlocutor was pronounced, giving decree for the taxed amount of expenses. Against this interlocutor an appeal was taken to the Court of Session, with the view of bringing up the previous interlocutors in the case. *Appeal refused*, on the grounds (1) that, under the 32d section of the Court of Session Act, 1876, after extract no appeal is competent, and (2) that an interlocutor which merely awards expenses is not subject to review. *Tennents v. Romanes*, June 22, 1881, p. 824.

Appeal—Competency—Value of the cause—Statute 16 and 17 Vict. c. 80 (Sheriff Court Act, 1853), sec. 22.

23. A summary petition in a Sheriff Court craved an order against the defender for delivery of a machine, and failing delivery within a specified time to be fixed by the Court, decree for payment of “£6, 10s. as the value of the said machine.”

Held that as the prayer of the petition shewed that the value of the cause did not exceed £25 it was not competent to appeal the case to the Court of Session. *Singer Manufacturing Co. v. Jessiman*, May 14, 1881, p. 695.

Special Cases.

24. *Observations* on the form of special cases. *Caledonian Railway Co. v. Inland Revenue*, Nov. 18, 1880, p. 89.

See *Poor's-Roll, 1 and 2—Teinds*.

PROOF. Confidentiality—Reports to insurance companies by medical advisers.

In an inquiry regarding the probable duration of life of a first substitute heir of entail, with the view of ascertaining the value of the expectancy of the second and third heirs prior to the disentail of the estate, diligence *granted* (by Lord Fraser (Ordinary) and acquiesced in) for the recovery of certain medical reports in the hands of insurance companies with whom the life of the heir in question was insured, and plea of confidentiality stated by the haver *repelled*. *McDonald v. McDonalds*, Jan. 7, 1881, p. 357.

See *Agent and Client*, 1, 2.

PROPERTY. Urban tenement—Implied servitude of light and air.

1. A property company purchased, in one lot, a villa and surrounding garden ground. Thereafter they divided the subjects into two lots, the first of which consisted of a shop, which they had erected on the plot of ground lying to the front of the villa, and two cellars or warerooms—part of the sunk storey of the villa—which, for more than forty years, had received light and air through two small windows in the south gable, which overlooked the plot of ground adjoining. This lot the company sold to A, together with the *solum* of the piece of ground on which the shop was built, and a right of property in common with the proprietors of the villa in the *solum* of the piece of ground on which the warerooms were situated. In the following year the company sold the remainder of the property to B. This lot consisted of the villa, other than the part of the sunk storey already sold to A, together with a right of property, along with A, in the *solum* of the piece of ground on which said house was built, together with the piece of ground, or green, lying to the back and south of the house, with right to make use of it as absolute owner, it being thereby declared that there was no restriction against building, or any right of servitude affecting the said piece of ground. B erected on the piece of ground to the south of the house a wooden screen, in such a manner as to obstruct the windows of the warerooms. *Held* that he was not entitled so to obstruct the windows, on the ground that A's title gave him, as at the date of purchase, an implied servitude of air and light over the said plot of ground, and that the subsequent declaration in B's title, that there was not "any right of servitude affecting the said piece of ground," could not override the implied servitude. *Heron v. Gray*, Nov. 27, 1880, p. 155.

Trespass—Ferry—Road—Public right of way—Interdict.

2. The Clyde Navigation Trustees having obtained from a riparian proprietor a strip of ground on the bank of the river to be used solely for the purposes of widening and straightening the river, and having thereafter obtained by statute an existing right of ferry over part of the river extending above and below the said strip of ground, established a ferry service, and embarked and discharged passengers at a part of the bank so acquired, which was separated from any public place by the lands of the said proprietor. The proprietor sought to have the trustees interdicted from embarking and discharging passengers at the point in question.

Held that the action was wrongly directed against the trustees, and that the proprietor's proper remedy was an interdict against persons actually trespassing on his lands,—*dis*s. Lord Justice-Clerk, who held (1) that the establishment by the trustees of this ferry was contrary to the *bona fides* of their feu-contract with the complainer, and (2) that they had no right by statute or otherwise to establish a ferry except where they could communicate directly with some public place. *Stirling Crawford v. Clyde Navigation Trustees*, June 22, 1881, p. 826.

River—Nuisance—Interdict.

3. Where A feued part of his ground for the erection of dwelling-houses, and gave the feuars right to send sewage through a drain passing through the remainder of his ground into an ordinary field drain which communicated with an open ditch on an adjoining property belonging to B, *held* that B was entitled to interdict against A discharging the sewage into the said ditch. *Scott v. Scott*, June 28, 1881, p. 851.

PROPERTY—Continued.

Restraints on use of—Questions between proprietors of flats—Servitude—Light and air.

4. A lot of building ground, extending from the street in front to a meuse lane at the back, having been feued out, the feuar erected on it an ordinary common stair tenement, consisting of a main-door house and two flats and attics opening from the common stair. He afterwards sold off the house, "consisting of the ground and street storeys of the tenement lately erected" by him, "with the area at the back of the said tenement," &c. to one purchaser, and the common stair houses, with certain rights in the callage and front area, but with no express right to or in "the area at the back of the said tenement," to others.

The proprietor of the street and sunk floor, having converted them into a shop, proposed to extend his premises by building a saloon the height of his street floor terminating in a building at the back facing the meuse lane, and rising to a height of 19 feet 9 inches at the ridge of the roof, and 8 feet 9 inches at the wall head above the level of the top of his street floor. This building was to be brought within 21 feet 6 inches of the back wall of the street floor and of the common stair floors above.

Held that there was no limitation on the right of the proprietor of the street floor and back area, and, as no injurious diminution of light and air to the flats above was to be apprehended, warrant granted subject to conditions. *Boswell v. Magistrates of Edinburgh*, July 19, 1881, p. 986.

Superior and vassal—Special stipulations in feus—Restrictions on building—Enforcement by one vassal against another holding of common superior.

5. The fact of several feuars of adjoining plots of building ground in the same street holding from a common superior, does not, by itself, entitle any one of those feuars to claim the benefit of restrictions contained in the feu-contract of another unless some mutuality and community of rights and obligations is otherwise established between them, and this can only be done (1) by the superior making it an express condition of his feu-contract that he will insert the same general restrictions in all feus granted by him in the same street or locality; or (2) by reasonable implication from a reference in all the feu-contracts to a common plan or scheme of building prepared and adopted by the superior; or (3) by mutual agreement between the feuars themselves.

A superior feued out ground for building detached villas to form one side of a square on his property. All the feuars were put under restrictions as to building, but these restrictions, though similar, were not uniform, but adapted to the situation of the various houses, and there was no reference in the feu-contracts to any general building plan as having been adopted by the superior, and except that all the houses had a uniform frontage, so far as related to their distance from the street in front, no uniform plan appeared to have been adopted; nor was there any undertaking by the superior in any of the feu-contracts to impose the same or any restrictions upon adjoining feuars. A and B, who held adjacent feus, and whose houses had been built before the date of their feu-contracts, were each restricted from erecting additional buildings, with certain specified exceptions. The excepted buildings were different in each case, but both feuars were restricted from building on the front area between their houses and the street. Held (rev.^d judgment of Second Division) that the restrictive provision as to building in B's feu-contract did not create a *jus quaesitum* in favour of A, but was merely a condition of tenure between superior and vassal; and that A was not entitled to enforce it against B to the effect of preventing him enclosing the space in front of his house for the purpose of a carriage show-room. *Hislop v. MacRitchie's Trustees*, June 23, 1881, H. L., p. 95.

Privileges stipulated for in disposition of heritable subjects—Destruction of subject—Whether privileges transmitted on reconstruction of subjects—Jus quaesitum tertio—Theatre.

6. The site of a theatre called "The Queen's Theatre and Opera House," as

PROPERTY—Continued.

well as the theatre itself, were conveyed to A B by trustees acting for certain shareholders or rentallers, subject to the real burden of a perpetual annuity of £2 to each of the rentallers and their successors or assignees. It was further stipulated that each of the rentallers "shall at all times be entitled to free admission to the audience department of the said theatre other than the present private boxes; . . . but declaring that the said right of free admission shall be personal to each shareholder or rentaller; . . . and also providing and declaring that the said A B and his foresaids shall not be entitled, without the consent of the said shareholders or rentallers, or their foresaids, to convert the said theatre and opera house to any other use or purpose; and also providing and declaring that the said theatre and opera house shall be kept open for performances during at least six months of the year."

This theatre was burned down, as was also a second theatre built on the same site. A third theatre was erected and opened. These several theatres had on various occasions changed hands, but in each case the conveyance was made subject to the burdens incumbent on the disponent under the titles of said subjects, and specially, without prejudice to the said generality, the disponent was taken bound to pay the annuity of £2 to each of the rentallers, and to "allow these parties the privilege to which they were entitled."

The rentallers enjoyed unchallenged the privilege of free admission to the theatre, as rebuilt, for fourteen years after its first destruction by fire.

In a question between the lessees of the theatre and the rentallers, held (aff. judgment of the Second Division) that the privilege of free entry conferred on the rentallers by the original disposition was confined to the theatre in existence at the date of the deed, and expired with its destruction by fire, and that the subsequent conveyances to which the rentallers were not parties were not intended to confer, and did not confer, on them any new right.

Scott, &c. v. Howard, &c., March 24, 1881, H. L., p. 59.

See Nuisance—Superior and Vassal, 8—Burgh, 3, 4.

PROVISIONS TO HUSBANDS, WIVES, &c. Antenuptial marriage-contract—Conveyance of universitas—Subsequent alterations in settlement.

A husband in an antenuptial marriage-contract conveyed his whole means and estate as at the date of his death to trustees, and therefrom provided £150 to his widow, "in full of all legal claims." He directed the residue of the estate to be divided equally among the children of a former marriage, and any children to be born of the present one. Two children were born of this marriage. The husband afterwards executed a trust-settlement, whereby he directed an additional payment of £300 to his widow, and also gave her the life interest of her children's shares of the residue, subject to the burden of alimenting them. Held that this was a fair and reasonable provision for the wife, and not a fraud upon the provisions of the antenuptial contract as regarded the children of the second marriage. Lowden's Trustees v. Lowden, &c., June 1, 1881, p. 741.

See Entail, 2, 5—Succession.

PUBLIC BURDEN. See Police, 2.

PUBLIC COMPANY. Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 121—Contributory—Suspension of a charge to pay calls granted without caution.

1. The liquidators in a joint stock bank, which was being wound up, came to an arrangement with one of the contributories, who was unable to pay the second call, that he should pay a sum of money and they should grant him a discharge. The authority of the Court was interposed to the compromise, and the money was paid. The liquidators refused to deliver the discharge, and obtained an order against the contributory for payment of the call, and caused him to be charged thereon. They averred that the contributory had not made a fair disclosure of his affairs before obtaining the discharge, and in particular that he had not disclosed the fact that he had recently become a partner of a trading company. They also averred that after the date of the compromise he had paid money into the copartnership funds.

PUBLIC COMPANY—*Continued.*

In the special circumstances of the case note of suspension of the charge to pay a call *passed* without caution. *Anderson v. Liquidators of City of Glasgow Bank*, Nov. 5, 1880, p. 44.

Winding up—Shareholder holding for himself and as executor—Construction of terms of compromise by surrender.

2. In a winding up a person was placed upon the list of contributories (1) in his own right, and (2) as one of two executors upon the estate of the deceased. He failed to pay the calls made upon him in the first capacity, but he paid those made on him in the second. Terms of an agreement between him and the liquidators, under the sanction of the Court, by which the Court *held* that he had surrendered his whole estate, and that he was bound to give an assignation to all claims which might be competent to him in the future in respect of either holding.

Observations upon the meaning of "compromise" as applied to such an agreement. *Liquidators of City of Glasgow Bank v. Mitchell*, Nov. 26, 1880, p. 135.

Winding up—List of Contributories—Constitution of Membership.

3. In the winding up of a joint stock company registered under the Companies Acts, 1862 and 1867, to entitle the liquidators to place the representatives of a deceased person upon the list of contributories they must prove that before his death he was a registered shareholder, or was bound to the company to become so.

A person who had been a chief originator and adviser in the formation of a company, and who, along with others, had signed a paper agreeing to subscribe £1000 towards the capital of the company if it were started, died the day after the memorandum of association was registered, and previously to the allocation of the shares. Further, he had been one of the seven signatories required for the memorandum of association, where his name was entered for the statutory single share. *Held* that the deceased had incurred no liability to the company except as a party to the memorandum of association, by which he became bound to take one share. *Molleson and Grigor v. Fraser's Trustees*, March 17, 1881, p. 630.

Reduction of Capital—Companies Act, 1867, secs. 9 to 20—Companies Act, 1877, secs. 3 and 4—Procedure.

4. The New Zealand and Australian Land Company was formed by the amalgamation of two previously existing companies, and was incorporated under the Companies Acts, 1862 and 1867, with a capital of £2,500,000. Soon after its incorporation it was found advisable upon inquiry to reduce the valuation of the estates held by it in New Zealand and Australia by £250,000, the result of which was that the nominal capital was larger than actually existed in assets. A petition was subsequently brought, founding upon the Companies Acts, 1867, secs. 9 to 20, and 1877, secs. 3 and 4, asking the Court to pronounce an order confirming a reduction of capital by £250,000, to approve of the draft minute proposed to be registered in pursuance of the above sections, to authorise the registration of both, and further, to dispense with the words "and reduced" as part of the name of the company. It was stated that the shares were all fully paid up, and that the reduction proposed was unrepresented by available assets, and did not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. *Orders pronounced.* *New Zealand and Australian Land Co. (Limited)*, March 19, 1881, p. 691.

Liability for calls where shares forfeited for non-payment—Want of Notice.

5. The articles of association of a limited company provided that "twenty-one days' notice at least shall be given of the time and place appointed by the directors for payment of every call," and "a call shall be deemed to have been made at the time when the resolution of the directors authorising such a call shall have been passed." They also provided (Rule 29) that "any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing on such shares at the time of the forfeiture."

PUBLIC COMPANY—Continued.

A call was made upon the 14th June, payable in equal instalments upon the 21st July and 23d August following. On the 28th June, before the date when notice of the call required to be given to the shareholders, the shares of a member of the company were forfeited in respect of non-payment of former calls. He received no notice of the call of 14th June until 13th August, when a circular intimating it was sent to him.

Held that his liability to pay the call arose under rule 29 without notice. *Ferguson v. Central Halls Co. (Limited)*, July 20, 1881, p. 997.

PUBLICATION. See *Interdict*.**RAILWAY.** *Compensation—Injury to access by shutting public street—Lands injuriously affected—Railway Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict., cap. 33), sec. 6.*

1. A railway company in the exercise of their statutory powers closed two public streets. *Held* that the owner of subjects in the neighbourhood (no part of which had been taken), whose access to a leading thoroughfare had been thereby materially injured, was entitled to compensation under section 6 of the Lands Clauses Act, on the ground that his property had been injuriously affected. *Walker's Trustees v. Caledonian Railway Co.*, Jan. 21, 1881, p. 405.

Railway Clauses Consolidation (Scotland) Act (8 and 9 Vict. cap. 33), sec. 6—Lands injuriously affected—Benefits from Railway.

2. *Held* that in determining the extent to which lands have been "injuriously affected" in the sense of section 6 of the Railway Clauses Act, compensatory benefit arising from the formation of the railway is not to be taken into account. *Ibid.*

Injury to Access—Compensation claimed in ordinary action—Stat. 8 and 9 Vict. cap. 19 (Lands Clauses Consolidation (Scotland) Act, 1845), sec. 17—Stat. 8 and 9 Vict. cap. 33 (Railway Clauses Consolidation (Scotland) Act, 1845), sec. 6.

3. A person held a feu bounded on one side by a vacant piece of ground which the superior bound himself to form into a street, the feu being bound to maintain it when made. Subsequently a railway company scheduled this piece of ground, and obtained by a private Act (which incorporated the Railways and Lands Clauses Acts) compulsory powers to acquire it. They acquired it by voluntary agreement with the proprietor (the superior).

The railway company having lowered the level of the ground, and injured the feu's access, he raised an action of damages against them at common law, maintaining that, as he had not got the notice which sec. 17 of the Lands Clauses Act requires to be given to all the parties "interested" in lands prior to their purchase, the railway company were not entitled to found on the statutes.

Held that the pursuer had not such an interest in the ground as to entitle him to notice under sec. 17 of the Lands Clauses Act, and that his only remedy was a claim for compensation under sec. 6 of the Railway Clauses Act, on the ground that his feu had been injuriously affected. *Lawson v. Caledonian Railway Co.*, Jan. 27, 1881, p. 442.

Judicial Factor—Powers—Management—Railway Companies (Scotland) Act, 1867 (30 and 31 Vict. cap. 126), sec. 4.

4. *Held* that a judicial factor appointed under the Railway Companies Act of 1867 has under and by virtue of his appointment the sole and exclusive power of management of the undertaking of the railway company, and of the whole works and property connected therewith. *Haldane v. Girvan and Portpatrick Junction Railway Co.*, March 18, 1881, p. 669.

Lands Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict., cap. 19), sec. 127—Deficiency of Poor's-rate, caused by lands being taken, to be made good—Poor.

5. The 127th section of the Lands Clauses Consolidation Act, 1845, enacts that the promoters of an undertaking shall make good the deficiency in the several assessments for land-tax and poor's-rate and prison assessment, which

RAILWAY—*Continued.*

may occur during the progress of their works, in respect of lands taken for the purposes of their undertaking.

Held that in determining whether or not such deficiency exists in the assessment for poor's-rate in a particular parish, the company's undertaking, so far as within such parish, is to be regarded as a whole, and that whenever such undertaking as a whole affords an assessable value as great as or greater than the subjects taken afforded at the date of the company's special Act, there is, within the meaning of the 127th section, no deficiency to be made good, though certain particular parts of the subjects may still have no assessable value, the works being incomplete, or the land being superfluous land, and vacant. *Hall v. City of Glasgow Union Railway Co.*, March 18, 1881, p. 687.

Judicial Factor—Special Powers—Railway Companies (Scotland) Act, 1867 (30 and 31 Vict. c. 126), sec. 4.

6. A judicial factor appointed on the undertaking of a railway company under sec. 4 of the Railway Companies (Scotland) Act, 1867, presented a note to the Court for authority to enter into negotiations for the sale of the line, and after considering the result of the negotiations, for authority to apply to Parliament for an Act authorising the sale of the line, or to raise capital by the issue of debentures. *Held* that the judicial factor did not require special powers to enter upon the negotiations. *Haldane v. Girvan and Portpatrick Railway Co.*, July 20, 1881, p. 1003.

REAL BURDEN. See *Sale of Heritage*.

RECOMPENSE. *Implied Contract—Architect's remuneration for preparation of plans.*

An architect prepared detailed plans for covering a piece of ground with buildings to be erected by the proprietor. The buildings were not proceeded with, but the proprietor used the plans to his advantage in dealing with a purchaser of the ground. In an action by the architect for payment of his account the proprietor denied liability, on the ground that the plans had been furnished upon the footing of there being a competition. *Held* that, assuming the fact as stated by the defender, it lay upon the employer to prove that the employment was gratuitous, which he had failed to do, and decree given accordingly. *Landless v. Wilson*, Dec. 15, 1880, p. 289.

REDUCTION OF CAPITAL. See *Public Company*, 4.

REI INTERVENTUS. See *Lease*, 2, 6.

RELIEF. See *Entail*, 3—*Superior and Vassal*, 4, 5.

REPARATION. *Wrongous information—Privilege—Malice and want of probable cause.*

1. A tenant, while removing some flooring from his house was stopped by his landlord on the street; the tenant having refused to return with the flooring, which he claimed as his own, was given into custody by the landlord, but on being taken to the police-office was at once liberated. In an action for reparation *held* that the landlord had in the circumstances been guilty of such recklessness in giving the tenant into custody as to amount in law to malice, and damages given accordingly. *Denholm v. Thomson*, Oct. 22, 1880, p. 31.

Oral slander—Issues—Counter issue of Law of Foreign State.

2. In an action of damages for oral slander between two domiciled Scotchmen the slander was alleged to have been uttered in Penang. The defender proposed this counter issue, "Whether, according to the law of Penang, no reparation is due for verbal slander unless special damage is proved." Counter issue *disallowed*.

Opinions that the case fell to be tried as if the slander had been uttered in Scotland. *M'Larty v. Steele*, Jan. 22, 1881, p. 435.

Wrongous use of diligence—Form of issue.

3. Forms of issue to try a question of wrongous filling up of and indorsation of a

REPARATION—*Continued.*

blank bill, and of wrongous apprehension and imprisonment on a *meditatione fugæ* warrant. *M'Meekin v. Russell and Tudhope*, March 9, 1881, p. 587.

Damages—Road—Duty of driver to keep at a distance from carriage in front.

4. Two omnibuses were being driven along a narrow road at a moderate speed, and a number of children were running after the first omnibus. One of the children, a boy of six years of age, having fallen, the driver of the second omnibus was so near that he could not pull up his horses in time, and the wheel of his omnibus went over the boy and killed him. In an action of damages by the father of the boy, *held* that it was the duty of the driver of the second omnibus to keep a sufficient distance between his own omnibus and the one in front to allow him to draw up if one of the children fall, and having failed to do so, that the proprietor of the omnibus and the driver were liable in damages. *Auld v. M'Bey, &c.*, Feb. 17, 1881, p. 495.

Slander—Issue—Innuendo.

5. A man wrote an anonymous letter to his sister-in-law, whose husband was at sea, in which he stated that Mrs B, the person with whom she lived, had not been her friend in days past, and then "the writer hopes to hear of different behaviour and not going under the roof of any one but the one you should, viz, your mother, or go to some place where drink and your present companions won't get near you, so that temptation will be out of your way." In an action of damages for slander by Mrs B and her husband, *held* (rev. judgment of Lord Adam) that these words would not found an innuendo that Mrs B and her husband were keepers of a house of disreputable character, and action dismissed as irrelevant. *Brydone v. Brechin*, May 17, 1881, p. 697.

Liability of owner of dog for damage.

6. *Held* that the owner of a dog, known by him to be ferocious, is bound to take, not only reasonable, but effectual, precautions against its attacking the public, and that, in the event of the precautions taken proving insufficient, he will be liable in damages to the injured person. *Burton v. Moorhead*, July 1, 1881, p. 892.

See also *Agent and Client*, 3.

REPUTED OWNERSHIP. See *Right in Security*, 1.RETENTION. *Accountant's right to retain his employer's documents—Implied contract—Law-agent's lien.*

1. A merchant placed certain documents in the hands of a firm of accountants to enable them to collect debts due to him. Shortly after he became insolvent, and granted a disposition *omnia bonorum* in favour of a trustee for behoof of his creditors. The trustee applied to the accountants for the documents, but they refused to give them up till their account for charges and outlay incurred in collecting the debts was paid. *Held* that they were entitled to retain the documents on the ground of implied contract.

Opinions that this was not a proper case of lien, but simply of right under a contract. *Meikle & Wilson v. Pollard*, Nov. 6, 1880, p. 69.

General Lien—Auctioneer.

2. A firm of auctioneers received horses to sell on commission and kept them in stables in connection with their sale yard until they were sold, and made advances against them to the owner. There had been a previous course of dealing between the parties, on which a balance arose in favour of the auctioneers. The owner having become bankrupt, *held* (diss. Lord Craig-hill) that the auctioneers were entitled to a lien over the horses in their stables for the general balance due to them on all their transactions with him. *Miller v. Hutcheson & Dixon*, Feb. 16, 1881, p. 489.

See *Sale*, 5—*Bankruptcy*, 6.

REVENUE. *Inhabited House Duty—48 Geo. III. c. 55, sch. B, rules 5 and 6—41 Vict. c. 15, sec. 13, sub-secs. 1 and 2.*

1. The Corporation of Glasgow, as trustees under a local Act, were owners (1) of a building occupied by them as an industrial and natural history museum,

REVENUE—*Continued.*

to which the public were admitted free ; and (2) of a building partly occupied by them as picture galleries, to which the public were admitted free, and partly by an institute of engineers, to whom separate rooms were let by the Corporation.

Held that the whole of these premises were liable for inhabited house duty under 48 Geo. III. c. 55, and did not fall under the exemption of 41 Vict. c. 15, sec. 13, sub-secs. 1 and 2, as "occupied solely for the purposes of any trade or business, &c. by which the occupier seeks a livelihood or profit." *Corporation of Glasgow v. Inland Revenue*, Oct. 19, 1880, p. 17.

Repayment of Inventory-Duty—5 and 6 Vict. c. 79, sec. 23—*Companies Act*, 1862 (25 and 26 Vict. c. 89), secs. 74, 75, and 76.

2. Executors gave up an inventory of the personal estate of the deceased, in which stock of a bank was entered as an item at the market price of the day. Before the stock was realised the bank stopped payment, and having gone into liquidation large calls were made in respect of the stock far in excess of the whole estate left by the deceased. *Held* (1) that the fact that the stock turned out to be worthless did not entitle the executors to a repayment of inventory-duty, as the stock was properly valued in the inventory at the market price of the day ; (2) that a repayment of inventory-duty fell to be made in respect of the calls paid by the executors, as these were payments of debts due by the deceased ; (3) that the executors were entitled to no other return of inventory-duty either in respect of the assignment of the shares to the liquidators, when they were of no value, or in respect of the whole executry estate having been lost. *Galletly's Trustees v. Lord Advocate*, Nov. 12, 1880, p. 74.

Stamp Act, 1870 (33 and 34 Vict. c. 97)—*Discharge (on redemption of feu-duty)*.

3. By feu-contract, which had been duly stamped with the *ad valorem* duty chargeable at its date in respect of the feu-duty, the vassal was bound to pay an annual feu-duty of £500, but it was provided that it should be in his power at any time to redeem the said feu-duty, or any part thereof, at the rate of twenty years' purchase, and that he should be bound, if required, to redeem the feu-duty at the said rate to the extent of at least £200, £100 within five years and another £100 within ten years from the term of entry under the feu-contract.

Held that the discharge granted by the superior in respect of the redemption of the feu-duty to the extent of £100 under the above obligation was chargeable with the duty imposed in the schedule appended to the Stamp Act, 1870, upon a "Release or Renunciation" of any right or interest in any property in any other case than "upon a sale," or "by way of security," viz., 10s., and not with the *ad valorem* conveyance on sale duty. *Gibb v. Inland Revenue*, Nov. 24, 1880, p. 120.

Income-Tax—Deductions for Wear and Tear—Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100, schedule D, case i. rule iii.—*Customs and Inland Revenue Act*, 1878 (41 Vict. cap. 15), sec. 12—*Finality of Commissioners' decision on questions of fact*.

4. Sec. 12 of the Customs and Revenue Act, 1878, provided that the Commissioners should, "in assessing the profits or gains of any trade . . . chargeable under schedule D, or the profits of any concern chargeable by reference to the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern." The commissioners in assessing a railway company under schedule D of the Income-Tax Act, 1842, for income-tax, allowed a deduction from income of sums expended or set aside for renewal and repairs of plant during the year. The company demanded a further deduction under sec. 12 of the Act of 1878, of a sum representing the diminished value by reason of wear and tear of new additional plant purchased within five years which had hitherto required no repairs. The

REVENUE—Continued.

Commissioners refused the additional deduction, holding that the deduction allowed to the railway company from year to year for actual renewal and repairs of the plant was all to which they were entitled.

In an appeal by the railway company, upon a special case stated by the Commissioners, the Court held that there was no ground for altering the determination of the Commissioners.

Observations on the form of special cases. Caledonian Railway Co. v. Inland Revenue, Nov. 18, 1880, p. 89.

Stamp Act, 1870, 33 and 34 Vict. c. 97, sec. 73—Conveyance on sale—Subject to real burden—Ad valorem duty, how fixed.

5. Section 73 of the Stamp Act, 1870, enacts,—“Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.”

Where a heritable property was conveyed in consideration of a debt due by the disponent to the donee, but subject to a bond over the property, *held* that the consideration on which *ad valorem* duty fell to be paid was the debt due by the disponent *plus* the amount of the burden. Commissioners of Inland Revenue v. Liquidators of City of Glasgow Bank, Jan. 15, 1881, p. 390.

Inhabited House-Duty—Hotel—Hydropathic Establishment—Customs and Inland Revenue Act, 1871, 34 and 35 Vict. c. 103, sec. 31.

6. *Held* that section 31 of the above Act restricting to sixpence per pound the inhabited house-duty on houses occupied by any person who shall carry on therein “the business of a hotel-keeper or an innkeeper or coffeehouse-keeper,” although not licensed, &c., applied to a house occupied as a hydropathic establishment. Strathearn Hydropathic Company (Limited) v. Inland Revenue, June 14, 1881, p. 798.

Excise—Spirits Act, 1860 (23 and 24 Vict. cap. 114), secs. 170-188—Entries in dealer's stock-book (1) where spirits obtained by “grogging,” and (2) where “samples.”

7. *Held*, upon a construction of the 170th to the 188th sections of the Spirits Act, 1860, that, alike with spirits obtained by “grogging” as with those received in the ordinary way, an omission by the dealer or retailer to insert in his stock-book the number of the permit or certificate, the Christian and surname of the person, or the name of the firm, from whom, and of the place from which the spirits were received, will entitle the Commissioners of Excise to disregard those entries, and will involve the statutory penalty if the amount of spirits in possession exceeds the amount duly entered.

Held that a dealer in spirits, whom the Commissioners of Excise had allowed to take samples of spirits out of bond, free from duty, and without a permit or certificate, was entitled, after using them for the purposes of his business, to put the surplus into stock, and that the Commissioners in balancing his stock-book were bound to take into account the entries therein of such spirits. Yeoman v. M'Intosh Brothers, June 22, 1881, p. 840.

Income-Tax—5 and 6 Vict. c. 35, sec. 60, schedule A, rule 3, sec. 100, schedule D, rule 3, and sec. 159—29 Vict. c. 36, sec. 8.

8. *Held* (aff. judgment of First Division) that a tenant of a mineral field in computing “the profits received therefrom” for assessment of income-tax is not entitled to write off and deduct from the gross earnings of any particular year a sum to represent the capital expended in pit-sinking exhausted by the year's workings.

Question, whether in any case expenses of sinking pits can be allowed as deductions from gross profits in assessing for income-tax. Coltness Iron Co. v. Black, April 7, 1881, H. L., p. 67.

REVOCATION, IMPLIED. See *Succession*, 4.

RIGHT IN SECURITY. *Security over moveables—Lease—Possession—Reputed ownership.*

1. The proprietor of a new hotel (which required £20,000 to furnish it) in letting it to a tenant agreed to advance £10,000, to be expended on furniture, on condition that furniture to that value should be placed in certain rooms and inventoried as his property, and that the tenant should lease this furniture for ten years at a rent equal to 5 per cent on the sum expended by the landlord. There was also a separate agreement that the tenant should purchase the furniture in ten lots by yearly payments of £1000, the furniture rent being reduced in proportion as the payments were made. In terms of this agreement the furniture was purchased and inventoried, and the agreement itself was subsequently embodied in formal deeds. The tenant, after making three half-yearly payments of the furniture rent, and paying for one lot of the furniture, became bankrupt. In a question between the landlord and the trustee in the tenant's sequestration, who claimed the whole furniture as the property of the tenant, maintaining that the arrangement was merely a device to create a security over the furniture without possession by the creditor, *held* that the agreement was lawful, and that in terms thereof the landlord was proprietor of the furniture standing in his name, and that the tenant had possession of it merely on a contract of hire. *Duncanson v. Jefferis' Trustee*, March 4, 1881, p. 563.

Ex facie absolute disposition—Debtor left in possession—Summary ejection.

2. A building society held a security for advances to one of its members over heritable property by way of *ex facie* absolute disposition duly recorded. Their debtor received no proper back-letter, but the rules of the society provided that he should remain in possession on certain conditions, and in the event of his falling in arrear with his instalments and interest, that it should be "in the power of the society, without any warning or legal process of any kind whatever, to enter into possession of the property," "and if such member shall be in the actual possession or occupancy of the premises, to remove him therefrom."

Held that a petition for summary ejection at the instance of the society against their debtor was incompetent. *Scottish Property Investment Company Building Society v. Horne*, May 31, 1881, p. 737.

See *Sale of Heritage—Sale*, 5 and 6.

RIVER. *Burn—Alteration of course—Mora.*

1. The tenant of a farm at the commencement of a nineteen years' lease diverted for drainage purposes the water of a small burn which followed a circuitous course through his farm into a straight channel which joined the original watercourse at right angles to it just before it entered B, an adjoining property. The tenant raised an embankment opposite the junction to prevent the water overflowing upon the lower part of his farm. The effect of his operations was, in time of flood, to throw gravel on two acres of pasture ground on B.

The proprietor of B objected to the operations when executed, but took no proceedings until the last year of the lease, when he raised an action concluding to have the tenant ordained to restore the burn to its former course, and for damages. *Held* that, in the circumstances, the defender was entitled to absolvitor. *Murdoch v. Wallace*, June 28, 1881, p. 855.

Navigable River—Foreshore—Clyde Navigation Consolidation Act, 1858 (21 and 22 Vict., c. cxlix.), secs. 76 and 84—Right of Clyde Trustees to dredge the foreshore without consent of proprietor.

2. *Held* (aff. judgment of First Division) that notwithstanding the general repeal of the previous Clyde Navigation Acts by section 3 of the Consolidation Act of 1858, the terms of section 76, read in connection with those of section 84, were sufficient to re-enact the powers of the trustees under the repealed Acts, inter alia, to dredge the river over a certain area till a depth of seventeen

RIVER—Continued.

feet at neap tides was obtained at every part thereof, and that a riparian proprietor was not entitled to interdict the trustees dredging a portion of the foreshore within the said area, which had by a judgment of the House of Lords been held to belong to him, subject to any right which the public might have over the same, "and subject also to any rights conferred upon the trustees of the Clyde Navigation by their Acts of Parliament." Lord Blantyre v. Clyde Navigation Commissioners, March 7, 1881, H. L., p. 47.

See *Process*, 2.

ROAD. *Burgh—Liability of the Magistrates of Royal and Parliamentary Burghs for damages for injury caused by insufficient fencing of road—General Police Act, 1862, secs. 147, 170, and 237.*

1. Leith was originally a burgh of barony, holding of Edinburgh, but after 1832 it became a parliamentary burgh, and there were subsequent Acts dealing with the rights, powers, authority, and jurisdiction of the Magistrates. Ultimately in 1862 the burgh adopted the provisions of the General Police Act, 1862.

In an action of damages against the Magistrates of that burgh for injury sustained in consequence of their alleged neglect to fence and protect a parapet wall at Newhaven, within the parliamentary limits of the burgh, on the road leading by the shore from Leith to Granton, *held (dub. Lord Deas)* that as the road in question had not been placed by the statutes above referred to under the charge of the Magistrates, but remained under the county turnpike district road trustees, there was no liability attaching to the Magistrates either (1) at common law, or (2) under the General Police Act, 1862.

Observations upon the cases of Innes v. The Magistrates of Edinburgh, M. 13,189; Threshie v. The Magistrates of Annan, 8 D. 276; and Dargie v. The Magistrates of Forfar, 17 D. 730. Harris v. Magistrates of Leith, March 11, 1881, p. 613.

Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. c. 51) secs. 7 and 37—*Effect of adoption of Act in one county and not in adjoining county where bridge and road situated partly in both.*

2. Held, where a bridge and road between two counties had been maintained by a trust under a private Act, that the effect of above Act was to continue the powers of the bridge trustees for the part of the road situated in the county which had not adopted the Roads and Bridges Act, and to destroy their powers over the part of the road situated in the county which had adopted the Act. Commissioners of Supply of Aberdeenshire v. Wellington Suspension Bridge Trustees, May 17, 1881, H. L., p. 93.

See *Burgh*, 3—*Prescription*, 1—*Reparation*, 4.

SALE. *Stoppage in transitu—Ship.*

1. A & Sons, Moscow and Birmingham, purchased goods from B & Co., Glasgow, to be shipped by C's "first steamer from Leith to Riga to A & Sons' orders." By the bills of lading, which bore that the goods had been shipped by A & Sons, the purchasers, they were to be delivered in good order at the port of Riga, "unto the agent of the R. D. Railway Company, to be by them forwarded in transit to A & Sons, Moscow." A & Sons became insolvent, whereupon B & Co. stopped the goods at Riga when in the hands of the railway company. Held that the goods were still *in transitu* when stopped. M'Leod & Co. v. Harrison, Dec. 7, 1880, p. 227.

Right of iron manufacturer to fulfil contract with iron not from his own works.

2. A firm of iron-merchants purchased a quantity of iron from a manufacturer, the quality being defined to be "Crown," to pass Lloyd's survey. The contract-note was written on paper of the manufacturer's, bearing a "crown" stamped on it, and "Brand, Moor," along with the manufacturer's name as manufacturer. Before all the iron was supplied the manufacturer closed his works owing to want of business. He then wrote to the buyers asking them to specify for the rest of the iron, and stating that he had arranged

SALE—Continued.

with another manufacturer to supply them. The buyers refused to do this, and declined to take any iron but the manufacturer's iron, alleging that that was what they had bought. In an action at the instance of the manufacturer for damages for breach of contract, *held* (following *West Stockton Iron Co. v. Nielson & Maxwell*, July 3, 1880, *ante*, vol. vii. p. 1055), that the iron tendered being of equal value with that contracted for, and the buyers having failed to make out that they had any special make in view, they were liable in damages. *Johnson & Reay v. Nicoll & Son*, Jan. 25, 1881, p. 437.

Retention—Sale on credit—Resale, intimation of—Retention against sub-purchaser on bankruptcy of original purchaser.

3. *S. & Co.*, on 9th and 10th February, sold certain lots of sugar to *M. & Co.*, taking their acceptance, dated 14th February, at one month. The sugar remained with the refiners subject to *S. & Co.*'s control, but was entered in the stock-book of the latter as sold to *M. & Co.*

On 11th February *M. & Co.* sold the sugar to *F*, and gave him a delivery-order (dated 17th February) in his favour addressed to *S. & Co.*, which he transmitted to them with a request to hold to his order. *S. & Co.* did not acknowledge the receipt of this order, but in their stock-book, of date 17th February, they entered against the parcels of sugar,—“Transferred by *M. & Co.* to *F.*”

M. & Co. became bankrupt on 13th March, and their bill for the sugar was dishonoured. On 19th March *F* demanded delivery of the sugar, which was refused by *S. & Co.* on the ground that they were entitled, on the bankruptcy of *M. & Co.*, to retain till the price was paid.

Held that *S. & Co.*, having sold on credit, were bound to deliver at the date when the delivery-order in favour of *F* was transmitted to them, the term of credit not having then expired, and the original purchasers, *M. & Co.*, being still solvent; and that, having at that date received *F*'s intimation of the resale and request to hold to his order, they were to be regarded as holding for *F*, and that they were barred from retaining against him on the bankruptcy of *M. & Co.* *Fleming v. Smith & Co.*, Feb. 26, 1881, p. 548.

Condition precedent—Implement rendered impossible by vendee.

4. *Where in a contract of sale there is a condition precedent, which the vendor has been prevented from fulfilling through the fault of the vendee, the condition is held to have been satisfied.*

A contracted to furnish *B* with a steam navy of novel construction, which *B* was to accept if on trial it fulfilled the condition of excavating 350 cubic yards per day of ten hours “on a properly opened up face” at the *C* railway cutting. The *C* cutting was not opened for several months after the expected time, and the machine was in the meanwhile tried at another cutting, where it broke down. It was altered, repaired, and strengthened, and removed to the *C* cutting where it was again tried, but not on a face properly opened up, and again broke down, and *B* refused to give it any further trial. *Held* (aff. judgment of First Division) that *B* having failed to give a proper opportunity for the stipulated test *A* was entitled to decree against him for the price of the machine. *Mackay v. Dick & Stevenson*, March 7, 1881, H. L., p. 37.

Delivery—Ship—Payment by instalments during construction—Bankruptcy of shipbuilder—Mercantile Law Amendment Act, 1856, sec. 1.

5. *Held* (in aff. judgment of Second Division) that the rule introduced by sec. 1 of the Mercantile Law Amendment Act whereby a purchaser's right to enforce delivery from the seller is secured against the subsequent diligence of the seller's creditors, “including sequestration,” applied in a case where a ship was sold by the builder in the course of construction, and remained in the seller's hands undelivered at the date of his sequestration.

Question, whether by the common law of Scotland the property of the ship

SALE—Continued.

passes to the purchaser without delivery as the instalments of the price are paid.

Observations on the case of Simpson v. Duncanson, 1786, M. 14,204. M'Bain v. Wallace & Co., &c., July 27, 1881, H. L., p. 106.

Right in security—Security over moveables—Ship—Mercantile Law Amendment Act, 1856, sec. 1.

6. *A, a shipbuilder who had a vessel on the stocks, applied to B & Co., to whom he was already indebted, to assist him with advances to enable him to complete the vessel. B & Co. only consented on condition that the vessel should be sold to them by A on an absolute contract of sale, the price to be payable by instalments, as they considered that in no other way would they be safe to make the advances asked. This was agreed to, and an absolute contract of sale was entered into by the parties, unqualified in any way, though there was, admittedly at least, an honourable understanding that should the vessel realise a profit beyond the sum paid by B & Co., they would communicate the benefit to A.*

The accommodation-bills above mentioned were not returned by B & Co. till after A's sequestration. The advances already made were attributed towards the agreed-on price, the balance of which was paid by instalments as required, for which receipts were granted by the seller "to account of the purchase price." At the same time, to raise money to keep the purchaser out of cash advances, bills to the necessary amount were drawn by B & Co. and accepted by A and discounted by B & Co. While the vessel was in course of completion B & Co entered into negotiations for the sale of the vessel, in which they described it as a vessel belonging to A in which they had a personal interest, as they were under considerable advances to A against the vessel. They did not succeed in selling the vessel, and before it was completed and delivered A was sequestrated.

Held that though the motive of the transaction undoubtedly was to secure the money which the purchasers had at stake, and the further sums which they were going to advance, and though there might be not only an honourable understanding but even a binding collateral agreement as to the appropriation of any surplus on the sale of the vessel over the sum advanced, still the contract was in its inception a clear contract of sale and nothing else, which fulfilled every condition of the provision of the Mercantile Law Amendment Act, 1856, sec. 1, and that there was nothing in the transaction or the accompanying circumstances to affect the operation of that provision as regarded the rights of the creditors of the seller. Ibid.

See Horse, 2.

SALE OF HERITAGE. Articles of Roup—Objections to Title—Right in Security—Real Burden.

By his settlement T M disposed to his wife in liferent his heritable property, and gave her "the disposal, as she may direct, of the sum of £125 sterling, to be paid twelve months after his death, out of or from the house now occupied by K" being a part of his heritage. He then disposed this house and another adjoining it, after his own and his wife's death, to his brother G M, or to his heirs after him, and added, "but this allotment is subject to the payment by the said G M or his heirs, in twelve months after the death of my wife, of the sum of £300 sterling, to be disposed of as follows, viz.—£125 sterling as aforesaid to be willed or disposed of by my wife," and the rest in small legacies.

G M having died, another brother, A M, served heir to him, and made up a title proceeding on his service and T M's settlement. The widow was also infeft for her liferent.

During the widow's life A M borrowed money on the fee of the property, and, becoming insolvent, the subjects were sold by the creditors under the powers in their bond. The articles of roup obliged the exposers to deliver a formal and valid disposition of the subjects under the burden of the

SALE OF HERITAGE—*Continued.*

widow's liferent, and under the burdens, conditions, provisions, &c., specified, contained, or referred to therein, or in the title-deeds thereof, and stipulated that "in respect the exposers are not aware of any incumbrances affecting the said subjects," except their own bond, which they were bound to clear off, "they, the exposers, shall not be bound to furnish any certificate of searches of incumbrances."

A list of titles was appended to the articles of roup, and included the settlement of T M.

The purchaser refused to pay the price until the subjects were cleared of the burden of £300 payable out of them in terms of T M's settlement.

Held (diss. Lord Justice-Clerk) that the purchaser having bargained to take the subjects with any burdens which the title-deeds laid upon them, and having had the opportunity of examining the title-deeds, including the settlement of T M, was bound to accept the title tendered.

Opinion (per Lord Justice-Clerk and Lord Craighill) that the burden of £300 imposed by the settlement of T M was not a real burden, but a personal obligation merely on G M and his heirs. *Davidson v. Dalziel, &c.*, July 19, 1881, p. 990.

SCHOOLMASTER'S SALARY. See *Bankrupt*, 8.

SEASHORE. *Right of barony proprietor to exclude public from his private pier and harbour.*

A proprietor of seaboard lands, with a barony title, who had built a quay upon the foreshore *ex adverso* of his barony, and had formed a small harbour, with a road giving access to it from a village on his estate, for more than forty years had exacted dues from coasting craft, but not from fishing-boats, for admission to the pier and harbour. In an action raised by him concluding for interdict to enforce payment of these dues by the lessees of oyster-fisheries, recently established in the neighbourhood, and by the owners of boats employed by them, *held* that, as the pursuer had no grant of harbour, he had no right to exclude the defenders from the use of that part of the shore where the harbour was built, or to exact harbour-dues, and defenders *assoiized*. *Earl of Stair v. Austin, &c.*, Dec. 2, 1880, p. 183.

SECURITY OVER MOVEABLES. See *Sale*, 6—*Right in Security*, 1.

SERVITUDE. *Thirlage*—Act 39 George III. cap. 55, secs. 1 and 4—*Registration of abbreviate of decree of commutation.*

Held (1) that the provision of the first section of the Act 39 George III. cap. 55, dealing with registration of the abbreviate of a decree of commutation of thirlage is merely directory, and that there is no implied nullity where it has not been recorded within sixty days after the verdict of the jury; and (2) that the words of the fourth section protect against challenge any verdict that may be recorded, although after the lapse of sixty days. *Duchess of Sutherland v. Reid's Trustees*, Feb. 25, 1881, p. 514.

Of Light and Air. See *Property*, 1, 4.

SHERIFF. *Sheriff-clerk*—*Interim appointment of two Sheriff-clerks for separate divisions of a county.* Lord Advocate, Oct. 16, 1880, p. 13.

SHIP. *Charter-party*—*Cesser clause, effect of*—*Bill of Lading, Charterer's obligation under.*

1. A vessel was chartered for the voyage from Greenock to Monte Video at a slump freight of £550, and the charter-party bore that £150 was to be payable on clearing at Greenock, and "bills of lading for the balance payable abroad to be taken (*sic*) by the captain, on receipt of which documents all responsibility of charterer to cease." The vessel was loaded chiefly with coal. The charterer divided the slump freight among the various items of the cargo, and presented bills of lading, together making up the *cumulo* sum, for the master's signature, the charterer himself being consignee. In that for the coal there was entered 453½ tons, freight 22s. 6d. per ton. This

SHIP—*Continued.*

the master signed, but the bill of lading had a note at the foot "weight and contents unknown." On arrival at Monte Video, the master, waiving his lien for freight, delivered the coal, which turned out only 398 tons, as weighed there. The agents for the charterer, in settling for the balance of freight, retained for coal alleged to be short delivered £24, and freight applicable thereto, £62.

In an action by the owners against the charterer for the balance of the freight stipulated for in the charter-party, *held* (1) that the action could not be sustained on the charter-party, in respect that, bills of lading having been granted for the freight, the cesser clause put an end to the charterer's obligation under the charter-party; (2) that the bill of lading only entitled the shipowners to recover the freight of the 398 tons proved to have been delivered; and (3) that as it had not been proved that any part of the cargo shipped had not been delivered, the defender was not entitled to retain the £24. *Beynon, &c. v. Kenneth*, March 10, 1881, p. 594.

Clean Bill of Lading—Charter-party.

2. In a charter-party the shipmaster and the charterer agreed that the vessel should load a full and complete cargo to be delivered at the port of discharge on payment of certain rates of freight, "the captain to sign bills of lading as presented at any rate of freight, without prejudice to this charter-party." A lien was given over the cargo for payment of freight, dead freight, and demurrage. When the lay-days expired the vessel was short of a full cargo by thirty-five tons. The master intimated a claim for dead freight and demurrage, and refused to sign bills of lading, unless qualified by a reference to the conditions in the charter-party. It was afterwards agreed that the charterer should fill up the ship, and that the captain should sign "clean bills of lading, but under protest for three days demurrage incurred here, to be settled at the port of discharge."

The captain still declined to sign bills of lading without this addition, "and all conditions as per charter-party." *Held* that, while prior to the agreement he was justified in so declining, he was thereby bound to sign clean bills, *i.e.*, such as neither contained nor implied any reference to matters previously in dispute between the parties, and was not entitled to insist on the bills of lading containing a reference to the conditions of the charter-party.

Observed that a condition in a charter-party that the captain "should sign bills of lading as presented at any rate of freight without prejudice to the charter-party" imported that the charterer might insert a different rate of freight from that stipulated in the charter-party, but not any farther departure from its provisions.

Observations as to the meaning of the term "clean bill of lading." *Arrospe v. Barr*, March 11, 1881, p. 602.

Agent and Principal—Election—Owner and Master.

3. Shipbrokers having made certain disbursements for a German vessel took bills for the amount from the master drawn upon the owner. The owner returned the bills unaccepted. The brokers then sued the master on the bills in the German Courts, but failed in obtaining decree, on the technical plea that the action was not brought within three months. They then raised an action in the Court of Session against the owner on the original debt. The defender pleaded that the pursuers, by electing to take the master as their debtor, were barred from suing the owner. *Held* (*rev. judgment* of Lord Rutherford Clark) that the doctrine of election did not apply, as the pursuers had not obtained a judgment.

Observations (*per* Lord Young and Lord Craighill) on the liabilities of the owner and master of a ship for advances made to the master.

Priestley v. Fernie, June 23, 1865, 34 L. J. Exch. 172, commented on. *Meier & Co. v. Küchenmeister*, March 17, 1881, p. 642.

See *Sale*, 1, 5, 6—*Insurance, Marine*.

SLANDER. See *Reparation*, 2, 4.

SPECIAL POWERS. See *Minor and Pupil—Judicial Factor*, 2.

SPONSIO LUDICRA. *Agreements and contracts—Stock Exchange—Gaming transaction—Betting as to the rise and fall of stock.*

Observations (per Lord Justice-Clerk and Lord Young) on the question whether contracts for the purchase and sale of shares when neither party intends to deliver or accept the shares, but merely to pay the differences according to the rise or fall of the market, is a gambling transaction, so as to deprive the parties of the aid of the Court in questions arising out of them. Risk v. Auld & Guild, May 27, 1881, p. 729.

STATUTES, CONSTRUCTION OF. *Caledonian Railway Co. v. North British Railway Co., H. L., p. 23.*

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1469, c. 36. See *Superior and Vassal*, 6.

1696, c. 25. See *Caution*.

48 Geo. III. c. 55, *schedule B, rules 5 and 6.* See *Revenue*, 1.

50 Geo. III. c. 112, *sec. 28.* See *Process*, 3.

— *Sec. 36.* See *Process*, 19.

6 Geo. IV. c. 120 (*Judicature Act, 1825*), *sec. 40.* See *Process*, 18.

5 and 6 Vict. c. 35 (*Income-Tax Act, 1842*), *sec. 60, schedule A, rule 3, sec. 100, schedule D, rule 3, and sec. 159.* See *Revenue*, 8.

— *Sec. 100, schedule D, case i., rule III.* See *Revenue*, 4.

5 and 6 Vict. c. 79 (*Stamp Act, 1842*), *sec. 23.* See *Revenue*, 2.

8 and 9 Vict. c. 17 (*Companies Clauses Act, 1845*), *secs. 46, 47, and 48.* See *Arrestment*, 1.

8 and 9 Vict. c. 19 (*Lands Clauses Consolidation (Scotland) Act, 1845*), *sec. 17.* See *Railway*, 3.

— *Sec. 127.* See *Railway*, 5.

8 and 9 Vict. c. 33 (*Railway Clauses Consolidation (Scotland) Act, 1845*), *sec. 6.* See *Railway*, 1, 2, 3.

— *Sec. 127.* See *Railway*, 5.

8 and 9 Vict. c. 83 (*Poor-Law Act, 1845*), *secs. 69 and 76.* See *Poor*, 1.

— *Sec. 76.* See *Poor*, 2.

9 and 10 Vict. c. 17 (*Exclusive Trading in Burghs Act, 1846*). See *Trading*.

11 and 12 Vict. c. 36 (*Entail Amendment Act, 1848*), *sec. 21.* See *Entail*, 2.

13 and 14 Vict. c. 36 (*Court of Session Act, 1850*), *sec. 40.* See *Process*, 9.

16 and 17 Vict. c. 80 (*Sheriff Court Act, 1853*), *sec. 22.* See *Process*, 23.

17 and 18 Vict. c. 91 (*Valuation Act, 1854*), *secs. 4, 8, and 11.* See *Police*, 1.

18 Vict. c. 23 (*Intestate Moveable Succession Act, 1855*), *sec. 1.* See *Succession*, 9.

19 and 20 Vict. c. 60 (*Mercantile Law Amendment Act, 1856*), *sec. 1.* See *Sale*, 5, 6.

— *Sec. 6.* See *Caution*.

19 and 20 Vict. c. 79 (*Bankruptcy (Scotland) Act, 1856*), *secs. 90, 91, and 92.* See *Bankruptcy*, 1; *secs. 35, 38, and 101—Bankruptcy*, 2; *secs. 126 and 127—Bankruptcy*, 3; *secs. 19, 31, 169, 170—Bankruptcy*, 5; *sec. 103—Bankruptcy*, 8; *sec. 146—Bankruptcy*, 9.

21 and 22 Vict. c. *cxlix.* (*Clyde Navigation Consolidation Act, 1858*), *secs. 76 and 84.* See *River*, 2.

23 and 24 Vict. c. 114 (*Spirits Act, 1860*), *secs. 170, 188.* See *Revenue*, 7.

24 and 25 Vict. c. 86 (*Conjugal Rights Amendment (Scotland) Act, 1861*), *sec. 8.* See *Husband and Wife*, 6.

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25 and 26 Vict. c. 89 (*Companies Act, 1862*), *secs. 74, 75, and 76.* See *Revenue*, 2.

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30 and 31 Vict. c. 131 (*Companies Act, 1867*), *secs. 9 to 20.* See *Public Company, 4.*

30 and 31 Vict. c. 97 (*Trusts (Scotland) Act, 1867*), *sec. 3.* See *Trust, 2.*

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30 and 31 Vict. c. 126 (*Railway Companies (Scotland) Act, 1867*), *sec. 4.* See *Railway, 4, 6.*

30 and 31 Vict. c. 100 (*Court of Session Act, 1868*), *sec. 62.* See *Process, 4.*

31 and 32 Vict. c. 101 (*Titles to Land Consolidation Act, 1868*), *sec. 8.* See *Superior and Vassal, 4; secs. 19 and 20—Succession, 10; sec. 20—Succession, 12; sec. 117—Succession, 2.*

33 and 34 Vict. c. 97 (*Stamp Act, 1870*). See *Revenue, 3.*

— *Sec. 73.* See *Revenue, 5.*

34 and 35 Vict. c. 103 (*Customs and Inland Revenue Act, 1871*), *sec. 31.* See *Revenue, 6.*

36 and 37 Vict. c. 63 (*Law-Agents Act, 1873*), *sec. 21.* See *Agent and Client, 2.*

37 and 38 Vict. c. 42 (*Building Societies Act, 1874*), *sec. 14.* See *Friendly Society.*

37 and 38 Vict. c. 94 (*Conveyancing Act, 1874*), *sec. 4.* See *Superior and Vassal, 4.*

38 and 39 Vict. c. clxvii. (*North British Railway, Dundee and Arbroath Junction Line Act, 1879*), *secs. 3 and 6.* *Caledonian Railway Co. v. North British Railway Co., H. L., p. 23.*

39 and 40 Vict. c. 70 (*Sheriff Court Act, 1876*), *sec. 32.* See *Process, 22.*

41 and 42 Vict. c. 26 (*Companies Act, 1877*), *secs. 3 and 4.* See *Public Company, 4.*

41 Vict. c. 15 (*Customs and Inland Revenue Act, 1878*), *sec. 12.* See *Revenue, 4.*

— *Sec. 13, sub-secs. 1 and 2.* See *Revenue, 1.*

41 and 42 Vict. c. 51 (*Roads and Bridges (Scotland) Act, 1878*), *secs. 7 and 37.* See *Road, 2.*

42 and 43 Vict. c. 32 (*Edinburgh Police Act, 1879*), *sec. 70.* See *Police, 2.*

STIPEND, OBLIGATION TO RELIEVE OF. See *Superior and Vassal, 7.*

STOCKBROKER. See *Agent and Principal, 2.*

STOCK EXCHANGE. See *Sponsio ludicra.*

STOPPAGE IN TRANSITU. See *Sale, 1.*

STREET. See *Burgh, 1.*

SUB-VASSAL. See *Superior and Vassal, 10.*

SUCCESSION. *Period of payment—Intention of testator—Calendar or lunar month.*

1. A testatrix directed her trustees, with all convenient speed, to collect and realise her moveable estate, and "as soon as convenient after my death to deliver, and at the first term of Whitsunday or Martinmas six months after my death," to pay such bequests and legacies as should be directed by any writings under her hand. Lastly, the trustees were directed to pay the interest of the whole residue of the estate to the heir of entail in possession of a particular estate "at the said term of Whitsunday or Martinmas six months after my death,"—the first term's payment of said interest to commence "as at the term of Whitsunday or Martinmas twelve months after my death." The testatrix died at nine in the morning of 15th May 1880. A question having arisen as to whether the legacies became payable at Martinmas 1880 or not until Whitsunday 1881, held that on a reasonable construction of the settlement, and in accordance with the evident inten-

SUCCESSION—*Continued.*

tion of the testatrix, *Martinmas 1880* was the first term six months after the testatrix's death, and that the legacies became payable then.

Opinion (per Lord Young) that the words "six months" fell to be construed as meaning six lunar months. *Campbell's Trustees v. Cazenove, &c.*, Oct. 20, 1880, p. 21.

Heritable and Moveable—Heritable Security—Conveyancing Act, 1868, 31 and 32 Vict. c. 101, sec. 117.

2. *Held* in the construction of a will disposing of the testator's moveable estate, and of a trust-settlement containing a general conveyance of his whole heritable estate (both executed in 1872), that a bond heritably secured fell under the former and not under the latter deed, in respect that the Conveyancing Act of 1868 made such securities moveable as regarded the succession of the creditor. *Guthrie, &c.*, Oct. 23, 1880, p. 34.

Cumulative provisions—Donation mortis causa.

3. A father bequeathed £400 to his daughter A, £400 to his daughter B, and directed his trustees to invest £400 for behoof of his daughter C in liferent allanarly, and of her children in fee. After the death of C's husband her father took her to live with him, and gave her from £40 to £50 a-year for her support. He subsequently lent £400 on the security of local rates, the destination in the bond being to C and her heirs. The bond was found in the father's repositories at his death. The Court, looking to the terms of the deeds and to the circumstances of the case, found that it was the testator's intention that his daughter C should receive both the provision under the will and that under the bond. *Dewar or Milne v. Scott*, Nov. 17, 1880, p. 83.

Implied revocation of codicil by subsequent codicil.

4. A testator died leaving a settlement, dated 8th February 1879, by the eighth purpose of which he bequeathed £18,000 to his nephew. By his eighth codicil, dated 17th November 1879, he reduced this legacy to £16,000. A twelfth codicil, dated 5th February 1880, provided—"In addition to the legacy or legacies left to my nephew . . . in the eighth purpose of my trust-disposition and settlement, which was executed by me in February last, I hereby leave him two thousand pounds stg. if my estate can afford it." In a question between the nephew and the residuary legatees, *held (dub. Lord Justice-Clerk)* that the twelfth codicil, in referring to the eighth purpose of the original deed, had restored the bequest there given to its original amount, and had given £2000 in addition thereto. *Best v. University of Edinburgh*, Nov. 5, 1880, p. 66.

Patent ambiguity—Testamentary writing.

5. An old lady executed a settlement with five codicils all on one sheet of paper. She disposed a property she had to a niece whom she named her executrix and residuary legatee. By the first of the codicils she bequeathed, *inter alia*, "to Edward Whish, son of my cousin Margaret Whish, wife of Colonel Whish, five hundred pounds." The last codicil bore,—“I revoke the legacy of five hundred pounds to my cousin Mrs Whish” (there being no such legacy), “wife of Colonel Whish, and bequeath to her in place thereof the sum of £400, and I bequeath the £100 to T. H.,” her husband's nephew. Two other papers were found in the testator's repositories giving directions to her executrix, and they shewed that she knew how much she possessed, and only meant to bequeath that amount, while if legacies were given to Edward Whish, Mrs Whish, and to T. H., the amount bequeathed would exceed by £500 the amount of the executry estate. A letter of a subsequent date written by the testatrix to Mrs Whish was produced, in which she stated that Edward Whish was still to be her chief legatee, “but not for so large a sum as I intended” and then went on to bequeath her gold watch to him, and certain jewellery, &c., to other relations.

Held (1) that this letter, though not found in the testatrix's repositories,

SUCCESSION—*Continued.*

was of a testamentary nature, and that the explanations contained in it might be read along with the will and codicils; and (2) that her intention was to revoke the legacy of £500 only to the extent of the £100, bequeathed to T. H., her husband's nephew. *Ritchie v. Wish, &c.*, Nov. 19, 1880, p. 101.

Vesting—Conveyance to Trustees—Interposed life-tenant—Destination over.

6. A trust directed his trustees to pay to his wife a life-tenant of his whole estate, so long as she remained a widow, and "within twelve months after the death of the longest liver of my said wife and me, or as soon thereafter as conveniently may be," to convey certain heritable subjects to his wife's nephew, "A, and the heirs of his body, whom failing, to B," A's brother, "whom failing," &c. A predeceased the trustor's widow, who had not married again. *Held* that as the deed conferred no right upon A, apart from the direction to convey to him, no right vested in him prior to the date when the conveyance fell to be made. *Bryson's Trustees v. Clark, &c.*, Nov. 26, 1880, p. 142.

Trust—Direction to sell.

7. A trust directed his trustees "twelve months after the death of my said wife and myself," to convey certain heritable subjects "if not sold as after-mentioned," to a certain series of heirs. The subjects were burdened with a bond for £2000. He then directed his trustees that should the holders of the bond "resolve to call up their money, and intimate such resolution prior to the expiry of twelve months from the death of the longest liver of my said wife and me," the property should be sold and the price divided, after payment of the bond, among a slightly different set of heirs. Prior to the death of the testator's widow a person who had right to one half of the bond gave notice to the trustees that he wished payment. The trustees arranged for payment to this creditor on his granting an assignation to another lender, and the property was not sold. *Held* that the calling up of a part of the bond was not in the circumstances the event contemplated by the testator, and that the trustees were not then bound to sell the property. *Ibid.*

Heritable or Moveable—Conversion.

8. A testator, whose estate consisted in nearly equal proportions of heritage and moveables, directed his trustees, after paying debts, &c., and certain small special legacies, "with regard to the residue of my means and estate," as soon after his death as possible, "to pay and convey the same" equally among his four children, the issue of children predeceasing the period of payment and conveyance to be entitled to their parent's share. In the event of a child's predecease without leaving issue that child's share was to accrete to the others and the issue of predeceasers. The deed then proceeded,—*"To enable my trustees to carry out the purposes of this settlement . . . I confer upon them all requisite powers, . . . and particularly power to sell my heritable estate."* The personal estate was sufficient to enable the trustees to pay all debts and special legacies. *Held* that by the terms of the settlement the estate was moveable *quoad* succession. *Baird, &c. v. Watson*, Dec. 8, 1880, p. 233.

Legacy to "nearest in kin"—Intestate Moveable Succession Act, 1855, 18 Vict. c. 23, sec. 1.

9. *Held* (rev. judgment of Lord Lee) that a legacy to a person's "nearest in kin" was not to be construed as a legacy to his heirs *in mobilibus*.

Question, whether a legacy to next of kin was to be construed as a legacy to nearest relations, or as a legacy to next of kin as defined by the law of moveable succession.

Observed, that the Intestate Moveable Succession Act, 1855, adopted the common law definition of next of kin. *Young's Trustees v. Janes, &c.*, Dec. 10, 1880, p. 242.

SUCCESSION—Continued.

Foreign—Destination—English entail of Scotch estate, effect of—Titles to Land Act, 1868 (31 and 32 Vict. c. 101), secs. 19 and 20—Conveyancing Act, 1874 (37 and 38 Vict. c. 94), sec. 46.

10. An Englishman left a will in the English form by which, *inter alia*, he devised all such of his lands, &c., situate in the counties of Devon, of Inverness in Scotland, &c., as consisted of "freehold of inheritance," "to the use of my elder son, E. F. S., and his assigns, for his life, without impeachment of waste, and after the death of the said E. F. S. to the use of the first and every other son of the said E. F. S. successively, according to their respective seniorities, in tail male, with remainder to the use of," &c. It was admitted that this was a valid settlement "in tail male" of the English estates, according to the law of England. Under a subsequent clause E. F. S. took, as residuary devisee or legatee, all property not otherwise disposed of. He was also the testator's heir-at-law.

The testator left an estate in Inverness-shire held of a subject-superior. E. F. S. claimed this estate as conveyed to him absolutely by the above clause, the destination not being such as by the law of Scotland imported any restriction or limitation of his right, or, alternatively, as forming part of the residue, or as intestate succession. His claim was opposed on behalf of his pupil children.

The parties agreed, by minute, on an interpretation of the meaning and effect, according to the law of England, of the terms used by the testator in the above clause. According to this interpretation the Inverness-shire estate would have been a "freehold of inheritance" had it been situated in England, and the incidents of an English settlement in tail male following on a tenancy for life, as therein described, were, in the opinion of the majority of the Court, substantially the same as those of a Scotch conveyance in liferent allanarly and in fee, with a simple destination to the heirs-male of the body of the fiar, subject to this condition, that the fiar should take no disposable estate till the death of the liferenter. *Held (diss. Lord Justice-Clerk, rev. judgment of Lord Curriehill)* (1) that under the Titles to Land Act, 1868, sec. 20, the testator's will was to receive effect according to its true import and effect with reference to heritable estate, to the same extent as with reference to moveable estate; (2) that that import and effect were ascertainable by means of the interpretation afforded by the parties, and could be carried out substantially, without inconsistency with the practice or with the policy of the law of Scotland, by giving the pursuer a liferent allanarly, and the heir-male of his body a fee (postponing vesting of the fee during the pursuer's life), with a destination over to the other substitutes; (3) that a registrable title, in accordance with such true intent and meaning, fell to be made up under the said Act and the Conveyancing Act, 1874; and (4) claim of E. F. S. repelled.

The Lord Justice-Clerk, in dissenting, *held* that the intention of the testator was to make an English entail of a Scotch property, that there was no equivalent in the land laws of Scotland for an English entail, and that to sustain the defender's contention would be to authorise land in Scotland to be held in a manner which the law of Scotland did not recognise.

Opinion (per Lord Justice-Clerk) that the 20th section of the Titles to Land Act, 1868, did not place bequests of land on the same footing as bequests of moveables, to be carried into effect according to the intention of the testator as gathered from his testamentary deed, a registrable title being made up, if necessary, by the execution of a conveyance or other deed in conformity with that intention, but merely made a bequest of lands (in words which would have been, prior to the passing of the Act, *habile* to convey moveables only) equivalent to a general disposition of lands, on which a title could be made up as upon a general disposition; that, therefore, conditions and qualifications must enter the record precisely as they were contained in the testamentary deed which was to be equivalent to a general disposition, and could have no effect, by reason of the testator's

SUCCESSION—*Continued.*

intention merely, if they were incompatible with the land laws of Scotland. *Studd v. Studd, &c.*, Dec. 10, 1880, p. 249.

Fee and Liferent—Fee with protected Succession—Repugnancy.

11. A testator, on the narrative that he had acquired considerable means by his first wife, and that it was his wish to make an additional provision for his two children by her, directed his trustees to convey certain heritable property to his son by his first marriage, W B L, and, "to make my said daughter C B L equal thereto, I leave and bequeath to her the sum of £1000 sterling, which legacy shall be payable at the first term" that should happen six months after his decease.

The residue of his estate the testator directed to be liferented by his second wife, and on her death to be divided among his whole children, the shares to vest at his death, and, subject to a condition of survivorship, to be payable to sons at the age of twenty-five, but in the case of daughters to be settled on themselves in liferent allanarly and on the issue of their bodies in fee. In this provision as to residue there was inserted a direction that the special legacy of £1000 to C B L, the daughter of his first marriage, should "be held by the trustees for her sole behoof during her minority," and should, upon her attaining majority, "be settled or placed so as validly and effectually to provide to herself a liferent only thereof, and to the lawful issue of her body, equally among them, the fee thereof."

C B L survived her father, attaining majority, but died shortly after unmarried.

In a competition for the special legacy of £1000 bequeathed to her, *held* (by the Second Division after consultation with the Judges of the First Division) that it had vested in her in fee absolutely and was transmitted to her executor, the restriction to a liferent allanarly only taking effect in the event of her being married and dying leaving issue surviving her. *Lindsay's Trustees v. Lindsay, &c.*, Dec. 14, 1880, p. 281.

Testamentary writing—Deed purporting to convey or bequeath land—Titles to Land Act, 1868 (31 and 32 Vict. c. 101), sec. 20.

12. There was found in the repositories of a deceased an informal holograph document in these terms:—"All furniture, books, and personal effects to A absolutely, and the free liferent use of all my other means and estate. After A's decease, the whole of the estates to turned into cash at the time my trustees deem most suitable for best realising, and proceeds safely invested for disbursing as under." There then followed certain pecuniary legacies and a bequest of residue, and a nomination of trustees "for carrying out the foregoing." *Held* that this document being conceived in terms applicable to the deceased's whole estate, heritable as well as moveable, and being a clear expression of his last will, and therefore sufficient to confer on the trustees named "a right to claim and receive" his moveable estate, was also by virtue of the 20th section of the Titles to Land Act, 1868, equivalent to a general disposition in their favour of his heritable estate. *Aim's Trustee v. Aim, &c.*, Dec. 15, 1880, p. 294.

Approbate and Reprobate—Causus improvisus—Clause of forfeiture—Repudiation by liferenter to exclusion of own issue.

13. A trust directed the residue of his estate to be held and retained by his trustees, who were to pay therefrom annual allowances to his children during their lives, and after their death to pay the capital, and any accumulations, to the lawful issue of his children, and, failing lawful issue of any of his children, then to the lawful issue of the survivors or survivor, equally among them *per stirpes*. He farther declared that any child repudiating the above provisions should forfeit for him or herself, and his or her issue, all right and interest under the settlement; and that the provisions made for the child or children so repudiating, and their issue, should pass to and be held for the child or children abiding by the settlement, and their issue.

The truster's only surviving child who attained majority, a daughter,

SUCCESSION—*Continued.*

while still unmarried, repudiated the settlement. *Held* (1) that, having done so, she was not entitled to found on the declaration as to the forfeiture of the right and interest of her possible issue, to the effect of throwing the dead's part into intestacy, and herself taking as heir *ab intestato*; and (2) that as the clause of forfeiture was in favour of children who did not repudiate, and their issue, and as no such persons existed, the clause did not take effect, and that the residue must be retained by the trustees for behoof of any issue that might be born to the daughter. *Gillies v. Gillies' Trustees*, Feb. 23, 1881, p. 505.

Payment, acceleration of—Widow's repudiation of settlement.

14. A testator directed his trustees, in the event of his leaving no issue, to pay to his widow a free yearly annuity of £200, and give her the life interest use of a house, "and whatever further interest and annual income my said estates shall yield . . . shall be accumulated during the lifetime of my said wife by my said trustees, and form part of my estates." The estate yielded a clear return of more than £300 a-year, after paying the widow's annuity, which, in the event, which happened, of the trustor leaving no issue, was the only provision to be paid or provided for during her life. On her death the trustees were to pay to the children of J M "surviving at said period the sum of £100 each," and an annuity of £100 a-year to the brother of the trustor's widow, "provided he return to this country and reside here, and provided my said trustees consider that he requires the same." The residue was to form a fund to be vested in certain persons *ex officio* for the establishment of a charitable foundation, to be styled after the trustor "The Lucas Trust."

Held, on the widow's repudiation of the settlement, that the trustees and patrons of "The Lucas Trust" were entitled to an immediate conveyance of the residue, subject to existing and contingent interests. *Lucas' Trustees v. The Trustees and Patrons of "The Lucas Trust,"* Feb. 18, 1881, p. 502.

Acceleration of distribution of residue.

15. The late Mr Thomas Elder, Edinburgh, died on 5th December 1869, leaving a trust-disposition and settlement for the following purposes, viz., first, payment of debts; second, payment of the provision in his marriage-contract in favour of his wife (being an annuity of £300); third and fourth, certain special legacies in favour of relations and charities, amounting to £5050; fifth, "that my trustees shall hold the whole rest, residue, and remainder of my estate remaining after fulfilment of the above written provisions, with the income arising therefrom, until the death of my wife, and shall out of such residue and income make payment of any other legacies or provisions I may leave by any writing to be hereafter signed by me expressive of my will although not formally executed; sixth, that my trustees shall, upon the death of my wife, set aside out of the residue of my estate the sum of £10,000, and shall either hold the same themselves or invest the same in the name of the general trustees for the time being of the Free Church of Scotland and their successors in office, or in the name of any other persons, as my trustees shall think best, in trust, to apply the free interest and profits accruing annually from the said sum, after deduction of all expenses, as a provision or endowment of a Professor of Natural Science in the said New College of Edinburgh in connection with the Free Church of Scotland;" seventh, upon the death of his wife to apply £7000 in building a territorial church, and £3000 as a partial endowment for the minister; and lastly, "after all the above purposes shall have been fulfilled, I appoint and direct my trustees to apply and pay over the whole residue and remainder of my estate, if such there shall be, to and for the use and benefit of such four of the Schemes of the Free Church of Scotland, and in such proportions as to my trustees shall appear most expedient." The residue of Mr Elder's estate as brought out in the residue account, after payment of legacies, but subject to his widow's annuity, amounted to £27,000. In a special case presented during the lifetime of the testator's widow the Court *held* that

SUCCESSION—*Continued.*

there was no reason why the express direction to the trustees to hold the residue and accumulations till the widow's death should not receive effect, and that the trustees were not entitled to make an immediate payment of the £10,000, even though the widow did not object. *Elder's Trustees v. Treasurer of the Free Church of Scotland, &c.*, March 10, 1881, p. 593.

"Lawful issue of her body," meaning of, when used in settlement of heritage.

16. The Court, without determining the general effect of the words "lawful issue of her body" occurring in a deed of settlement of heritage, *held*, in conformity with the opinion expressed in 1852 by Lord Rutherford, Ordinary (15 D. 176), and by Lord Wood in the Inner-House (15 D. 185), that in the particular deed the context shewed that they were to be construed as equivalent to "heirs of her body." *Campbell v. Campbell*, March 19, 1881, p. 694.

Testament—Holograph Will headed "Notes of intended Settlement."

17. In the repositories of a person who died leaving no other testamentary writing, the following holograph document was found bearing a date seven years before his death:—

"Bankhead, 19 June
1873

"Notes of intended settlement by Walter Whyte of Bankhead.

first—I liferent my wife Mrs. Margaret Pollok or Whyte, in my whole estate both Heritable & Moveable burdened with an Annuity of £300 Stg Three hundred pounds Sterling a year to," &c. After various bequests expressed in the same full and careful manner, the writer's signature was appended.

After a parole proof as to the circumstances, *held* (*rev. judgment of Lord Fraser*) that the document was effectual as a testamentary writing of the deceased. *Whyte v. Hamilton, &c.*, July 13, 1881, p. 940.

Vesting.

18. A testator, under the sixth purpose of his testament, bequeathed to his brothers Thomas and Alexander "the sum of £500 sterling each, payable at the first term . . . after the decease of my said spouse." By the residue-clause he appointed "the residue and remainder of my estate of every description, at the death of my said spouse, and including . . . any legacy that may have lapsed by the legatees predeceasing her, to be equally divided," &c. The legacies of £500 to his brothers Thomas and Alexander, who had survived the testator, but predeceased his widow, were the only legacies under the testament to which the above reference to lapse could apply.

Held that the legacies of £500 to the testator's brothers Thomas and Alexander vested in them *a morte testatoris*, in terms of the sixth purpose of the testament, and that the direction as to lapsed legacies in the residue-clause did not suspend vesting, but only provided for the possibility of lapse by reason of there being no one to take. *Yeats v. Paton, &c.*, Nov. 27, 1881, p. 171.

Residuary Bequest—Condition.

19. A bequest of residue "to be equally divided among the children then alive of my brothers and sisters, equally *per capita*," contained the condition "but always secluding the eldest son of each family who may have succeeded to any heritable property of his father's." *Held* that this condition did not apply in the case of a brother or sister having only one child. *Ibid.*

See *Entail*, 4.

SUPERIOR AND VASSAL. *Non-entry—Proof of Superior's Title.*

1. In 1821 a vassal entered with a superior. The lands were subsequently sold, and no other entry was asked by the superior until 1879, when an action was brought for payment of casualty against a singular successor of the vassal in question. It was not stated when the latter died. *Held* that the defender was liable unless he could shew that the superiority belonged

SUPERIOR AND VASSAL—*Continued.*

to some one other than the representative of the superior with whom the previous entry had been made. *Earl of Breadalbane v. Macdougall*, Nov. 4, 1880, p. 42.

Payment of feu-duty—Claim by original vassal to assignation of superior's rights against insolvent disponees of former.

2. *Held (diss. Lord Shand)* that a vassal in tendering payment of his feu-duty is not entitled to require from his superior an assignation of his rights to enable him (the vassal) to recover the proportion of feu-duty applicable to part of the feu he had disposed, although the assignation were qualified with a declaration that it should not prejudice the rights of the superior. *Guthrie and M'Connachy v. Smith*, Nov. 19, 1880, p. 107.

Composition—Debitum fundi.

3. *Held* that a composition due to a superior on the death of a vassal, where the entry is taxed by the feu-contract, is a *debitum fundi*, and not merely a personal debt of the succeeding vassal. *Stewart v. Gibson's Trustee*, Dec. 10, 1880, p. 270.

Relief—Claim of relief for composition by purchaser against seller—Conveyancing Act, 1874 (Stat. 37 and 38 Vict. cap. 94), sec. 4—Titles to Land Consolidation Act, 1868 (Stat. 31 and 32 Vict. cap. 101), sec. 8.

4. A proprietor of lands entered with the superior in virtue of the Conveyancing Act of 1874, and liable to the superior for a casualty of composition, sold the subjects, and executed a disposition binding himself to relieve the purchaser of all casualties payable to the superior prior to the date of entry. The purchaser took infettment on the disposition, and the superior obtained decree against him for payment of the composition.

In an action brought by the purchaser against the seller for relief, *held* by the Second Division and four consulted Judges, *rev. judgment* of Lord Curriehill, (1) that at the date of the sale the seller was bound to clear the subjects of liability for the casualty then exigible; and (2) that the purchaser, by accepting the disposition and recording the same, had not barred himself from enforcing the obligation of relief.

Question, whether, apart from the obligation in the disposition, the seller would have been bound to relieve the purchaser. *Straiton Estate Co. (Limited) v. Stephens*, Dec. 16, 1880, p. 299.

Relief—Expenses.

5. A superior obtained decree for payment of composition due by a vassal against the latter's singular successor, who, after notice, had defended the action. The singular successor, having been found entitled to relief from the vassal of the casualty, was *held* to be entitled also to the expense of his unsuccessful defence. *Ibid.*

Composition—Unlet shootings to be included in casualty—Stat. 1469, c. 36.

6. When shootings are of such value that they might bring a rent if let, their value must be taken into account in computing the "year's mail as the land is set for the time," payable as a composition on the entry of a vassal under the Act 1496, c. 36. *Stewart v. Bulloch*, Jan. 14, 1881, p. 381.

Obligation to relieve of stipend—Right of redemption, whether open to superior as well as to vassal.

7. Certain lands and teinds were disposed in 1673, the superior undertaking to relieve the vassal of bypast burdens, "and yearly and tearmly in all time comeing, of all teynd-duty, minister's stipends, and annuity of teyns allenarly." The superior further bound himself "that in case the teind sheaves of the said lands, with the crofts and pertinents thereof, or any part or portion of the said teinds, should be evicted from them, or that the same lands and teinds be burdened and affected with any minister's stipend in time coming, whether present or supervenient, then and in that case, and immediately after the said eviction or burdening of the said lands and teind, as said is, to content and pay to the said Andrew Ross and his fore-saids, in liferent and fee respective, the sum of £1200 Scots money for each chaldre that should be so evicted, whether of stock or teind, with the

SUPERIOR AND VASSAL—*Continued.*

annualrent of the said sums, yearly and termly during the not-payment thereof after the said eviction."

Held that by the terms of these clauses the option of fixing the mode of relief by redemption or by an annual payment was conferred on the vassal, and not on the superior.

Observed that a right of redemption is *res meræ facultatis*, which no prescription can take away. *Reid's Trustees v. Duchess of Sutherland*, Feb. 25, 1881, p. 509.

Feuar bound to make a road in front of his feu when road is made through adjoining ground is not bound to make the road by becoming proprietor of the adjoining ground.

8. In August 1863 a proprietor feued a piece of ground (part of the estate of D), bounded on the north by a proposed road, on the east by the adjoining estate of K, belonging to a different proprietor, which lay between D and the city of Glasgow, subject to the condition that, in the event (which was then improbable) of a street being formed through K in connection with the proposed road, the feuar should be bound to form and maintain one-half of the said road in front of his feu.

In February 1864 the feuar, to take advantage of a wall which had been built by the proprietor of K four and a half feet within his boundary, bought from him the strip of ground lying between his feu and the wall, extending northwards from the south-east corner of the feu, the whole length of the feu and twice that distance beyond.

In 1872 the proprietor of D bought a part of the estate of K, which would have enabled him to form a street through K in connection with the proposed road, had it not been for the intervening strip acquired by the feuar.

In an action brought by the proprietor of D, against the feuar, concluding, *inter alia*, for declarator that the defender was bound to form a road forty feet wide over the strip, upon payment of such compensation as the Court should fix, *held* by seven Judges that the defender was under no obligation, express or implied, to make, or allow to be made, a road over the part of K acquired by him. *Paterson v. M'Ewan's Trustees*, March 18, 1881, p. 646.

Condition in favour of superior—Vassal not to sell or retail any kind of malt or spirituous liquors—Property.

9. In the middle of the last century the proprietor of a large estate commenced to feu ground for building at a particular part of the estate, where in course of time a considerable town sprang up. In the titles of all the feuars was inserted as a real burden the condition that it should not be lawful for the vassals "to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating-houses" on the subjects, "unless they shall obtain permission in writing to that effect from the superior."

This prohibition was not enforced in any case from the commencement of the feuing down to 1880, and a number of licensed houses of different kinds were opened in the town. In 1880 the superior, having given some months notice to the vassals, proceeded to enforce the prohibition by action of declarator and interdict. His object was the furtherance of his views for the social reform of the district. *Held* (*aff. judgment* of Lord Rutherford Clark) that the superior was not entitled to enforce the prohibition, the Lord Justice-Clerk and Lord Craighill being of opinion (with the Lord Ordinary) that he had no interest to do so which the law would recognise, and Lord Young, that the prohibition was repugnant to the absolute right of property conferred on a vassal by the nature of his feu-right. *Earl of Zetland v. Hislop*, March 18, 1881, p. 675.

Sub-vassal—Feu-duty—Liability of Sub-vassal to Over-superior.

10. *Held* that an over-superior has not a direct personal action for the whole *cumulo* feu-duty against a sub-vassal holding part of the feu.

Opinion, per cur., that the over-superior is entitled to enforce for his own

SUPERIOR AND VASSAL—Continued.

benefit the obligations come under by the sub-vassal to his own immediate superior. *Sandeman v. Scottish Property Investment Company Building Society, Limited*, June 8, 1881, p. 790.

Non-entry—Proof of superior's title.

11. In 1821 *A* entered with *B* as his superior in the lands of *S*. *A*'s predecessors had entered in the same way with *B*'s predecessors in 1740 and 1795. The lands of *S* were subsequently sold, but no entry was asked by *B* or his successors from 1821 down to 1879, when *B*'s successor brought an action for payment of casualty against a singular successor of *A*. The defender maintained that there was no evidence to establish the identity of the lands of *S* possessed by him with the lands of which the pursuer held the superiority, and that his lands of *S* really held of another subject-superior. Held (aff. judgment of First Division) that as the defender had failed to prove that the superiority of his lands of *S* belonged to some one other than the representative of the superior with whom the previous entries had been made he was liable in the casualty. *Macdougall v. Earl of Breadalbane*, May 17, 1881, H. L., p. 92.

TACIT RELOCATION. See *Master and Servant*.

- TEINDS. *Process—Citation—A. S., July 5, 1809.*—A rectified scheme of the locality of St Cuthbert's parish, Edinburgh, having been approved as final, the Lord Ordinary approved of the Auditor's report, and decerned for expenses. After extract had been issued it was discovered by the teind-clerk that certain lands belonging to the city of Edinburgh had been entered and localled upon twice under different classifications. The Lord Provost and Magistrates, when this error was discovered, prepared a summons of reduction of the said final decree of locality, and, as preliminary to raising the action, petitioned the Court to dispense with the ordinary mode of citation of the heritors of the parish (1075 in number), on the ground of expense, and instead thereof to allow citation by means of notice given in the kirk by the precentor, written notice on the kirk door, and subsequent newspaper advertisements in the manner prescribed by the Act of Sederunt, July 5, 1809, for the raising of actions of augmentation. The expenses of citation in the ordinary way were estimated at about £250, besides agent's fees and other expenses. The Court, in the circumstances, granted the prayer of the petition. Lord Provost and Magistrates of Edinburgh (Locality of St Cuthbert's), July 18, 1881, p. 982.

TITLE TO SUE. *Effect of "consent and concurrence."*

Where the principal party to a suit has an interest or right of his own, but so qualified by or dependent upon some *jus tertii* or some limitation or condition that he has no title to sue separately, his defect of title may be cured by the "consent and concurrence" of the person by or on whose right his is qualified or dependent. But when the principal party to a suit has no interest or right of his own, his defect of title cannot be cured by the "consent and concurrence" of the person to whom alone the right of action truly belongs.

Where a feuar of building ground had no title to enforce a restriction in the feuar-contract of a neighbouring feuar, held (rev. judgment of Second Division) that the "consent and concurrence of the superior" did not obviate the objection to his title to sue. *Hislop v. MacRitchie's Trustees*, June 23, 1881, H.L., p. 95.

See *Husband and Wife*, 2.

- TRADING, EXCLUSIVE. *Nobile officium—Stat. 9 and 10 Vict. (Exclusive Trading in Burghs Act, 1846), cap. 17, secs. 1, 2, and 3—Application of funds of incorporation nearly extinct—Procedure.*

An ancient Incorporation of Masons and Wrights in a burgh, which had formerly the privilege of exclusive trading, having become almost extinct, a petition was presented to the Court, under the 3d section of the Exclusive Trading in Burghs Act, 1846, to have certain resolutions as to the future

TRADING, EXCLUSIVE—Continued.

application of the funds approved of. The Court remitted the resolutions to the Registrar of Friendly Societies, and upon his report approved of the resolutions as amended by him.

Resolutions approved of by the Court in the above circumstances. The United Incorporation of Masons and Wrights of Haddington, July 20, 1881, p. 1029.

TRUST. Liability of trustees—Discretion as to investment—Bank stock—Severing of interests of beneficiaries—Whether trustees' relief thereby affected.

1. *A testatrix directed her trustees, by the second purpose of her trust-deed, to pay to her daughter A "the interest or annualrent of £2000" during her life, and on her death to pay the fee of that sum to her children. By the third purpose of her trust-deed she made a similar provision for her daughter B in liferent and her children in fee; and she directed her trustees, after making provision for the payment of these legacies, to divide the residue of her estate. Power was conferred on the trustees "to continue to hold any or all of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so," without any personal responsibility for loss, if any, thereby sustained; and power also "to lend or place out on such security or securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively, the said security or securities to be conceived in favour of my trustees, and that for the purposes of this trust, and not otherwise."*

The trustees allocated various stocks belonging to the testatrix and sums of money to meet the legacies of £2000 to A and B respectively, and though the various investments stood without distinction in the names of the trustees, separate accounts were kept and regularly rendered to A and B respectively of the profits arising from the investments allocated to her, and of the expenses connected therewith. The residue was then divided. Among the stocks belonging to the testatrix was certain stock of the City of Glasgow Bank. A portion of this was realised, but the rest was on the request of B retained by the trustees as an investment of part of the legacy to her and her family. The City of Glasgow Bank afterwards suspended payment, and, being an unlimited company, the trustees were subjected to heavy calls. They claimed relief out of the trust-estate generally, which then consisted only of funds held for behoof of A and B and their respective families.

Held (rev. judgment of Second Division) that while the trustees were under the trust-deed empowered to retain the City of Glasgow Bank stock, being stock held by the truster, not only till the residue was realised and divided, but also as an investment of the special legacies bequeathed to A and B and their families, that having appropriated certain investments for behoof of A and her family, they must be regarded as holding the same in trust for their behoof exclusively, and were not entitled to relief therefrom for liability arising from investments held for B and her family.

Observed that the liability incurred by the trustees in respect of the calls on the City of Glasgow Bank stock was in no sense a debt of the truster. *Robinson v. Fraser's Trustee*, August 3, 1881, H. L., p. 127.

Power to grant leases—Trusts (Scotland) Act, 1867 (30 and 31 Vict., c. 97), sec. 3.

2. Section 3 of the above Act empowers the Court to grant authority to trustees to grant long leases of the estate under their management "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." A trust-deed directed that after the death of the truster's widow (who was to have a liferent of the whole estate), the trustees were to enter into possession of the whole lands thereby disposed, and to divide and pay over the proceeds half-yearly among his children as an alimentary provision, and, upon the death of the last survivor of the said children, to sell and dispose of the whole lands so

TRUST—*Continued.*

conveyed, and to divide the proceeds among his grandchildren then alive. The trustees, during the life of the truster's widow, presented a petition to the Court for leave to grant a lease of part of the said subjects for 999 years, the expediency of which course was beyond dispute. The Court (*rev. judgment of Lord Lee*) held that the proposed lease was not contrary to the truster's intention as expressed in the trust-deed, and granted authority as craved. *Birkmyre, &c.*, Feb. 5, 1881, p. 477.

Assumption of new trustees.

3. In a trust which consisted of three trustees, two of them, as a quorum, executed a deed of assumption of two additional trustees without giving any notice to their co-trustee. *Held* that the deed of assumption was invalid. *Wyse v. Abbott, &c.*, July 19, 1881, p. 983.

Separation of funds jointly administered.

4. Prior to 1695 the magistrates of a burgh held a fund as trustees for a hospital for poor and sick. In that year a person of the name of Alexander conveyed to the hospital two heritable bonds for sums amounting to £2270, stating that the revenue thereof was to be applied in supporting a certain number of pensioners in the hospital, and directing that any surplus revenue should be applied to increase the capital. He further directed that the patrons of the mortification (the magistrates and the ministers of the burgh) should prefer as beneficiaries (1) his own kindred, (2) those of the name of Alexander, and, failing these, should select beneficiaries. In 1696 the magistrates, as trustees of the hospital, obtained possession of the bonds, and subsequently, disregarding the special directions as to the application of the revenue, administered it along with the general revenue of the hospital, keeping no separate account of the two funds.

In 1734 the magistrates expended £4634 of the hospital funds in the purchase of lands. In 1744 and 1753 the two Alexander bonds were paid up and the funds mixed with the hospital funds. The whole funds not invested in land were subsequently lent by the magistrates to the burgh, which became bankrupt, and its debts were, by statute, converted into three per cent annuities.

In a question raised in 1873 as to the amount of the Alexander fund held (*aff. judgment of First Division*) (1) that since the year 1700 the said fund had been immixed with and dealt with as part of the funds of the hospital, and must be held to have participated proportionally with the hospital funds in the increase of value of the aggregate funds and property between the years 1700 and 1873; and that the purchase of lands in 1734 was to be regarded as a purchase on account of the joint funds, although the original Alexander bonds were not paid until a subsequent date. *Magistrates of Edinburgh v. Maclaren*, August 3, 1881, H. L., p. 140.

Ex officio Trustees.

5. *Held* that the fact of the ministers of a burgh, who were named along with others as trustees for a charity, taking no part in the management of the trust for upwards of a century, was no bar to their successors exercising their rights. *Ibid.*

See *Entail*, 6—*Judicial Factor*, 2.

TUTOR. See *Minor and Pupil*.

TUTOR-DATIVE. See *Judicial Factor*, 3.

VESTING. See *Succession*, 6, 18.

WINDING UP. See *Public Company*, 2, 3—*Friendly Society—Trading, Exclusive*.

WRIT. *Holograph writing regarding heritage—Agreement between landlord and tenant written by factor to landlord's dictation.*

Where a proposed additional agreement between a landlord and tenant was dictated by the landlord to his factor in the tenant's presence and handed to the tenant unsigned, and subsequently accepted by the tenant in writing, held (*aff. judgment of First Division*) that the writings did not constitute a com-

WRIT—*Continued.*

pleted contract, the first writing being neither holograph of the landlord nor the writ of his factor, and that the tenant was therefore entitled to reside.
Sinclair v. Caithness Flagstone Quarrying Co., April 7, 1881, H. L., p. 78.

WRIT, BLANK. See *Cautioner*.

CASES DECIDED IN THE REGISTRATION APPEAL COURT.

Representation of the People (Scotland) Act, 1832, sec. 9, and schedule G—Representation of the People Act, 1868, sec. 6—Tenant and Occupant—Entry in Register—Necessity for statement of occupancy on the Roll.

1. *Held* that "tenant" is a sufficient entry in the qualification column of the register of voters, without the addition of the words "and occupant," even in cases where "actual personal occupancy" is essential to the qualification. *Kennedy v. Alexander*, Nov. 8, 1880, p. 1.

Qualification—Beneficiary—Trust—Heritable or Moveable.

2. A and his two sisters were the sole surviving beneficiaries under a trust-deed and settlement conveying property both heritable and moveable, the value of the heritable estate being £76 per annum, subject to a feu-duty of £5 per annum, and the amount of the moveable estate £1300. The trustees, of whom A was one, were infest in the property. Under the trust-deed one-fifth of the whole estate was to be paid over to A, and he was likewise to receive the income of other shares as they fell in. At the date of this case he was entitled to and received seven-fifteenths of the income of the whole estate. The trust-deed contained a power of sale, which had not been exercised. An objection to A's right to be placed on the roll of voters as joint proprietor of the heritable property, on the ground that his right was moveable and not heritable, *repelled*. *Anderson v. Niven*, Nov. 8, 1880, p. 4.

Claim—Signature of claim by claimant's agent—Necessity for written mandate—Proof of agent's employment.

3. *Held* that a claim may be signed for a claimant by his agent, and that no written mandate is required provided there be sufficient proof *aliunde* that the agent has the requisite authority. *Rutherford v. Lockie*, Nov. 13, 1880, p. 6.

Valuation-roll—Proof aliunde of value—Claimant impugning valuation-roll of preceding year.

4. The value of certain heritable subjects was entered in the valuation-roll 1879–80 at £10, and in the roll 1880–81 at £20. It was admitted that the entry in the roll of 1879–80 should have been £20. *Held* that the tenant was entitled to the franchise.

Question, whether the valuation-roll of 1880–81 was not in itself conclusive on the question of value. *Stevenson v. Miller*, Nov. 13, 1880, p. 8.

Process—No appearance for respondent in an appeal.

5. The Court will not sustain an appeal in respect of no appearance for the respondent, but will require the appellant to shew cause why the Sheriff's judgment should be altered. *Aitken v. Robertson*, Nov. 13, 1880, p. 12.

Title to object—Person on assessor's list—Altered qualification.

6. A voter stood on the register for the year 1879–80 as "tenant and occupant." He lost that qualification and at the same time became qualified as "proprietor." The assessor placed him on the list of persons having lost

REGISTRATION CASES—*Continued.*

their qualifications, and placed him on the list of persons having become entitled to vote. *Held* that he was entitled to object to the name of a person being entered on the register. *Ibid.*

Joint Tenant—Constructive occupancy—Woodyard.

7. William Lunan and Peter R. Lunan, sole partners of the firm of William Lunan & Co., were joint tenants of a woodyard at Borrowstounness of the annual value of £32. Neither of them resided within the county of Linlithgow, in which the subjects were situated. There was no house on the property, but the woodyard was used for storing wood belonging to the firm. The business was carried on by the servants of the firm.

Held that the partners of the firm were in the actual personal occupancy of the subjects within the meaning of the statute, and were entitled to be registered thereon. *Lunan v. Allan*, Nov. 13, 1880, p. 13.



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